

Neutral Citation Number [2016] EWHC 2450 (Ch)

IN THE HIGH COURT OF JUSTICE

Claim No: 2013 CH 000252

CHANCERY DIVISION

The Rolls Building,  
Fetter Lane, London EC4A 1NL

Date: 7 October 2016

**Before:**

**Mr John Martin QC (sitting as a Deputy Judge of the High Court)**

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**IN THE ESTATE OF EDWIN LINDSAY TOWNSEND DECEASED**

**BETWEEN:-**

**FAY ELIZABETH CRABBE**

**Claimant**

**- and -**

**EDWARD LINDSAY TOWNSEND**

**Defendant**

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**Alexander Learmonth** (instructed by Richard Wilson Long) for the Claimant

**Penelope Reed QC** (instructed by Michelmores LLP) for the Defendant

Hearing dates: 16 – 18 June 2016

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**APPROVED JUDGMENT**

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

  
**John Martin QC**

## JOHN MARTIN QC:

1. Edwin Lindsay Townsend ("the Deceased") died on 12 November 2004. He was survived by a daughter, the claimant, Fay Crabbe ("Fay"), and a son, the defendant, Edward Lindsay Townsend ("Lindsay").
2. By his will, dated 17 September 2001, the Deceased appointed Fay and Lindsay to be his executors and trustees; gave a number of pecuniary legacies; gave a property known as Madeira to Fay's children Robert and Kristina; gave a property known as Bridge Villa and the adjoining caravan park, and his interest in the partnership known as Edwin L Townsend & Son ("the Partnership"), to Lindsay; gave his stocks and shares to Fay; left his chattels to Fay and Lindsay to dispose of in accordance with a memorandum to be left with his will (although there was in fact no such memorandum); and divided the residue of his estate between Fay and Lindsay. He subsequently made two codicils: the first, dated 16 April 2003, made a gift of £200,000 to be divided equally between Fay and Lindsay, and the second, dated 25 April 2004, gave a pecuniary legacy to his housekeeper, Cynthia Mackay. All the gifts except that of residue were stated to be "free of tax".
3. The will and codicils were ultimately proved by Fay and Lindsay in the Winchester District Probate Registry on 17 May 2007. It was, however, evident from soon after the Deceased's death that there would be problems with the administration of the estate. This was primarily because all assets of value had been specifically devised or bequeathed by the will, meaning that there were no substantial assets available to meet inheritance tax. The inheritance tax was eventually declared at £396,354; and, although part of that was payable by instalments, it was necessary to find some means of funding it. There were in addition other issues that presented obstacles to the administration of the estate. These were as follows: (1) An issue ("the Orchard Land issue") whether land adjacent to a property known as Orchard House was included within the terms of a devise of "my freehold property known as Orchard House" made by the will of the Deceased's father. The Orchard Land had been assented to the Deceased, apparently on the footing that it was not included in the devise of Orchard House but instead formed part of the residue of the Deceased's father's estate, and so prima facie it was part of the Deceased's estate. However, Lindsay contended that the Orchard Land was included in the devise, and under the terms of the devise passed to him on the death of the Deceased without falling into the Deceased's estate. Once these proceedings were started, he claimed rectification of the assent accordingly. (2) An issue ("the Money Issue") as to the status of a payment of £203,890 (in round terms) made by the Deceased to the Partnership. Lindsay contended that the payment was an injection of capital by the Deceased and formed part of his interest in the Partnership, with the consequence that it passed to Lindsay as part of the gift of the Deceased's interest in the Partnership made to Lindsay by the will. Fay contended that the payment was a loan, and so an asset of the Deceased's estate. (3) An issue ("the Portfolio Issue") - which arose only after probate had been granted - as to the portfolio of stocks and shares given to Fay by the will. It was not until 25 February 2013 that the portfolio was assented to Fay, and then only because she assented it to herself without Lindsay's concurrence. She contends that it should have been

assented to her shortly after the grant of probate, or at least subjected to sensible management prior to any assent; and she claims damages from Lindsay for losses she claims to have suffered as a result of what she asserts to be breaches of his duty as executor in relation to the portfolio.

4. All these issues were still in dispute at the commencement of the hearing. There was, however, a further issue, namely whether the Orchard Land Issue and the Money Issue (and certain other issues not the subject of the litigation, but not including the Portfolio Issue) had been compromised on the terms of a document, signed by Fay and Lindsay, bearing date 15 March 2006; and, if so, whether Fay was entitled to enforce it. It was agreed between the parties that I should determine the issues relating to this document ("the 2006 Letter") first, since if I concluded that it constituted a binding agreement that remained enforceable all other issues save the Portfolio Issue fell away. Accordingly, I heard evidence and argument relating to the 2006 Letter, at the conclusion of which I announced my decision that the 2006 Letter was a binding agreement enforceable by Fay. The first part of this judgment constitutes my reasons for that decision. I then dealt with the Portfolio Issue, and the second part of this judgment constitutes my decision and reasoning on that matter.

*The 2006 Letter*

5. The 2006 Letter takes the form of a letter to a solicitor, Sophie Martin of Boyes Turner. It is in the following terms:

**Executors to the Estate of**  
**Mr Edwin Lindsay Townsend (Deceased)**

*Mrs F E Crabbe*  
*Mill Cottages*  
*35, Preston Crowmarsh*  
*Benson, Oxfordshire*  
*OX10 6SL*

&

*Mr E L Townsend*  
*33, Thamesmead*  
*Crowmarsh Gifford*  
*Wallingford*  
*Oxfordshire*  
*OX10 8EY*

*15th March 2006*

*Sophie Martin*  
*Boyes Turner*  
*Abbots House*

Abbey Street  
Reading  
RG1 3BD

Dear Sophie

**The Estate of Mr E L Townsend (Deceased)**

*The two executors of the above estate have reached agreement regarding its future.*

*It is intended that a Deed of Variation be made, reflecting the agreement, and will only change the Will to make it more detailed to take into account the lack of cash within the estate in the following way: –*

*Firstly; the deeds to a parcel of land known as the "River Meadow" are contained within the papers held by Sylvia Kahn, of Pryce & Co, relating to the above.*

*The River Meadow was given in equal shares, by way of a Lifetime Gift to Fay Crabbe and Lindsay Townsend, sufficient time has passed and therefore it falls outside the estate.*

*Lindsay Townsend wishes to pass all of his share to Fay Crabbe by way of a Lifetime Gift.*

*Please could you draw up the relevant documents to put this wish to effect at the same time as the deed of variation is signed.*

*Second; the parcel of land known as the "Orchard" is currently contained within clause 8 of the last Will dated 17th September 2001.*

*'The Orchard' is to be removed from this section and a 'Deed of rectification' be made to Lindsay Townsend as reflected in the 1967 Will of Edward Lindsay Townsend (deceased).*

