Neutral Citation Number: [2024] EWHC 2343 (KB)
Case No: AC-1998-LON-002080

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/09/2024

Before:

Mr. Justice Eyre

- -

Between:

MINISTRY OF JUSTICE OF THE KINGDOM OF THE NETHERLANDS	**Claimant**
- and -	
HUSEYIN BAYBASIN	**Defendant**
- and -	
1) CHRISTINE BARTLETT (as enforcement receiver in respect of Mehmet Baybasin) **2) MEHMET BAYBASIN** **3) ABDULLAH BAYBASIN**	**Applicants**
-and-	
CROWN PROSECUTION SERVICE (as prosecuting authority in respect of Mehmet Baybasin)	**Interested Party**

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- -

Richard Padley (instructed by the **Crown Prosecution Service: POC Unit**) for the **Claimant**
Richard Saynor (instructed by **W Legal Limited**) for the **Defendant**
Gary Pons (instructed by **Richard Long & Co**) for the **First Applicant**
Kate Round (instructed by **ADH Law**) for the **Second and Third Applicants**
Michael Newbold (instructed by the **Crown Prosecution Service: London**) for the **Interested Party**

Hearing date: 25th June 2024

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Approved Judgment

This judgment was handed down remotely at 10.00 am on 13th September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE EYRE

Mr. Justice Eyre:

Introduction.

1. Mesut Baybasin is the registered proprietor of 3 Dukes Avenue, Edgware ("the Property"). The dispute before me relates to the beneficial ownership of the Property and turns on the question of the extent to which Mesut Baybasin and particularly his brothers, Huseyin, Mehmet, and Abdullah Baybasin, are bound by or entitled to rely upon findings as to that beneficial ownership which HH Judge Aubrey QC made in July 2018. I will refer to the brothers by their first names throughout.

2. Since April 1998 the Property has been subject to a High Court restraint and management order ("the High Court Order") in support of proceedings brought by the Government of the Netherlands against Huseyin.

3. In August 2018 in proceedings in Liverpool Crown Court Judge Aubrey made an order ("the Enforcement Order") in respect of the Property. That order was made in confiscation proceedings against Mehmet under the Proceeds of Crime Act 2002. The judge appointed Richard Long as enforcement receiver of the assets of Mehmet and declared that Mehmet had a 25% beneficial interest in the Property. That declaration flowed from Judge Aubrey's conclusion that the four brothers were equal beneficial owners of the Property.

4. Christine Bartlett ("the Receiver") has replaced Richard Long as receiver pursuant to the Enforcement Order. She has applied for an order that the Property be sold and for 25% of the net proceeds to be paid to her in her capacity as Mehmet's receiver. Mehmet and Abdullah have applied jointly for the Property to be sold and for each of them to receive 25% of the net proceeds (though Mehmet accepts that in his case the payment will be to the Receiver, at least to the extent that is necessary to satisfy the requirements of the confiscation order to which he is subject). Huseyin resists these applications and seeks to contend that he is the sole beneficial owner of the Property. The Receiver, Mehmet, and Abdullah say that it is not open to Huseyin to advance that argument and that he is precluded by Judge Aubrey's order from asserting any beneficial interest greater than that of one-quarter.

5. On 12th February 2024 Farbey J directed the trial as a preliminary issue of the question of:

   > "whether issue estoppel/res judicata/collateral attack on decisions of a court of competent jurisdiction (`Issue Estoppel') applies in relation to any of the parties concerning:
   >
   > a. The decision of HHJ Aubrey KC … that Mehmet Baybasin has a 25% beneficial interest in the Property.
   >
   > b. The decision of HHJ Aubrey KC …that the Property is beneficially owned by the four brothers Baybasin, … in equal shares"

6. The matter has come before me for determination of that issue.

The Procedural and Factual Background to the Hearing.

7. Huseyin, Mehmet, and Abdullah have all been involved in serious criminal activity.

8. Huseyin is serving a sentence of life imprisonment in the Netherlands. That sentence was imposed for the offences of conspiracy to murder and conspiracy to export controlled drugs to into the Netherlands.

9. In October 2011 Mehmet received a sentence of 30 years imprisonment following his conviction at Liverpool Crown Court of a conspiracy to import between 1 and 2 tons of cocaine into the United Kingdom.

10. Abdullah served a sentence of imprisonment in Turkey. That sentence was imposed for the offences of setting up and directing a criminal network and of involvement in the trafficking and smuggling of narcotics.

11. On 8th April 1998 Sedley J (as he then was) made the High Court Order. The order was made under the Drug Trafficking Act 1994 on the application of the Government of the Netherlands following the commencement of criminal proceedings in the Netherlands against Huseyin, and in contemplation of a confiscation order (or the Dutch equivalent thereof). It appointed a receiver and prohibited Huseyin or anyone else from dealing with his assets within the jurisdiction and identified the Property as a particular asset which was caught by the order.

12. On 23rd December 2014 Judge Aubrey made a confiscation order against Mehmet in the sum of £334,393.13 pursuant to section 6 of the Proceeds of Crime Act 2002. Mehmet failed to pay that sum and the Crown Prosecution Service applied for the appointment of an enforcement receiver in respect of his assets. That application came before Judge Aubrey at a hearing which began on 18th December 2017 and continued for a further four days on 18th – 21st June 2018.