*Please could you draw up relevant document for the executors to sign.*

*Third; Lindsay Townsend wishes to underwrite the first £200,000 of inheritance tax whilst the remainder of the Estate's liabilities (inheritance tax, interest, additional fees, funeral expenses and any other expenses) will be split equally between the two executors.*

*Please could you incorporate this into the Deed of Variation.*

*Fourth; it is understood and accepted by all the cash beneficiaries, except Cynthia Mackay, that there is no cash within the Estate for distribution to the beneficiaries and therefore such legacies will abate.*

*Please confirm that this is in order and therefore, make the relevant adjustment by way of a deed of variation notwithstanding that Cynthia Mackay may not agree.*

*Fifth; it is accepted that the tenancy on the land known as "Howbery Park" was held on trust by the above for the benefit of "The Partnership" and whilst the tenancy is currently held by the executors no liability whatsoever shall fall upon the estate or the executors.*

*Sixth; Fay Crabbe wishes to have a number of specific items from Bridge Villa before clause 7 is enacted relevant to the 17th September 2001 Will of Edwin Lindsay Townsend (deceased).*

*Seventh; The executors will proceed on the basis that the Lifetime gift and the Deed of variation and the Deed of Rectification be completed and signed simultaneously before the application for probate is made.*

*Please could you adjust your terms of engagement to reflect this course of action.*

*And finally; it is accepted that the remainder of the will is to go unchanged and therefore reflecting E L Townsend (deceased) wishes as closely as possible.*

*Please supply hard copies of all correspondence to the above addresses of the executors relating to the estate of Edwin Lindsay Townsend (deceased).*

*Please find enclosed the various forms of identification relevant to the executors proof of identity.*

*Many thanks for your patience regarding this matter.*

*Yours sincerely,*

*Fay Crabbe*

*[manuscript signature]*

*Date (MS) 15<sup>th</sup> March 2006*

*Lindsay Townsend*

*[manuscript signature]*

*Date (MS) 15 March 2006*

All parts of this document were in typescript, except the manuscript signatures and dates.

6. Fay's case is that the 2006 Letter is a binding agreement; and that, although she was prepared to consider subsequent departures from its terms, no final agreement was ever reached on anything to replace it. She nevertheless adopts the position, to which I return later, that she is happy either to be bound or not to be bound by the terms of the 2006 Letter, provided that if she is bound Lindsay also is bound and that if she is not she is free to pursue claims in relation to the Orchard Land Issue and the Money Issue. Lindsay's case in relation to the 2006 Letter is that it was merely a joint letter of instruction to the solicitor acting in the estate; that it was not phrased in the language of a concluded agreement, but merely expressed the wish that certain things might be achieved; that it omitted to deal with certain issues; that it was impliedly subject to contract, in that it envisaged a more formal document or documents being drawn up and entered into; and that neither party treated the document as binding in their subsequent dealings until Fay asserted its validity at the commencement of these proceedings. This last contention is the foundation of a defence that, if the 2006 Letter is in fact a binding agreement, Fay is estopped by convention from enforcing it.
7. There is no dispute between the parties as to the applicable law relating to formation of contracts. Both sides made reference to the decision of the Supreme Court in *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG* [2010] 1 WLR 753, in which Lord Clarke of Stone-cum-Ebony JSC said the following (at [45]):

"The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement on such terms to be a precondition to a concluded and legally binding agreement."

Reference was also made to *Bieber v Teathers Ltd* [2014] EWHC 4205 (Ch) where at [14] HHJ Pelling QC sitting as a High Court Judge set out eight summary principles as follows (omitting internal references to authority):

- "i) Whether the parties have reached a concluded agreement is to be determined objectively by considering the whole course of the parties' negotiations. Once the parties have to all outward appearances agreed on the same terms concerning the same subject matter, a contract will have been formed and that is so even though it is understood that a formal agreement will be entered into that records or even adds to the terms agreed. However, where it is understood that a formal agreement will be entered into, whether the parties intended to be bound immediately or only when a formal agreement has been executed depends on an objective appraisal of their words and conduct.
- ii) Generally the subjective state of mind of a party to negotiations and thus any subjective reservations that have not been communicated to the other party to an alleged agreement are irrelevant and evidence of their existence is inadmissible. This is so because subjective reservations do not prevent the formation of a binding contract. At most subjective belief may be relevant and thus is admissible to demonstrate that objectively a particular term has been agreed where the consensus depends on oral exchanges or conduct.
- iii) If, on an objective appraisal of the parties' words and conduct, the parties intended to conclude a legally binding agreement, the fact that certain terms of economic or other significance had not been agreed does not prevent it being concluded that the parties had concluded a binding agreement. The only requirement is that the parties shall have agreed all the terms necessary for there to be an enforceable contract. In the context of settlement agreements, this may mean that the failure to agree terms concerning confidentiality and other allied matters will not prevent a court from concluding that the parties had objectively entered into a binding settlement agreement.
- iv) Where the parties wish to ensure that a contract otherwise capable of being made orally is only made in a formal document the parties may ensure that is so by expressly stipulating that the negotiations will take place "subject to contract". Where there is such a stipulation then there is no binding agreement until a formal written agreement has been duly executed.

v) It is not essential that there be an express stipulation that the negotiations are to be conducted "subject to contract" if that was nevertheless the mutual understanding of the parties.

vi) Whilst negotiations being conducted "subject to contract" are most commonly encountered in transactions concerning land, the rule is capable of applying to any contractual negotiation.

vii) Whether there was a mutual understanding that negotiations would proceed on a "subject to contract" basis is a question of fact in each case.

viii) Even if the parties had initially agreed to proceed "subject to contract" it is open to them subsequently to agree either expressly or by necessary implication to remove that qualification or waive that stipulation; however, whether the parties have so agreed is a question of fact that needs to be approached with care since the Court should not "impose contracts on the parties which they have not reached".

In relation to the significance of matters occurring after the date of an asserted contract, I also set out paragraphs 55 to 57 of the same judgment.

"55. The final point that arises concerns what happened after the 29 June. There is an issue between the parties as to whether as a matter of law what happened thereafter is admissible for the purpose of deciding whether a contract was concluded on that date or not. This issue was considered by Lewis J in *Newbury v Sun Microsystems* [2013] EWHC 2180 (QB). The facts are not material. The statement of principle on the issue I am now considering was at [27] and was in these terms:

"First, where a contract is said to be contained in a document or documents, I do not consider that it is legitimate to have regard to the parties' subsequent conduct for the purpose of considering whether those documents give rise to a binding agreement. In those circumstances, the question for the court will be whether, considering the whole course of events up to and including the documents in question, the parties, objectively, have reached agreement. That will involve consideration of the meaning of the documents viewed against the whole of the relevant background to the negotiations. But, as Males J put it in the *Air Studios* case at para.5, "Once the parties have to all outward appearances agreed in the same terms on the same subject matter, usually by a process of offer and acceptance, a contract will have been formed". Conduct after that date is not a legitimate aid in determining whether or not the parties had reached an agreement by that date. Such conduct may be relevant if it is said there is a variation or a new agreement or it is alleged that the contract is a sham or in other, limited, circumstances such as claims of estoppel. It may be that evidence of such conduct may be admissible and relevant if there is a dispute as to whether or not particular terms, not included in the written documents, were terms of the agreement. If the contract is oral, or partly in writing and partly oral, the parties' conduct may be relevant to test the evidence as to whether or not the terms were agreed or which terms were included. But where the contract is said to be contained in documents,

conduct occurring after the date of the documents will not be a legitimate aid in determining whether, properly construed, those documents were intended to give rise to a binding contract."