13. In the course of that hearing Huseyin was represented by leading counsel. In addition to his own evidence Huseyin called evidence from his wife, his son, his Dutch lawyer, and his Turkish lawyer. Judge Aubrey also heard evidence from Mehmet.

14. Judge Aubrey's reserved judgment was handed down on 16th July 2018. The Enforcement Order was approved on 1st August 2018 although apparently not sealed until January 2021. By that order Richard Long was appointed as receiver and it was declared that Mehmet "has a 25% beneficial interest" in the Property.

15. Judge Aubrey's analysis of the law and of the facts as contained in his judgment was subsequently commended by the Court of Appeal as being "cogently argued and lucid".

16. The judge summarised the criminal convictions of the brothers and the history of the purchase of the Property. He noted that each brother had at different times and in different proceedings chosen to deny or to assert an interest in the Property. The judge concluded that this was because each brother had been prepared to say whatever was most likely to assist in keeping the Property out of the hands of the authorities at the particular time.

17. Having set out the history of the proceedings the judge summarised the law in respect of claims to a share in the beneficial ownership of a property by persons other than the sole registered proprietor. He noted that it was necessary for him to revisit the provisional conclusion he had reached when he made the confiscation order and that in order to do so he had to make findings of fact on the evidence as it had been presented

before him. Judge Aubrey explained that he had to consider the evidence as a whole with a view to making findings on the intention of the parties at the time of the acquisition of the Property.

18. In the course of his summary of the evidence and of the submissions the judge recorded his finding that it was an "overwhelming inference" that the brothers' assets were "held by each together `in one large pool'".

19. At the conclusion of his judgment Judge Aubrey identified two questions which had to be considered. The first was whether it had been intended that any brother or brothers other than Mesut was to have a beneficial interest in the Property. The second was, if so, what was the extent of that interest. Having posed those questions the judge concluded that it had been intended that the Property should be owned jointly by all four brothers and that each had provided funds in relation to the Property pursuant to that joint intention with the result that "each [brother] had a 25% beneficial interest in the Property".

20. Huseyin appealed to the Court of Appeal Criminal Division. His application for permission to appeal was referred to the full court and permission was refused on 11th February 2022 after submissions had been made on Huseyin's behalf by counsel.

21. The following aspects of the Court of Appeal's judgment, delivered by Macur LJ, are relevant here:

    i) The principal argument advanced in favour of the appeal was that the Enforcement Order was unlawful because of the pre-existing High Court Order affecting the Property. It was accepted that the existence of the latter did not of itself invalidate the former. Instead the contention was that Judge Aubrey's order was invalidated by the fact that the Crown Prosecution Service had failed to give the Dutch authorities (as the beneficiary of the High Court Order) notice of the application which was being made to Judge Aubrey.

    ii) At [9] Macur LJ noted that Huseyin's counsel had recognised "that there is no legitimate appeal against the findings of fact made regarding the beneficial interest of Mehmet". Macur LJ characterised that recognition as realistic. As a consequence Huseyin's counsel had been "unable to identify the unfairness that befalls [Huseyin]". Instead Huseyin's counsel focused on the contention that the Dutch authorities may have had a legitimate complaint.

    iii) At [11] the Court of Appeal rejected the Crown Prosecution Service's argument that adequate notice had been given to the Dutch authorities. However, Macur LJ then said that:

    > "we do not consider that it is possible for [counsel for Huseyin] to demonstrate, nor has he attempted to do so, any unfairness whatsoever befalling Huseyin Baybasin as a result of this defect in procedure".

    iv) At [14] the Court of Appeal rejected the argument that Judge Aubrey had no power to make the Enforcement Order. Macur LJ said that in determining that Mehmet had a 25% beneficial interest in the Property Judge Aubrey:

> "was not making a formal declaration of interest, good against all others in terms of it being capable of registration, but rather indicating the extent of his own powers in which to order enforcement in relation to the particular property."

v) The Court of Appeal rejected the argument that the case should have been transferred to the Chancery Division. It then considered the contention that Judge Aubrey had been misled because he had been told that the High Court Order had been "lifted". The Crown Prosecution Service accepted that the judge had been inadvertently misled in that regard. The Court of Appeal concluded that this had not had any impact on Judge Aubrey's decision.

vi) Save to the extent of the point that the Dutch authorities should have been notified of the application to Judge Aubrey, the Court of Appeal said that there were "no arguable grounds" of appeal and that it found "absolutely no merit in the application for permission to appeal".

22. On 14th December 2022 the Receiver applied to vary the High Court Order to provide for the sale of the Property. Kerr J granted that application on paper on 15th December 2022 and on 28th March 2023 Master Eastman gave permission for the issue of a writ of possession in favour of the Receiver. On 17th April 2023 Huseyin applied to vary those orders. On 18th May 2023 Andrew Baker J set aside the orders of Kerr J and Master Eastman and gave directions for the further conduct of the matter. That order was followed on 14th June 2023 by the application of Mehmet and Abdullah to join the proceedings. Matters then moved forward to the hearing in front of Farbey J and her order of 12th February 2024 joining the applications and directing the hearing of the preliminary issue.

The Statutory Framework.

23. The High Court Order was made pursuant to the Drug Trafficking Act 1994 and the Enforcement Order was pursuant to the Proceeds of Crime Act 2002. The statutory framework as it was at the time of the orders can be summarised shortly.

24. Both Acts provide for the making of confiscation orders; for the making of restraint orders to preserve property; and for the appointment of receivers with power to realise property in the event that the sums due under a confiscation order are not paid: see section 29 of the 1994 Act and sections 50 and 51 of the 2002 Act. The High Court Order was made following the commencement of criminal proceedings in the Netherlands against Huseyin and in contemplation of a confiscation order (or the Dutch equivalent thereof) but the effect of section 39 of the 1994 Act and the Drug Trafficking Act 1994 (Designated Countries and Territories) Order 1996 is that the Dutch order is to be treated for these purposes in the same way as one made within this jurisdiction.

25. Under each Act the purpose of the provisions for the realisation of property is that there should be a means to ensure that the property of a person who is subject to a confiscation order is realised and the resulting funds used in paying the sums due under such an order. The purpose is not that property which belongs to a different person should be expropriated. Accordingly, each Act provides for persons who have or who claim to have an interest in property which is subject to action with a view to its realisation to have an opportunity to make representations and for the court to determine the existence and extent of such interest: see sections 29 and 31 of the 1994 Act and sections 51(8) and 69 of the 2002 Act. At the time of the proceedings before Judge Aubrey the time

for the assertion of an interest in the relevant property was the stage when the court was moving to enforcement (*Re Norris* [2001] UKHL 34, [2001] 1 WLR 1388 at [23]).

26. The exercise being undertaken by the Crown Court in such circumstances is the determination of property rights with a view to ensuring both that property belonging to the person subject to the confiscation order is realised and that the property interests of others are not expropriated. This exercise is carried out in the Crown Court and against the immediate background of a confiscation order and the ultimate background of the criminal proceedings which led to that order. It is nonetheless an exercise in the determination of civil law property rights. Thus in *Re Norris* at [23] it was the "civil law rights" of Mrs Norris over the relevant property which were in question.

27. The determination in the Crown Court is of the same nature and turns on the same questions as would be the position if the matter were being determined in the County Court or in the High Court. In his application for permission to appeal from Judge Aubrey's decision in this case Huseyin argued that the matter should have been referred to the Chancery Division. The Court of Appeal rejected that argument because it took the view that the matter did not involve any particular complexity or difficulty but it did not disagree with the proposition that the issues were of a kind which were capable of being addressed in that Division. (see per Macur LJ at [15] and [16]). In *Ahmet v Tatum* [2024] EWCA Civ 255 Newey LJ (with whom Coulson and Stuart-Smith LJJ agreed) explained that it could be appropriate for disputes relating to property ownership to be determined in the Crown Court. At [29], drawing on the judgment of Hughes LJ (as he then was) in *Re Stanford International Bank Ltd* [2010] EWCA Civ 137, [2010] Ch 33, Newey LJ made it clear that the exercise in which the court was involved in such circumstances was that of determining property rights by reference to the civil law rules governing such rights. Then, at [37] and following, Newey LJ explained that even in the context of confiscation proceedings it might on occasion be appropriate for the question of rights in particular property to be determined by way of civil proceedings in the County or High Court rather than in the Crown Court. All would depend on the particular circumstances. What is relevant for current purposes is that Newey LJ was proceeding on the footing that whether the determination was made in the Crown Court or in the County or High Court it would be made on the same basis and by reference to the same principles.

The Competing Positions in Summary.

28. The Government of the Netherlands has accepted that it is not in a position to challenge the factual basis of Judge Aubrey's findings. It has confirmed that it does not seek either to set the Enforcement Order aside or to challenge the judge's findings including the findings that Mehmet has a 25% beneficial interest in the Property and that the four brothers are beneficial owners in equal shares. It has also confirmed that Huseyin will be entitled to rely on that concession in any confiscation proceedings in the Netherlands and in particular in any proceedings brought with a view to the imposition of a default sentence for a failure to comply with the confiscation order made in that kingdom. It has stated that the Dutch Ministry of Justice has approved that stance. The Government of the Netherlands takes a neutral stance on the question of whether Huseyin is estopped or otherwise precluded from arguing that he is the sole beneficial owner of the Property. In light of that approach Mr Padley maintained that neutral stance at the hearing before me.

29. The Receiver says that determination of the question of the extent of Mehmet's interest in the Property was essential to Judge Aubrey's decision to appoint an enforcement receiver. Huseyin took a full part in the hearing leading to that decision. Through Mr Pons the Receiver said that in those circumstances there is an issue estoppel in respect of the issue of Mehmet's 25% interest and it is not open to Huseyin to argue that Mehmet does not have such an interest. The Receiver is neutral on the question of whether Huseyin is also estopped from advancing any argument as to the balance of the beneficial ownership of the Property. The Receiver did, however, point out that in order to reach his determination of Mehmet's interest Judge Aubrey necessarily had to consider the argument that Huseyin was the sole beneficial owner and that he had rejected that argument.