It would only be appropriate for me not to follow this analysis if satisfied that it was plainly wrong. I am not so satisfied. However, in case I am wrong to have reached that conclusion, I set out my conclusions as to the effect of what happened after 29 June on my assessment of whether an agreement had been reached between the parties as at that date.

56. In my judgment, if on an objective analysis a binding agreement had been reached on 29 June 2014, then what happened thereafter cannot undo that agreement unless what happened amounts to a rescission or variation of what had been agreed previously. Since it is common ground that nothing was agreed after 29 June, on any view what occurred could not be either. Thus the only significance of conduct after 29 June is for the purpose of informing a conclusion as to whether an agreement was in fact reached then. If, as here, all other factors point to the conclusion that a concluded and binding agreement was reached on that date, only conduct which very clearly and unambiguously demonstrates that no final agreement had been reached is likely to assist.

57. The conduct after 29 June relied on by the defendant does not in my judgment lead to the conclusion that an agreement had not been reached on the 29 June. In essence, the defendant submits that the parties engaged in protracted negotiations concerning the terms of the settlement agreement that in the end broke down. It was submitted that this conduct on the part of the claimants is consistent only with the mutual understanding of the parties being that the agreement reached on 29 June was subject to contract or was an agreement in principle subject to the agreement of all other terms and conditions. I do not agree. That parties are prepared to negotiate concerning the terms of a settlement agreement does not lead necessarily to the conclusion that the parties had not earlier entered into a binding agreement to settle the dispute. It might be thought convenient for agreement to be reached on outstanding points if at all possible but there is nothing in such conduct that is necessarily inconsistent with agreement having been reached earlier."

Finally, in relation to estoppel by convention, both parties made reference to the following statement of principle from the judgment of Briggs J (as he then was) in *Commissioners for Her Majesty's Revenue and Customs v Bencdollar Limited* [2010] 1 All ER 174 at [52], approved by the Court of Appeal in *Dixon v Blindley Heath Investments Ltd* [2015] EWCA Civ 1023:

"(i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them. (ii) The expression of the common assumption by the party who is alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it. (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a



sufficient extent, rather than merely upon his own independent view of the matter. (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties. (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."

8. The circumstances in which the 2006 Letter came into existence were as follows. A certain amount of work towards the identification of the assets of the estate was undertaken soon after the death of the Deceased by a firm of solicitors in Wallingford, Slade Son and Taylor ("Slades"), who had acted for the Deceased. By early 2005, however, Lindsay had made it plain that he was not prepared to engage Slades to act in the administration of the estate; and in June 2005 Sylvia Kahn of Pryce & Co, a firm of solicitors in Abingdon, was instructed jointly by Fay and Lindsay to act in the estate. Lindsay had also engaged his own solicitor, Miles Farren of Burges Salmon LLP ("Mr Farren"). By the end of August 2005, however, Fay and Lindsay were contemplating using yet another firm of solicitors, Boyes Turner of Reading ("Boyes Turner"). On 13 October 2005 Fay and Lindsay signed a short document giving authority to Fay's son Robert ("Robert") and Lindsay's son Andrew ("Andrew") "to negotiate terms that will enable the probate solicitor to proceed with the administration of my late father's estate". Robert and Andrew made some progress: on 8 February 2006 Fay drafted a letter (it is not clear if she sent it or not) to Sylvia Kahn confirming that "my son and my nephew are still trying to work out an agreement for a Deed of Variation to my late father's will"; and on 9 February 2006 Mr Farren created an attendance note of a telephone conversation on that day between him and Andrew which recorded (among other things):
- "[Andrew] saying that since he rang he has had a further meeting with his cousin and they now appear to be close to agreement. Whilst he recognises that the basis of the agreement goes further than [Mr Farren] would recommend to [Andrew] and to [Lindsay], they nevertheless feel that this is the basis on which they can move forward. However, they are very close to saying to [Fay] that this is as far as they will go and if she wants anything else they will revert to the strict legal position".
- There is no dispute that on 16 March 2006 Robert went to see Lindsay and Andrew at Lindsay's house, Bridge Villa. He had with him the document that became the 2006 Letter, already signed and dated the previous day by Fay. According to Robert's witness statement:
- "We sat in the kitchen at Bridge Villa. Andrew sat at the table behind me. My uncle [i.e. Lindsay] had a clear view of both of us, but I could not see Andrew. My uncle read the document to check its contents, which he was already familiar with. He was at ease with the document and relaxed with me in his company as he signed and dated it in front of me. As his eyes moved from me to Andrew behind me, his manner changed in an act of dominance and defiance over Andrew and he said "Boy, let that be the fucking end of it". Andrew remained silent, but was visibly fuming, seething at what his father had just committed himself to. A copy was taken and left with my uncle, while the original was sent to the Boyes Turner by recorded delivery."

Robert, Lindsay and Andrew all gave oral evidence about this occasion.

- (a) Robert maintained his account in cross-examination. In particular, he insisted that Lindsay had expressed himself in the way Robert had set out in his witness statement. He accepted that Lindsay and Andrew had not seen the form of the 2006 Letter before the meeting at which Lindsay signed it, but he said that it contained only terms that had already been agreed and was not just his latest proposal. He denied the suggestion that it was mentioned at the meeting that the 2006 Letter would have to be run past a solicitor for approval.
- (b) Lindsay's evidence was that Robert had arrived unannounced. There was no hostility, but he (Lindsay) was uncomfortable. He read through the document, and "possibly" agreed with its contents, but thought it did not cover every issue. He said that Andrew also read it through and okayed it, but said he did not want Lindsay to sign it. He could not explain why this was not mentioned in his witness statement. He said that he had signed in haste after Robert had said that Fay had signed in good faith and Lindsay should too. It was suggested to him that he had taken a conscious decision to sign despite Andrew's view, and answered "I guess so". He was not sure if he had sworn, and not sure if he had said "let that be the end of it"; but he accepted that he had made a comment to the effect "I've done it – it's done". His overall view was that an agreement was something drawn up by a solicitor, and that the 2006 Letter did not constitute an agreement until it was properly set out in writing and simultaneously signed.
- (c) Andrew's evidence was that the document produced by Robert on 16 March 2006 did not represent any prior agreement, and was different in some respects from what had been discussed before. He read through the document before Lindsay signed it, and said that he had pointed out that it was not exactly what had been discussed between him and Robert. He said that he and Robert had got close to agreement, but what was in the document was not quite what they had discussed. He said that he had said to Lindsay that they should run the document past a solicitor before signing it, but Lindsay was anxious to sign and get something to the probate solicitor. Robert said that they needed to get something to the probate solicitor to make a start, and he mentioned that the document would have to be checked by the probate solicitor anyway. Andrew said that he suggested to Lindsay that they should run the document by Mr Farren first, but Lindsay took Robert's assurance and signed. He said that the absence of any mention in his witness statements of the need to get the document checked by a solicitor before signature was because the statements did not include all parts of the conversation; but he denied that he had changed his evidence to fit his case. He said that he could not remember Lindsay swearing at all, and knew that Lindsay had not used the word "fucking"; and Lindsay absolutely did not say something to the effect that it was the end of the matter.
9. I have no hesitation in accepting Robert's version of what occurred. He gave his evidence in a forthright and sensible manner, and was untroubled in cross-examination. Moreover, on critical matters his evidence was supported by that of Lindsay. It is clear, and I so find, that Lindsay was content to sign the 2006 Letter despite Andrew's objections, and that when he had done so he expressed in no uncertain terms the view that that should be the end of the matter. Insofar as it is relevant to do so, I find that Lindsay used the words quoted by Robert in his witness statement. Lindsay by his own admission had read the 2006 Letter before

signing it, and must therefore have seen that its opening sentence recorded in terms that the executors had reached agreement regarding the future of the estate. His own view that an agreement was something drawn up by a solicitor is immaterial. Viewed objectively, what occurred at the meeting at Bridge Villa on 16 March 2006 in my judgment resulted in a concluded contract in the terms of the 2006 Letter. By the end of that meeting, the parties had to all outward appearances agreed on the same terms concerning the same subject matter as set out in the 2006 Letter, with the consequence that a contract was accordingly formed.

10. As I have indicated, it is part of Lindsay's case that the 2006 Letter was merely a letter of instruction. It is, of course, the case that it took the form of a letter of instruction to Boyes Turner; but in order to give effective instructions, the parties had first to have reached agreement on how the disputes affecting the estate were to be resolved. The 2006 Letter expressly recorded that such agreement had been reached; and it constitutes not only the instructions to the solicitors, but also the agreement that was the essential foundation of those instructions.
11. Lindsay also asserted that the 2006 Letter omitted to deal with the Money Issue, and so could not be taken to be a comprehensive agreement resolving all outstanding issues. In my view, this assertion is misconceived: one of the terms of the 2006 Letter was that Lindsay would "underwrite" the first £200,000 of inheritance tax, the remaining liabilities being shared equally. In the context of the parties' negotiations, this clearly meant, and was understood by both parties to mean, that Lindsay would undertake sole liability for £200,000 of the inheritance tax; and that agreement only makes sense if the Money Issue was by implication being resolved in his favour. If the contrary were the case, Lindsay would have committed himself to paying £200,000 whilst remaining at risk of a successful claim by the estate for repayment of the £203,890 paid to the Partnership by the Deceased. I find as a fact that, at the time when he signed the 2006 Letter, Lindsay understood – as also did Fay – that his undertaking to be responsible for £200,000 of the inheritance tax was in exchange for Fay giving up her claim that the £203,890 was a loan.
12. A further contention by Lindsay was that the 2006 Letter was impliedly (although he accepts not expressly) subject to contract, in that it clearly envisaged that further documents were needed. However, as the first proposition from the passage from *Bieber v Teathers Ltd* cited above makes clear, the fact that further documents are contemplated is not conclusive against the existence of an agreement before those documents come into existence, it being a question of fact in every case. In the present case, the additional documents contemplated by the 2006 Letter are in my judgment matters of machinery only, whose contents are sufficiently defined by the terms of the 2006 Letter and which were intended to give effect to an existing agreement, not to create one.
13. Finally, there was a suggestion that the sixth provision of the 2006 Letter – which stated that Fay wished to have a number of specific items from Bridge Villa – might be too uncertain to be enforced, that uncertainty also affecting the 2006 Letter as a whole. However, in cross-examination Lindsay accepted that the specific items were items which belonged to Fay,

who had herself lived in Bridge Villa prior to her marriage. Accordingly, I find that the reference in the 2006 Letter to specific items was understood by both parties to be a reference to items belonging to Fay and are therefore falling outside the estate.

14. So far I have considered the status of the 2006 Letter without regard to the parties' conduct after its signature. I do not accept Lindsay's suggestion that the subsequent conduct has relevance to the question whether or not an agreement was concluded on 16 March 2006; accepting, as I do, the primary view expressed by Judge Pelling in *Bieber v Teathers Ltd*, I consider that such conduct is irrelevant unless it shows either that the parties contractually agreed to abandon their earlier agreement (which it is common ground they did not) or that an estoppel operates to prevent its enforcement. In order to consider the estoppel argument made by Lindsay, however, it is necessary to set out what happened after the meeting on 16 March 2006.

15. Immediately after the meeting, and on the same day, Andrew spoke to Sophie Martin of Boyes Turner: her attendance note of their conversation is in the following terms:

"Come to agreement with aunt.

Father signed that agreement earlier today but he signed it without thinking properly and it is not quite correct – father's solicitors have noticed some discrepancies.

[Sophie Martin] may receive agreement but take no action on it until informed to do so."

I interpolate that, if (contrary to my view) subsequent conduct is capable of being taken into account when considering if a contract has been concluded, this attendance note is strong support for the proposition that an agreement had indeed been made. Also on the same day, Andrew spoke to Mr Farren, who then drafted two letters: one to Fay (which he did not send), and one to Boyes Turner (which he did send). The letter to Boyes Turner, itself dated 16 March 2006, was in the following terms:

"We understand that our client and his sister, Fay Crabbe are on the brink of instructing you in the administration of their late father's Estate. Those instructions are at present dependent upon them reaching agreement concerning various matters which impact upon the administration of and devolution of the Estate.

There have been various meetings between Andrew Townsend and Robert Crabbe each representing their parents' interests as a result of which broad agreement has been reached.

This morning, a document signed by Lindsay and Fay dated 15 March 2006 purports to reflect the agreements that have been made. Our purpose in writing to you is twofold:

1. Having reviewed the document, in some respects it does not reflect what has been agreed and therefore cannot be relied upon; in other respects, the document remains silent. Whilst it is a document intended to record the agreement that has been reached between Lindsay and Fay, part of which needs to be reflected in a Deed of Variation, it is in fact an Overarching Agreement (because some of the matters on which they have agreed cannot be dealt with by a Deed of Variation); and

2. This document may be presented to you as a concluded agreement together with our client's cheque in payment on account of one half of your fees; for the reasons that we set out above (and about which we are today writing to Mrs Crabbe) there is no concluded agreement yet and accordingly, you are asked not to present our client's cheque for payment at this stage.