30. For the Crown Prosecution Service Mr Newbold submitted that the finding that Mehmet had a 25% beneficial interest in the Property was a necessary finding for the purpose of the appointment of the Receiver. He said that because Huseyin was a party to the proceedings in which that determination was made by a court of competent jurisdiction an issue estoppel arises preventing Huseyin from attempting to reopen the same issue. Alternatively, the Crown Prosecution Service says that it would be an abuse of process for Huseyin to attempt to relitigate the issue. The Crown Prosecution Service focused its submissions on the question of Mehmet's 25% interest and did not advance submissions as to the balance of the beneficial ownership.

31. Through Miss Round Mehmet and Abdullah submitted that in order to decide the existence and the size of Mehmet's interest in the Property Judge Aubrey had to decide the issue of the entirety of the beneficial ownership of the Property. This necessarily involved a determination of the interests of all four brothers. It follows, Miss Round contended, that Huseyin is attempting to relitigate a matter which has already been determined. Mehmet and Abdullah say that in those circumstances there is a cause of action estoppel. Alternatively, there is an issue estoppel because the issue of the brothers' beneficial interests is common to the proceedings before Judge Aubrey and the current proceedings. To the extent that the fact that the Government of the Netherlands was not a party to the proceedings before Judge Aubrey prevents either of those principles applying these parties say that Huseyin's attempt to assert more than a 25% interest in these proceedings is an abusive collateral attack on a decision made by a court of competent jurisdiction. In that regard they say that it would be unfair to them to allow the question to be relitigated now and that there is no corresponding unfairness in Huseyin being precluded from raising the argument.

32. Huseyin's position is that there is no estoppel here and that his action in asserting full beneficial ownership is not an abuse of process. Through Mr Saynor he advances a number of arguments relating to the nature of the proceedings and to fairness. In doing so he contends not only that there is no estoppel but also that it would be unjust if he were not permitted to maintain his assertion of full beneficial ownership of the Property. I will deal with those particular arguments below.

Res Judicata and Abuse of Process: the Law.

33. The court has an inherent power to prevent abuse of its process or misuse of its procedure. As Lord Diplock (with whom the other members of the House agreed) said in *Hunter v Chief Constable of the West Midlands* [1982] AC 529 at 536C that is:

> "the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people."

34. Lord Diplock went so far as to say that where circumstances amounting to such an abuse arose it was a matter of duty rather than discretion for the court to act to prevent the abuse.

35. In *Hunter* the abusive conduct was the bringing of a civil claim for personal injury damages in circumstances where the allegations on which the claim was based had been advanced and rejected in a *voir dire* in the Crown Court.

36. At 540H – 541A Lord Diplock said that it was preferable to limit the use of the term "issue estoppel" to refer to the form of estoppel *per rem judicatum* which could arise in civil actions between the same parties or their privies.

37. At 541H Lord Diplock noted that a "collateral attack upon a final decision of a court of competent jurisdiction may take a variety of forms". At 541B he had described the abuse in that case as:

> "The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made."

38. In *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] AC 160 Lord Sumption reviewed the principles encompassed within the term "*res judicata"*. At [17] he described that as "a portmanteau term which is used to describe a number of different legal principles with different juridical origins". Lord Sumption said that it included the following principles:

    i) Cause of action estoppel which is the principle 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".

    ii) The principle "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".

    iii) The doctrine of merger "which treats a cause of action as extinguished once a judgment has been given on it, and the claimant's sole right as being a right on the judgment".

    iv) Issue estoppel which 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".

v) The rule in *Henderson v Henderson* which "precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in earlier ones".

vi) "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."

39. At [22] Lord Sumption considered the decision in *Arnold v National Westminster Bank* [1991] AC 93. He explained that this had the effect that where cause of action estoppel applies it operates as an absolute bar. Issue estoppel is similarly an absolute bar "except in special circumstances where this would cause injustice".

40. At [25] Lord Sumption explained the similarities and differences between *res judicata* and abuse of process thus:

> "...Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive. As Lord Keith put it in *Arnold v National Westminster Bank plc* [1991] 2 AC 93, 110G, estoppel per rem judicatam, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process"

41. In *Allsop v Banner Jones Ltd* [2021] EWCA Civ 7, [2021] 3 WLR 1317 the defendants had acted for the claimant at a financial remedies hearing in matrimonial proceedings. The claimant brought a negligence claim and the matter was before the court on the question of whether that claim should be struck out as an abusive collateral attack on the judgment given at the financial remedies hearing.

42. Marcus Smith J (with whom Lewison and Arnold LJJ agreed) summarised the law governing such collateral attacks at [20] and following. At [21] after defining cause of action estoppel the judge said that "a final decision will create an issue estoppel if it determines an issue in a cause of action as an essential step in its reasoning". Marcus Smith J characterised those forms of estoppel as being together "res judicata estoppel".

43. At [27] the judge explained that collateral challenges to a prior decision are not precluded by res judicata estoppel saying:

> "*Collateral* challenges to prior decisions ex hypothesi do not give rise to res judicata estoppel. For the purposes of this judgment, a collateral challenge is one where no matter how similar the issue in question - the parties to the later dispute are different from the parties to the earlier dispute that is the subject of the collateral challenge. As a matter of principle, collateral challenges should not give rise to an estoppel because even though a dispute or issue has been determined by an anterior final judicial decision - that decision was binding only as between A and B, whereas the later claim arises between A and C. In short, whereas B could allege that A is estopped from bringing a later claim as against B, C can make no such assertion, because C was not a party to the anterior decision. Generally speaking, where no res judicata estoppel arises, A is permitted to bring a claim without being fettered by what has been decided previously..."

44. Marcus Smith J then turned to consider the approach set out in *Hunter.* At [32] he noted that an "anterior criminal decision" could not be said to give rise to a res judicata estoppel operating in subsequent civil proceedings "simply because there is no identity of party". I pause to note that it is necessary to consider the nature of the particular earlier proceedings with care in order to see whether the parties and issues in the subsequent proceedings are or are not identical with those in the earlier proceedings. A criminal prosecution will typically involve the prosecutor (normally but not always the Crown) as one party with the issue being the defendant's guilt or innocence of a particular offence. However, the fact that a hearing is in a criminal court does not necessarily mean either that the only parties are the prosecutor and the defendant or that the only issue is the defendant's guilt or innocence.

45. At [36] Marcus Smith J emphasised the broad basis of the *Hunter* principle and the need for an "intense focus" on the facts of the particular case saying:

> "The *Hunter* principle is thus quite broadly based, as was also emphasised by Buxton LJ in *Laing v Taylor Walton* [2008] PNLR 11, at para 12:
>
> > `The court therefore has to consider, by an intense focus on the facts of the particular case, whether in broad terms the proceedings that it is sought to strike out can be characterised as falling under one or other, or both, of the broad rubrics of unfairness or the bringing of the administration of justice into disrepute. Attempts to draw narrower rules applicable to particular categories of case (in the present instance, negligence claims against solicitors when an original action has been lost) are not likely to be helpful.'"

46. At [38] – [43] Marcus Smith J analysed the decisions in *Walpole v Partridge and Wilson [*1994] QB 106 and *Laing v Taylor Walton* [2008] PNLR 11. He explained that whether a collateral attack on an earlier decision is an abuse of the court's process will depend on the circumstances of the case in question. Thus the coming to light of fresh evidence or the fact that a ground of appeal had been overlooked could, depending on the circumstances, mean that a collateral challenge was not abusive.

47. The judge summarised the applicable principles at [44]. For current purposes the following points are relevant:

> "(i) The jurisdiction to strike out proceedings as an abuse of process is one that should not be tightly circumscribed by rules or formal categorisation. It is an *exceptional* jurisdiction, enabling a court to protect its procedures from misuse. Thus, a court is able to - indeed, has a duty to control proceedings which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people...
>
> (ii) Any further attempt to define the circumstances in which this power should be exercised is subject to this overriding formulation of the principle, and can only be helpful if seen in this light. Thus, there can be identified a class of abuse which involves the *relitigation* of issues which have already once been determined by a court of competent jurisdiction in earlier proceedings...
>
> (iii) However, the cases make clear that to regard relitigation as even prima facie amounting to an abuse of process would be to adopt too rigid an approach and to disregard the importance of individual circumstance and the need to consider each case on its own facts...

(iv) In terms of the facts and circumstances that render relitigation potentially abusive, the following points are of particular relevance:

(a) There is a clear distinction to be drawn between the collateral challenge of an anterior *criminal* decision when compared to the collateral challenge of an anterior *civil* (to include matrimonial) decision. There is a public interest in criminal convictions only being challenged by way of appeal, and for them not otherwise to be called into question...

(b) There is a second, important, distinction between collateral challenge to anterior criminal rather than civil decisions. As Lord Diplock emphasised in *Hunter* (at p 540), criminal decisions do not give rise to res judicata estoppels in the way that civil decisions do. That is, at least in part, because there is no meaningful identity of parties between the earlier (criminal) and later (civil) decisions. That, in turn, means that the abuse doctrine has an inevitably greater role where the anterior proceedings the subject of collateral challenge are *criminal* rather than *civil*. The doctrine of res judicata estoppel does not operate in the criminal sphere as they do in the civil.

(c) Thirdly, and relatedly, it is necessary to be very clear what is meant by "relitigation". In my judgment, relitigation means arguing the same issue, that has already been determined in earlier proceedings, all over again in later proceedings. In civil proceedings, generally speaking, for an issue to be *the same*, it will arise as between *the same parties* (or their privies) That is why, in such cases, the doctrine of res judicata estoppel comes into play. The role of the doctrine of abuse of process is, correspondingly, much more limited..."

48. Marcus Smith J put the matter in condensed terms at [45] saying:

"In short, the doctrine of abuse of process is best framed, at least in the context of a "collateral" attack on a prior civil decision, by reference to the test expounded by Lord Diplock and Morritt V-C: If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge in the earlier action if *(a)* it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or *(b)* to permit such relitigation would bring the administration of justice into disrepute"

The Position between Huseyin and the Receiver and Mehmet.