Our client is happy for you to hold the cheque pending joint instructions from Lindsay Townsend and Fay Crabbe to proceed which we anticipate will be forthcoming fairly shortly once these outstanding details have been attended to."

16. On 21 March 2006 Sophie Martin informed Fay that she had been "instructed by Burges Salmon Solicitors that the agreement as set out in the letter to me of 15 March has not yet been concluded and accordingly I will not present your cheque for payment (or that of your brother) until I have heard that the agreement has been concluded and that matters can therefore proceed. I understand that your son will be speaking to Andrew Townsend regarding the parts of the agreement which are in dispute."
17. On 27 March 2006 Mr Farren drew up a draft Overarching Agreement and sent a copy of it to Fay, who made substantial amendments to it. On 12 May 2006 she wrote to Andrew, saying that she had taken solicitors' advice, making various points on the Overarching Agreement and proposing further amendments. On 16 May 2006 Fay and Lindsay wrote to Sophie Martin enclosing "copy of an Overarching Agreement prepared by solicitors Messrs Burges Salmon", asking her to prepare a deed of gift of River Meadow to Fay, a deed of rectification relating to the Orchard Land to Lindsay, a £200,000 indemnity to the estate, and a document passing Fay's interest in Howbery Park to the Partnership; saying that all parties would like to sign these documents and the Overarching Agreement as soon as possible in Sophie Martin's presence before proceeding with probate; and saying that if this way forward was acceptable to Sophie Martin they would be happy for their cheques to be presented for payment. However, on 30 May 2006 Fay sent a further letter (wrongly dated 30 March 2006, and received by Boyes Turner on 31 May 2006) to Sophie Martin, saying that Burges Salmon would not alter any wording in the draft Overarching Agreement as requested by her, hence the document was unsigned; and saying that she agreed with the aims of the document and hoped to reach a speedy conclusion to the deceased's probate. On 28 September 2006 Sophie Martin wrote to Fay (copying her letter to Lindsay) setting out at length her views about the Deceased's estate. Among other things, she stated that the inheritance tax calculation had been prepared on the basis that the repayment of £203,890 made by the Deceased was an injection of capital, in the hope that it would attract full business property relief – which it would not if it were a loan; and raising certain objections to the use of a proposed deed of variation. On 5 January 2007 Andrew spoke to Sophie Martin, saying that Mr Farren had come up with some ideas, including that River Meadow should be sold to Fay. On 9 January 2007 Fay wrote to Sophie Martin saying (among other things) that when probate had been obtained she and Lindsay would wish to sign documents including a document implementing the sale of half of River Meadow to Fay for £25,000. On 15 April 2007 Lindsay sent Sophie Martin cheques totalling £197,240.51 on account of the inheritance tax, stating that payment was made to enable probate to proceed and was not an acknowledgement of liability to pay that amount. On 17 May 2007 probate was granted.

During the rest of 2007 and March 2008 little progress appears to have been made; and on 8 November 2008 Fay wrote to Caroline Wallis at Boyes Turner raising several issues, saying that she was not prepared to pay Lindsay £25,000 for River Meadow; that she had not been notified by Lindsay that he did not intend to adhere to the Overarching Agreement and charge £25,000 for River Meadow, and asking why Lindsay did not honour the Overarching Agreement. On 13 March 2009, Mr Farren wrote to Caroline Wallis, suggesting a meeting and setting out some background. In that letter, he said among other things the following:

"In the meantime, our client and his sister had identified Sophie Martin of your firm as somebody sufficiently independent who could act on their joint instructions in the administration of the Estate. They both signed a letter dated 15 March 2006 setting out the basis of the agreements that they entered into with regard to the administration of the Estate and other related matters. A copy of that letter should be on your file. On 16 March 2006 we wrote to Sophie Martin explaining that the document that had been provided the day before did not reflect what had been agreed between our client and his sister and that, in some respects, the document was silent. A copy of that letter should be on your file. At the end of April/beginning of May 2006 we prepared a draft overarching agreement which we understand was the subject of some discussion between our client and his sister. Fay proposed some amendments to that document but it was never finally concluded. As we understand it, your firm was then instructed in the administration of the Estate and although our client and his sister have a tacit understanding as to how the administration of the Estate and other related matters would be dealt with, neither is bound by the agreement."

The reference to a tacit agreement was used by Mr Farren on frequent occasions subsequently; and in a letter to Henmans dated 14 May 2009 he explained that the term had originally been used by Caroline Wallis, and that it meant "an agreement in principle on which our respective clients have taken certain steps on the assumption that if all of the matters that are part of their agreement are given effect to then the agreement would become binding. If not, then the agreement is not binding." However, on 29 April 2009 Lindsay sent an e-mail to Caroline Wallis, copied to Fay, saying this:

"Please find attached a copy of the HM Revenue & Customs Calculation of inheritance tax. In view of the content of the Henman's letter of 20th April 2009, the tacit overarching agreement appears invalid and I am therefore not prepared to personally pay the outstanding instalments at this stage. The Estate will need to make alternative arrangements to pay the instalments and I would be grateful if you could inform the HM Revenue & Customs accordingly."

Henmans had by then been instructed by Fay, and their letter of 20 April 2009 was sent to Caroline Wallis in relation to her proposed agenda for a projected meeting. It contains nothing that may be taken as a reference to the 2006 Letter or the draft Overarching Agreement, or any other version of the "tacit agreement"; and it appears that the only thing likely to have excited Lindsay's dismay is a reference to the Orchard Land, about which Henmans said that the 1985 assent clearly recorded that the Deceased owned the land in question, that it seemed to them that the true position must therefore be established and regularised now, and that it was extremely important from the point of view of the administration to ensure that the position regarding ownership of the land had been