49. For these purposes the Receiver and Mehmet are to be treated together. The Receiver did not take part in the proceedings before Judge Aubrey leading to the appointment of Mr Long as receiver. However, for the purposes of the High Court proceedings the Receiver accepts that her entitlement is limited to the extent of Mehmet's interest in the Property and it is that interest which she is seeking to realise. The Receiver is, therefore, standing in Mehmet's shoes for these purposes.

50. No cause of action estoppel arises here. The Receiver's application to Judge Aubrey was an application invoking the powers which the Crown Court had under the 2002 Act. That is a different cause of action from the current application which seeks an exercise of this court's powers to vary the High Court Order.

51. At first sight there is an issue estoppel between the Receiver/Mehmet on the one side and Huseyin on the other. Mehmet, and Huseyin were both parties to the proceedings before Judge Aubrey. Mehmet was the defendant in those proceedings and Huseyin was

a party as an interested party who was allowed to and who did intervene and take part in the proceedings. In the latter regard it is to be noted that Huseyin not only took part in the hearing before Judge Aubrey but he also sought permission to appeal. Permission was refused but there was no suggestion that Huseyin did not have standing to seek permission and such standing came because he had been a party to the proceedings leading to the order which he was seeking to appeal.

52. When considering who were parties to previous proceedings for the purposes of determining whether an issue was decided as between those parties the court must look to the reality of the proceedings. The proceedings before Judge Aubrey were held in the Crown Court and arose out of an order made in the context of criminal proceedings against Mehmet. Nonetheless, the reality was that for the purposes of issue estoppel the parties were the Crown Prosecution Service as applicant, Mehmet, and Huseyin. The latter two are also parties to the current applications with the Receiver also being a party but standing in Mehmet's shoes. The fact that the Government of the Netherlands is also a party to the current proceedings is irrelevant as between the Receiver/Mehmet and Huseyin. There can be an identity of parties between two different sets of proceedings for the purpose of giving rise to an issue estoppel even if not all the parties are the same in those proceedings. What is necessary is for the parties between whom the issue estoppel is said to arise to have been engaged either by themselves or their privies in both sets of proceedings.

53. The question of the extent of Mehmet's beneficial interest in the Property was at issue between the Crown Prosecution Service, Mehmet, and Huseyin in the proceedings before Judge Aubrey and was determined by him. The Crown Prosecution Service and Mehmet were contending that Mehmet had a 25% beneficial interest while Huseyin was saying that he was the sole beneficial owner and that Mehmet had no beneficial interest. The finding that Mehmet had a 25% beneficial interest was the determination of that issue and prima facie an issue estoppel arises between the Receiver/Mehmet and Huseyin in that regard.

54. What are the points which Mr Saynor advanced to say either that there was not in fact an issue estoppel or that there was some unfairness which precluded the application of that principle against Huseyin here?

55. Mr Saynor submitted that there is no place for an estoppel in criminal proceedings. That is correct to the extent that there is no scope for a party being estopped from raising a defence when that party's guilt or innocence of a criminal charge is in issue. However, the nature of the proceedings has to be considered. Here although Judge Aubrey was sitting in the Crown Court and although the proceedings derived ultimately from Mehmet's criminal conviction the proceedings leading to the Enforcement Order were civil in nature and were based on a determination of the parties' civil law rights (see the analysis at [26] and [27] above). It was because that was the nature of the proceedings and of the issue between the parties that Huseyin argued in the Court of Appeal that the proceedings ought to have been transferred to the Chancery Division.

56. Next, it is said that Huseyin had different capacities in the different proceedings. He is the Defendant in the High Court proceedings but was an interested party in the proceedings before Judge Aubrey. This submission is misconceived. A person's status as claimant, defendant, or interested party is irrelevant for the purpose of assessing whether that person was a party to previous proceedings which are said to have given

rise to an issue estoppel. The question is whether the issue was determined in proceedings between the same parties not whether they were participating in the same way (it will often be the case that a person who was a defendant or an interested party in one action is estopped from raising an argument as claimant in a subsequent action or *vice versa*). In the proceedings before Judge Aubrey the issue was the extent of Huseyin's interest in the Property in his personal capacity and that is the issue which Huseyin seeks to raise in the current proceedings. The position might have been different if Huseyin had been involved in the different proceedings in different capacities for example as a trustee in one set of proceedings and in his own capacity in another but that is not the case here.

57. Huseyin again raised the procedural failings by the Crown Prosecution Service in the proceedings before Judge Aubrey and in particular the failure to give notice to the Government of the Netherlands. However, this was addressed by the Court of Appeal and the conclusion was that this had no impact on Huseyin. In addition, as Mr Pons correctly submitted, the Government of the Netherlands does not itself have a proprietary interest in the Property. Its entitlement is to have the Property realised so as to enforce the Dutch confiscation order against Huseyin's share in the Property. That entitlement is dependent on the extent of Huseyin's interest. In circumstances where Huseyin was represented at the hearing before Judge Aubrey and where evidence was called on his behalf the fact that the Government of the Netherlands was not involved in those proceedings did not affect the outcome.