correctly identified and accounted for to the Revenue. They also said that it seemed clearly desirable to deal with all the issues between Fay and that Lindsay as one. Whatever it was that prompted Lindsay's e-mail, it is relied on by Fay as constituting a breach of the 2006 Letter. On 7 May 2009 Henmans wrote to Burges Salmon a letter in which they themselves denied that the 2006 Letter was binding on the parties to it. Fay initially claimed that this letter was written without her authority, but in evidence accepted that it was authorised by her. Henmans said that the 2006 Letter was "drafted by the parties alone and without their solicitors, and at a time when our client had not received any independent legal advice. It is not, nor could it ever be treated as, binding upon the parties as matters stand. Not only is your client in no position to argue that it is binding, we note that you have in the past argued strongly that it is not and refer to it as a tacit agreement in your letter." Burges Salmon's response, contained in the letter 14 May 2009 that I have already referred to, was that "our client has never suggested that the tacit agreement was binding as between him and his sister. Equally, your client cannot take the benefit of that agreement without accepting the liabilities. If her case is that no agreement now exists and it cannot be relied upon then that has implications for the Inheritance Tax position and how that was funded.... Our client takes the view that various matters have been agreed between him and his sister with regard to the administration of the Estate and other matters outside the administration of the Estate. On that basis our client agreed to pay the first £200,000 Inheritance Tax with the balance of the tax being paid equally between our client and his sister (notwithstanding Robert's personal liability for the tax on Madeira) but on the basis that our client would have the benefit of the instalment option. Clearly our client would not have been prepared to offer such a generous position to his sister and her son so far as the tax was concerned if his sister at some later stage was going to be able to set aside the tacit agreement, that is, the understanding that existed between them as to how they were going to proceed with the administration of the Estate and the other related matters. It was therefore in our view quite proper and reasonable for our clients to say that the proposed meeting should proceed on the basis that the agreement that already exists (and on the strength of which our client has already acted to his detriment) should be set out in a document which the parties can then sign." On 15 May 2009 Fay wrote to Caroline Wallis, saying: "it was with great dismay that I learned that my brother was once again reneging on the agreement that was made with regard to the payment of the instalments of the Inheritance Tax and that he had allowed this to attract interest in such a long period without raising this matter previously. Once again he has failed to meet his side of the agreement." However, on 17 August 2009 Henmans wrote to Burges Salmon, stating that "Our client confirms that she wishes to reach an agreed way forward in relation to each of the issues of dispute have arisen between her and your client, and to abide by the spirit of the "tacit agreement" when doing so. This has always been her wish. It is clear that neither the tacit nor the over-arching agreements are binding". On 26 August 2009 Mr Farren sent an e-mail to Henmans, saying "we can safely say that your client has clearly resiled from the tacit agreement by the content of your letter of 17 August 2009". The position of Burges Salmon and Lindsay thereafter remained that there was no agreement in place; but on 11 June 2010 Fay wrote to Caroline Wallis asserting that Boyes Turner had been instructed on the basis of the 2006 Letter; and thereafter her position has been that the 2006 Letter is and always was binding.

18. Although I have set out in some detail the events subsequent to 16 March 2006, I can state my conclusions on the question of estoppel comparatively briefly. It is a prerequisite of the existence of an estoppel by convention that there should be a common assumption as to a state of affairs. If the plea of estoppel is to succeed in the present case, Lindsay must show that there was a common assumption, shared by Fay and himself, that there was no agreement in terms of the 2006 Letter. I find it impossible to discern any such assumption. The correspondence I have referred to, which is typical of the correspondence as a whole, demonstrates only uncertainty on both sides as to the true position. The use of the expression "tacit agreement" is symptomatic of this: it was apparently intended to denote an agreement in principle, whose substance was largely that set out in the 2006 Letter and elaborated in the draft (but unagreed) Overarching Agreement, on which the parties based their subsequent dealings, and from which they apparently could not resile. Both parties at various stages asserted the existence of an agreement, and complained of the other party's failure to abide by it; but one looks in vain for any clear identification of its terms. In the absence of such identification, it is not possible to discern any shared assumption that the 2006 Letter was not binding: all that it is possible to say is that the parties thought they were bound, formally or informally, by some agreement but were unsure what it was. Even when Henmans unequivocally stated, in their letter of 7 May 2009, that the 2006 Letter was not and never had been binding, the response of Burges Salmon in their letter of 14 May 2009 was to dispute the ability of Fay to resile from an agreement that had been acted upon by Lindsay.
19. There are two other reasons why I consider that the estoppel argument fails. The first of them is based on the third of the five requirements set out in *HMRC v Benchdollar Ltd*, namely that the party asserting the estoppel must have relied upon the common assumption, not merely upon his own independent view of the matter. In the present case, Lindsay, Andrew and Mr Farren throughout relied upon their own view of the enforceability of the 2006 Letter. The genesis of the uncertainty about the status of that document was Mr Farren's letter of 16 March 2006, and throughout the correspondence he maintained the view that the 2006 Letter was not binding. When Henmans also took that view, it did not cause Mr Farren – or through him Lindsay – to change his view in any way; rather, as I have said, Mr Farren's response was to complain of Fay's departure from the concept of the tacit agreement which was largely of his own devising.
20. The second reason turns on the fifth of the five requirements set out in *HMRC v Benchdollar Ltd*, namely that there must have been some detriment to Lindsay or benefit to Fay sufficient to make it unjust or unconscionable for her to assert the existence of the 2006 Letter. I cannot see that there has been any detriment to Lindsay or benefit to Fay, or that it would be unjust in the circumstances for her to rely upon the 2006 Letter. So far as detriment is concerned, Lindsay asserts that he has paid more inheritance tax than Fay has done; but, whether or not he did that in the belief that the "tacit agreement" required him to do so, it was in fact something he was obliged to do under the terms of the 2006 Letter. The payment cannot, therefore, constitute a detriment that he would not have suffered but for his assumption that the 2006 Letter was not binding. So far as benefit to Fay is concerned, it seems to me plain that there has been none. To the extent that she concurred



in Mr Farren's view that the 2006 Letter was not binding, it has produced only detriment to her in the form of protracted uncertainty that has resulted in these proceedings, and in the ability of Lindsay to seek to extract payment for the transfer of the River Meadow. But underlying all this is the fact that what Lindsay is seeking to do by his claim of estoppel is to compel Fay to accept his erroneous view of the 2006 Letter. As I have said, Lindsay was content to accept the terms of the 2006 Letter despite Andrew's reservations, and he sought to make it clear that he regarded his signing of the document as bringing the disputes to an end. When, nevertheless, he, Andrew and Mr Farren called the validity of the 2006 Letter into question, Fay cannot be blamed for resuming negotiations in the hope of once again reaching a concluded agreement; and it seems to me objectionable that her willingness to negotiate in the face of Lindsay's repudiation of the agreement they had reached should now be said to make it unconscionable for her to insist upon the terms of that agreement. In my view, there has been nothing unjust or unconscionable about her conduct; and on that ground, as well as on the others I have identified, the claim of estoppel fails.

21. For all these reasons, I hold that Fay is entitled to enforce the 2006 Letter according to its terms. She is, however, in my view not entitled to pick and choose which terms she wants to enforce. Had she chosen to accept Lindsay's repudiation of the 2006 Letter agreement arising from his denial of its existence as a contract, she could have pursued a claim for damages for his failure to comply with all its terms; but that would not have entitled her to litigate the Money Issue and the Orchard Land Issue (except to the limited extent necessary for the determination of damages). Instead, she has asserted the continued existence of the agreement; and, having succeeded in that, she remains as much bound to implement the terms of the 2006 Letter as Lindsay does. Lindsay's refusal to pay inheritance tax which under the terms of that document he was obliged to pay amounts to a breach of contract, and she is entitled to damages for that breach; but she must forgo her claims to the Orchard Land and the money the subject of the Money Issue on the terms set out in the 2006 Letter. Unless the parties can agree the terms of an appropriate order, including agreement on the damages attributable to Lindsay's breach (claimed by Fay to be £141,248.29 plus interest), I will hear further submissions on that matter.