58. In his skeleton argument Mr Saynor submitted that the Crown Prosecution Service had not only misled Judge Aubrey into believing that the High Court Order had lapsed but had also misled Huseyin. He said, at [51]:

> "Accordingly, the Defendant was misled into a position wherein he believed the enforcement receivership application against Mehmet was the last and only opportunity he would have to contest the question of his 100% ownership of the House. Had he not been misled he may well not have decided to act in the Crown Court proceedings, and preserve his position until the High Court proceedings…"

59. In the course of the submissions to me Mr Newbold pointed out that the erroneous reference to the High Court Order having lapsed came in the second witness statement which Nimesh Jani had provided in the Crown Court proceedings. Accordingly, it came after the application for the Enforcement Order had been made and after Huseyin had chosen to take part in the proceedings but before the hearing before Judge Aubrey. This caused Mr Saynor to recast this submission as one that if he had not been misled Huseyin might not have chosen to continue with his involvement.

60. There are a number of difficulties with this submission. The principal one is that there is no evidence on the point from Huseyin. Thus, there is no evidence from him to confirm that he was misled. It is inherently unlikely that he was in fact misled because he was a party to the High Court proceedings and so was able to know whether or not the order against him had lapsed. Nor is there any evidence as to how Huseyin would have acted differently if he had not been misled. Thus there is no confirmation that he would have chosen to end his involvement in the proceedings before Judge Aubrey. There is no suggestion that the evidence and arguments advanced on the issue of the interests in the Property would be different if they were being advanced for the first time in the High Court from those put before Judge Aubrey. It is also relevant that the Court of Appeal accepted that the misleading of Judge Aubrey had been inadvertent

rather than deliberate. For Huseyin's argument to even begin to be relevant here he would have to show both that he was in some way tricked into taking part in the Crown Court hearing and also that this was in some way to his disadvantage with regard to the determination of this issue. He has not begun to establish either of those elements.

61. Mr Saynor rightly did not place great weight on the contention that the application of the asserted estoppel amounted to an ouster of the jurisdiction of this court. The point can be dismissed shortly. The High Court's jurisdiction is not being ousted and a finding that Huseyin is estopped from advancing a particular argument will itself be an exercise of that jurisdiction. In that regard it is of note that, as Lord Sumption explained, the policy underlying the principle of issue estoppel is the need to prevent abuse of the court's process.

62. Huseyin raises a number of connected points in support of the contention that fairness requires that he be allowed to reopen the question of the extent of Mehmet's interest and/or that it would be unjust for him to be precluded by an issue estoppel from raising such arguments as he wishes. He says that it is unjust and contrary to his Convention rights for him to be precluded from defending himself when the point at issue relates to his property rights. He says that there is a particular further factor here because a failure to satisfy the Dutch confiscation order will put him at risk of a further term of imprisonment.

63. There is no substance in those arguments. Huseyin is not being precluded from resisting the application in the High Court proceedings but the effect of the estoppel would be that his defence would have to be predicated on the correctness of Judge Aubrey's decision and that he would not be able to reopen the question which was decided against him in those proceedings. There will be no unfairness or injustice in that course. Fairness requires that Huseyin have an opportunity to advance all relevant points before a court of competent jurisdiction before a finding adverse to his property interests is made. Here, Huseyin has already had that opportunity and took advantage of it. He advanced evidence and made submissions through leading counsel before Judge Aubrey. He also sought to appeal Judge Aubrey's decision albeit doing so on the footing that he accepted that he had no legitimate appeal against that judge's findings of fact. Fairness requires that Huseyin has an opportunity to advance his case but it does not require him to have multiple opportunities and still less does it require him to be able to reopen an issue which has already been decided against him.

64. The contention that Huseyin is at risk of a sentence of imprisonment in the Netherlands can be addressed shortly. As I have explained at [28] above the Government of the Netherlands has confirmed that it does not seek to challenge Judge Aubrey's findings as to the extent of the interests in the Property. It has also confirmed that Huseyin will be entitled to rely on that position in any proceedings in the Netherlands arising out of the Dutch confiscation order. Mr Saynor sought to argue that this concession would not necessarily be binding on the Dutch prosecutor or the Dutch courts. However, I must proceed on the basis that the Dutch legal system will take account of the fairness of the matter and will not proceed unjustly. If there were to be some attempt to cause Huseyin to be penalised in the Netherlands on the basis that he had a more than 25% beneficial interest in the Property that would be unjust and I proceed on the basis that there is no material risk of such a course being taken.

65. It was submitted on behalf of Huseyin that the Receiver and Mehmet were not able to contend that there was an issue estoppel because they did not come to court with clean hands. The procedural failings in the Crown Court (failing to give notice to the Dutch authorities and the inadvertent misleading of the court) were said to mean that the Receiver did not have clean hands because she was appointed on the application of the Crown Prosecution Service and is affected by that service's failings. In respect of Mehmet it was said that his actions in changing his account and in saying whatever was most likely to keep the Property out of the reach of the authorities demonstrated a failure to have clean hands. There is no substance in this argument. Even if, which is debateable at best, the procedural failings on the part of the Crown Prosecution Service were to be attributed to the Receiver they would not be relevant here. The Court of Appeal has already considered those matters and concluded that they had no impact on the order made by Judge Aubrey. As for Mehmet's changes of account what is now relevant is that he accepts Judge Aubrey's decision and that Judge Aubrey found that the account which was being given to him was correct. There is a further and fundamental difficulty with this argument. The maxim that "he who comes to equity must come with clean hands" is an equitable doctrine as to the circumstances in which the court will or will not exercise its equitable jurisdiction in favour a party. Here the invocation of the principle of issue estoppel by the Receiver and Mehmet is not to be seen as a request that the court's equitable jurisdiction be exercised in favour of those persons. Rather it is an assertion that the circumstances are such that the court's own interest in preventing abuse of its processes and in preventing the multiplication of litigation means that Huseyin is not to be allowed to reopen a question which has already been decided.