#### The Portfolio Issue

22. The Portfolio Issue concerns the stocks and shares given to Fay by the terms of the Deceased's will. Fay's complaint is that, following the grant of probate, Lindsay failed to take proper steps to assent the Portfolio into Fay's name or to ensure its proper management until it was assented. The relevant timescale is between the grant of probate on 17 May 2007 and December 2009, when Lindsay agreed that the portfolio could be managed on Fay's instructions. In the middle of that period, there occurred the turmoil in the stock markets caused by the collapse of Lehman Bros in September 2008.
23. Two points are to be noted about the Portfolio Issue at the outset. First, the issue is to be determined in the light of my finding that the 2006 Letter was a binding agreement. The significance is said to be that the allocation of responsibility for inheritance tax contained in that agreement meant that the likelihood that some part of the portfolio might be needed to meet the tax liability was substantially reduced, and could be quantified with a reasonable

degree of confidence. Secondly, if I find that there was a breach of duty by Lindsay in relation to the portfolio, I am not asked to quantify what loss if any stemmed from that breach; instead, I am asked to define the parameters – such as the date on which the portfolio should have been assented, and how Fay would have managed it if it had been under her control – within which an assessment of damages can subsequently occur.

24. The relevant facts are as follows. On 23 May 2007 Sophie Martin sent a sealed copy of the grant of probate to Philip Cropper ("Mr Cropper") of Charles Stanley Stockbrokers, who had managed the Deceased's shareholdings during his lifetime. The letter said that it was important that no shares were transferred to Fay or anyone else for the time being, since a substantial amount of inheritance tax remained unpaid. On 4 June 2007 Boyes Turner made an attendance note of a telephone call with Andrew, which stated that "Aunt wants ability to manage the shares which is fine with Andrew + father". At around the same time, Fay drafted a letter of authority to Mr Cropper, intended to be signed in by herself and Lindsay, authorising him to manage the Deceased's portfolio of stocks and shares in accordance with Fay's instructions. She signed this document on 2 June 2007, and forwarded it to Lindsay for signature by him. It appears that he did in fact sign it, but Fay denied that she had seen a copy signed by him, and Lindsay did not assert that the signed copy was returned to Mr Cropper. However, on 15 June 2007 Mr Cropper wrote to Lindsay, saying that Fay had asked him to write so that the investments held in the estate could be managed, and including a private client application form to be completed by Lindsay "if you wish to discuss anything to do with the investments before taking action". He then said this:

"It has been made clear to me by Sophie Martin of Boyes Turner that no assets from the portfolio are to be distributed without instructions from both the executives. Sophie Martin agreed that it was essential to get the management of the investments onto a proper footing as until death is proved using the "Grant of Probate" in effect the investments are in limbo, which does not make commercial sense".

On 18 June 2007 Lindsay responded to Mr Cropper by fax, saying:

"Further to your letter to me dated 15 June 2007 I confirm I am happy to complete the private client application form to enable you to manage my father's investments but feel it would be appropriate at this juncture to be in receipt of an updated valuation and would be grateful if you could forward this to me".

It was common ground (Fay having accepted as much in her evidence) that Lindsay had in fact signed the private client application form. However, Fay did not sign any similar form. In evidence, she explained this fact by saying that her relationship with Lindsay was poor, and she did not want him to have to consent to every transaction. What she wanted instead was for him to give her authority to manage the portfolio by signing the form she had drafted and signed on 2 June 2007. In the absence of that authority, she let matters rest until 7 March 2008, when both she and Lindsay signed a form entitled "Consent to Charles Stanley's Order Execution Policy", which appears merely to give limited authority to trade outside of a Regulated Market or Multilateral Trading Facility. On 4 August 2008 she wrote to Mr Cropper saying, among other things

"I agree that the Share Portfolio needs to be placed in a nominee account in the names of myself and my brother as Executors of my late father's estate. However

before proceeding I need to clarify a few points with the Probate Solicitor. It was my late father's wish that I manage the shares on an "execution only" basis and I would prefer to continue in this vein until probate has finally been completed".

On 17 October 2008, however, Fay accepted Mr Cropper's suggestion that the portfolio should be managed by him on a discretionary basis. On about 22 October 2008, Mr Cropper telephoned Lindsay to arrange a meeting. On 29 October 2008 Lindsay e-mailed Mr Cropper saying, among other things:

"On the assumption that the purpose of your visit was to discuss the need to prove the death of my late Father to the various registrars of his holdings, I can confirm I would be happy for this to proceed on the understanding that they will be placed in the names of the joint Executors. If you require further authorisation please forward the necessary form/s which I will sign and return".

On 30 October 2008 Mr Cropper sent transfer forms and a client agreement letter to Lindsay for signing. On 6 November 2008 Mr Cropper sent a reminder; and on 11 November 2008 Lindsay replied saying that he had passed the documents to his solicitors. In the meantime, on 8 November 2008 Fay wrote to Caroline Wallis on a number of matters, and said "I accept that my late father's share portfolio cannot be transferred to me at the present time". On 18 November 2008 Lindsay wrote to Mr Cropper, saying among other things:

"In July 2007 I signed a private client application form. In your letter of 15th June 2007 you stated that this was because Fay "now wishes for the registrars of the various companies in which your late father had investments to be notified of his death so that the investments held in the estate can be managed." Why am I being asked to repeat this process? What has changed?"

Mr Cropper responded to this by e-mail on 20 November 2008, saying:

"1. Your father had an execution only account with me and Fay decided to continue the same terms with the estate notwithstanding you signed an advisory client agreement letter.

2. I have tried to persuade Fay that there was a requirement to prove death to the various registrars but this did not happen. If you want to know why you will need to ask Fay. I have no authority to tell the executors what to do and can only advise them.

3. Fay has now decided the best course of action is to put the management of the account into my hands on a discretionary basis and hence why the transfer forms and discretionary client agreement were sent to you for signing. With the markets in decline she was keen this should be done as a matter of urgency. As you sent the papers on to your solicitor this is causing further delay."

On 1 December 2008 Fay wrote to Lindsay in the following terms (so far as relevant):

"I write to ask that you sign the necessary forms sent to you by Philip Cropper of Messrs Charles Stanley our late father's Stockbroker. These forms will enable Mr Cropper to manage the share portfolio on behalf of the Executors in accordance with my wishes as the beneficiary.

I have been forwarded your recent letter to Philip Cropper dated 18th November. I would advise you that I did not sign the private client application form. As your Co-Executor I could not take the risk that you might be obstructive when I approached you to counter sign any transaction. As it was then, and still is now, not a sensible

decision to enter into a partnership with someone who refuses to speak to you! I therefore had hoped that a conclusion to the estate with the CTO would be speedy, which looked possible at that time. This still has not happened. I therefore wish to put the share portfolio in the professional care of the stockbroker for management, which has been agreed by Caroline Wallis of Boyes Turner as a sensible move.

- 1. Please confirm that you will deal with the share transfer forms as soon as possible so that you do not become personally responsible for any further loss in share value.** [Emphasis in original.]

On 13 March 2009 Burgess Salmon wrote to Caroline Wallis. The letter deals with most of the outstanding issues, and contains the following passage:

"Equally, our client recognises that Fay needs to be given comfort on other matters which are of concern to her. It is our client's intention to give her that comfort. By way of example (but by no means exclusively so) Fay would like to have the income from the underlying investments which comprise the share portfolio left to her in the will. She would also like to have a greater say in the transposition of those investments. They might be held in equities but they might equally be held in freehold or leasehold properties or bonds and gilts or any combination thereof. Our client fully accepts that the share portfolio and any investments which may be represented by that fund in the future have been left to Fay. Just as importantly a part of the Inheritance Tax liability falls on that share portfolio and Fay will need to fund the liability. The underlying assets will need to remain in the executors joint control until that liability has been settled or otherwise provided for. However, our client is happy for Fay to make decisions as to how her fund should be invested from time to time and for her to have the income from that provided that the underlying assets remain vested in the executors until the tax liability has been settled. Our client would nevertheless like to be kept informed if there are to be any changes in the nature of the underlying assets; indeed, his signature would still be required as co-executor in order to give effect to any changes".

Nothing came of this suggestion, which was overtaken by disagreement over the agenda for a projected meeting in April 2009. Nothing of substance changed until 15 September 2009, when Burgess Salmon raised various questions with Mr Cropper which ultimately revealed that Charles Stanley had transferred a capital sum in excess of £113,000 to Fay's own investment account without authority. Although Lindsay had on 5 October 2009 signed the necessary form to allow Charles Stanley to manage the portfolio on a discretionary basis, the circumstances surrounding the transfer of the capital sum meant that, as Mr Farren explained in a letter dated 9 October 2009 to Caroline Wallis, Lindsay "is not at the moment in a position to instruct Charles Stanley but is more than happy to instruct another firm of brokers ... or to consider the management of the portfolio with his sister if she has some suggestions as to how the nature of it might be changed and on the basis that she will disclose any advice that she has received about that". In the end the parties agreed a change of stockbroker to Brewin Dolphin; and in December 2009 Lindsay released to that firm a discretionary management agreement. In January 2010 he provided executed stock transfer forms. Finally, on 25 February 2013, Fay assented to the vesting in herself of the whole portfolio. There now appears to be no dispute that that assent was effective.

25. Fay puts her claim on the basis that Lindsay as executor owed her four separate duties: a duty to collect and get in the estate promptly; a duty to administer the estate promptly, in particular by distributing assets specifically bequeathed as soon as reasonably practicable; a duty to preserve and protect the estate from loss; and a duty, pursuant to the Trustee Act 2000, to review and consider the investments in the estate with reasonable skill and care. Lindsay accepts that he was under the first three of these duties, but denies that he was under the fourth. For reasons which I explain in due course, I consider that only the second and third of these are relevant to Fay's claim.
26. On the basis of the facts I have set out above, it is in my judgment clear that Fay can have no complaint until 28 November 2008 at the earliest. The position up to that point was that Lindsay had executed the private client application form necessary to give Mr Cropper authority to deal with the portfolio, and had supplemented that form with a further authority in May 2008. The only reason that Mr Cropper was unable to act on the authority given to him by Lindsay was that Fay had decided not to give him the equivalent authority. This was, however, something that she did not at the time communicate to Lindsay; so that, when Mr Cropper sent further forms for Lindsay's signature on 30 October 2008, he was in my view perfectly entitled to react to them as he did in his letter on 18 November 2008 by asking what had changed from the position as he understood it. It is only once he received Mr Cropper's explanation on 20 November 2008 that there can be any complaint against him in this regard: prior to that, he assumed and was entitled to assume that the shares were being properly managed, and it is not his fault that they were not.
27. On 1 December 2008 Fay wrote to Lindsay specifically warning him of the possible financial consequences of failure to complete the stock transfer forms and a form giving Mr Cropper authority to act on Fay's sole instructions. From that point onwards, he was at risk. He knew that, contrary to his previous understanding, there was no authority in place, so that the portfolio was not being managed at all. Although the initial effects of the collapse of Lehman Bros had passed, the investment outlook was extremely uncertain. In those circumstances, it seems to me that his admitted duty to protect the estate from loss took effect. Although this was not the view of himself and his solicitor, or indeed the view of Boyes Turner, the 2006 Letter agreement was in force and had the effect of limiting the potential liability of Fay to additional inheritance tax to a relatively small amount which he can have been in no doubt she would be able to pay if necessary. In those circumstances, there was no need to preserve control over the portfolio in case it should become necessary to realise shares to fund the inheritance tax; and any objection there might otherwise have been to allowing Fay to determine the investment of the portfolio fell away. It is true that he was receiving advice that he should retain control of the portfolio until the inheritance tax was fully discharged, but that does not seem to me to afford a defence. On any basis, it was in my view unacceptable for him to do nothing at all to enable the value of the portfolio to be protected for almost the whole of 2009. That is so even after it was discovered that Charles Stanley had acted without authority, since their actions represented no threat to any legitimate interest of the estate.

28. Accordingly, it seems to me that Lindsay was in breach of his duty to protect the estate from loss during the period between 15 December 2008 (which is 14 days after the date of Fay's warning letter and is in my judgment a reasonable time to allow him to react to it) and the same date in 2009 (which I fix as the date on which authority was given to Brewin Dolphin). In the same period, he was also in breach of his duty to distribute bequeathed assets, although he would have been entitled to make a small retention - amounting to the maximum amount that Fay could have been required to pay by way of additional inheritance tax - to cover the remote possibility that Fay would be unable to fund that amount. He was not in breach of his duty to get in the estate promptly; and it is unnecessary for me to resolve the issue between the parties as to the existence of the Trustee Act duty in the circumstances of this case, since it would not give rise to more extensive liability even if it existed and had been broken.

29. As I have said, I am not asked to assess the damages (if any) that flow from these breaches. Lindsay expressly reserved the right before me to assert subsequently that there was no loss. I will therefore confine myself to declaring that Lindsay was in breach of duty between 15 December 2008 and 15 December 2009 in failing to authorise management of the portfolio in accordance with Fay's sole instructions and in failing to vest the majority of the portfolio in her. I accept Fay's evidence that, if she had had full control over investment of the portfolio, she would have managed it in the same way as she managed her own investments.