66. Not only would there be no unfairness to Huseyin in him being precluded from reopening the question of the extent of Mehmet's beneficial interest there would be unfairness to the Receiver and to Mehmet if Huseyin were not so precluded. There would be injustice if they were required to litigate again a matter which has already been considered over the course of a five-day hearing.

67. The position, accordingly, is that the issue of the extent of Mehmet's beneficial interest in the Property is the same issue as was determined as between Mehmet and Huseyin in the proceedings before Judge Aubrey and an issue estoppel arises to prevent Huseyin from reopening that question as against the Receiver or Mehmet.

68. If the foregoing analysis is wrong then the same result is achieved by the application of the rule that the court will act to prevent abuse taking the form of the court process being used to mount a collateral attack on a decision of a court of competent jurisdiction. Here Judge Aubrey determined that Mehmet had a 25% beneficial interest in the Property. He did so after hearing submissions and evidence from Huseyin. Huseyin not only took part in those proceedings but he sought to appeal the decision conceding in the course of that appeal that he had no legitimate basis for attacking Judge Aubrey's conclusions on the facts. To allow Huseyin now to raise the same issue and to seek to get a different result from that which was obtained before Judge Aubrey would necessarily bring the administration of justice into disrepute. It would also be manifestly unfair to the Receiver and Mehmet for the reasons I have just given. Therefore, to the extent that Huseyin's argument is not precluded by an issue estoppel it is precluded as an abuse of process.

The Position between Huseyin and Abdullah.

69. Abdullah did not take part in the proceedings before Judge Aubrey. There can, therefore, be no question of an issue estoppel between him and Huseyin. Nonetheless, for the following reasons it is not open to Huseyin to contend that he has a 75% beneficial interest and that Abdullah does not have a 25% beneficial interest in the Property.

70. Before Judge Aubrey Huseyin argued that he was the entire beneficial owner of the Property (alternatively that he and his wife were the sole beneficial owners). Judge Aubrey rejected that contention and found that the four brothers were equal joint beneficial owners of the Property. The conclusion that each brother had a 25% beneficial interest was the basis of Judge Aubrey's conclusion as to the size of Mehmet's interest and it was a fundamental and essential step in the reasoning leading to that conclusion. The judge reached that conclusion after hearing Huseyin's evidence and the submissions in which Huseyin had contended that he was the sole beneficial owner. For Huseyin now to argue that any brother has a less than 25% interest would amount to a collateral attack on Judge Aubrey's decision.

71. Applying the approach explained by Marcus Smith J in *Allsop v Banner Jones Ltd* at [45] I have to consider whether to allow that collateral attack would either be manifestly unfair to a party or a matter which would bring the administration of justice into disrepute. There is perhaps scope for debate as to the degree of unfairness to Abdullah in circumstances where he did not take part in the earlier proceedings and so he would not be required to litigate again a matter which he has already litigated. There would, however, be a degree of unfairness in that Huseyin would be enabled to litigate against Abdullah a matter which Huseyin has already argued and lost. The question of unfairness does not stand alone. More significant here is the effect on the administration of justice if Huseyin were to be allowed to argue that Abdullah has less than a 25% beneficial interest. At the risk of some repetition the position is that Huseyin chose to engage in the proceedings before Judge Aubrey; he was represented by leading counsel; he called evidence; and he put his case on the basis that he was the sole beneficial owner of the Property. That contention was rejected and Huseyin sought to appeal the decision. For Huseyin now to be allowed to argue that Abdullah does not have a 25% interest would be for Huseyin to be allowed to argue again the self-same issues as were argued in front of Judge Aubrey. Huseyin does not suggest that there is any evidence he would wish to call or any argument he would wish to advance in relation to Abdullah which is different from that put before Judge Aubrey. In those circumstances it would bring the administration of justice into disrepute for Huseyin to be allowed to attempt to subvert Judge Aubrey's conclusion and for him to do so would be an impermissible abuse of process.

Conclusion.

72. In those circumstances the answers to the preliminary issue formulated by Farbey J are as follows. As against the Receiver and Mehmet Huseyin is precluded by reason of an issue estoppel from contending that Mehmet does not have a 25% beneficial interest in the Property. Alternatively, Huseyin is so precluded because for him to advance such a contention would be an abusive collateral attack on the decision of a court of competent jurisdiction. As against Abdullah there is no question of issue estoppel but again Huseyin is precluded from arguing that Abdullah does not have a 25% beneficial interest in the Property because for him to do so would be an abusive collateral attack on the decision of a court of competent jurisdiction.