



[2019] EWHC 2761 (Ch)

IN THE HIGH COURT OF JUSTICE **Claim nos. C 30 LS 699 and E 91 LS 038**

BUSINESS AND PROPERTY COURTS IN LEEDS

BUSINESS LIST

HIS HONOUR JUDGE SAFFMAN, SITTING AS A HIGH COURT JUDGE

BETWEEN:

(1) SHARON LESLEY WALSH

(2) SCOTT SAMUEL WALSH

Claimants (in action C30LS699)

- and -

(1) REDMAYNE-BENTLEY LLP

(2) REDMAYNE (NOMINEES) LTD

(3) REDMAYNE BENTLEY (A FIRM)

(4) IAN HOOPER

Defendants (C30LS699)/Claimants (E91LS038)

- and -

(1) HARVEY JOHN HALL

(2) JOANNE HILARY RAINES

Defendants (E91LS038)

Mr Benjamin Wood for Redmayne Bentley
Mr Gregory Pipe for the Harvey John Hall and Joanne Raines
Mr Mark Cawson QC for Sharon Walsh and Scott Walsh

Hearing date: 10 and 11 September 2019
Date draft circulated to the Parties 24 September 2019
Date handed down 18 October 2019

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.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

JUDGMENT

Introduction

1. This matter was listed before me on 10 September 2019 for a 2 day hearing to consider 2 distinct issues.
 - a. First, applications to consolidate i) a claim brought by Mrs Sharon Walsh and her son, Scott Walsh against the defendants who are various entities operating under the Redmayne Bentley banner (all of whom shall hereafter be referred to simply as RB) with ii) a claim brought by RB against Mr John Hall and Mrs Joanne Raines. Mr Hall is Sharon Walsh's father and Mrs Raines is his daughter and Sharon Walsh's sister.
 - b. Second, applications to strike out the claim brought against RB by Sharon Walsh and Scott Walsh on the basis that it has no real prospect of success and/or that the proceedings are an abuse of process. These latter applications are brought by RB and Mr Hall and Mrs Raines, as indeed are the applications for consolidation.
2. Mr Benjamin Wood of counsel represents RB, Mr Gregory Pipe of counsel represents Mr Hall and Mrs Raines and Mr Mark Cawson QC represents Mrs Sharon Walsh and Mr Scott Walsh. I am grateful to all three for their very helpful skeleton arguments and oral submissions
3. The consolidation applications were initially resisted by Sharon and Scott Walsh. However, that is no longer their position. Accordingly, an order for consolidation has been made by consent. The fact that the 2 claims have now been consolidated has relevance to the strike out applications inasmuch as Mr Pipe argues that Mr Cawson's recognition that consolidation is appropriate gives additional credence to the arguments that he and Mr Wood offer in support of their joint contention that the current action brought by Sharon and Scott Walsh should not be permitted to progress and should be struck out.
4. The only substantive issues requiring determination therefore are the applications of RB, Mr Hall and Mrs Raines to strike out the claim brought by Sharon and Scott Walsh. It is not disputed by Mr Cawson that Mr Pipe is as entitled as Mr Wood to make such an application following consolidation notwithstanding that there is no claim by Mrs or Mr Walsh against either of Mr Pipe's clients.

5. Before I come to applications it is appropriate to set out some brief background.

The current proceedings

6. In November 2016 the claimants, Sharon Walsh and Scott Walsh, issued proceedings against RB. The claim alleges breach of contractual, fiduciary, statutory and tortious duties and breach of trust in connection with RB's management of 2 share portfolios. RB are in business as stockbrokers and investment portfolio managers.
7. The claim centres around two share portfolios managed by RB on a discretionary basis which had been set up John Hall in 2001. These two share portfolios were held in the name of RB as nominees but were designated in their accounts as being held, in respect of one such portfolio, for the benefit of Sharon Walsh and, in respect of the other portfolio, in Sharon Walsh's name for the benefit of Scott Walsh.
8. Both Sharon and Scott Walsh allege that the beneficial ownership in these respective portfolios reposed in them. Mr Hall denies that was ever the position. His position is that the true beneficial ownership in those portfolios has always vested in him. His assertion is that they were simply two of a number of portfolios managed by RB which were set up in the names of members of John Hall's family but in respect of which he, John Hall, remained the ultimate beneficial owner.
9. In September 2010 RB received a letter purportedly signed by Sharon Walsh requesting that they transfer the assets in these two portfolios to Joanne Raines. RB acted on that letter and accordingly re-designated the accounts in favour of Joanne Raines. Thereafter therefore the share portfolios were held in the name of RB as nominees of Joanne Raines rather than of Sharon and/or Scott Walsh. The share portfolios remained in place and there is no suggestion that this re-designation resulted in different investment decisions being applied as to how the portfolios operated.
10. Sharon and Scott Walsh have asserted that the letter was fraudulent and that they did not request a transfer of the portfolios out of their name and did not wish such transfer to occur bearing in mind that they assert that they were respectively the beneficial owners of those portfolios. Mr Hall and Mrs Raines assert that the letter was genuinely signed by Sharon Walsh on her own behalf and on behalf of Scott Walsh.
11. As I have said, the current claim alleges breach of duty by RB and is premised essentially on the assertion of Sharon and Scott Walsh that, on the basis that they owned the portfolios beneficially, RB's failure to take any step to ascertain whether, in fact, the letter of September 2010 upon which they acted genuinely reflected the wishes of Sharon and Scott Walsh prior to transferring the designation of the accounts, constituted a breach of duty. They allege that as a result of this breach they have lost the value of the portfolio in respect of which they assert their beneficial interest¹.
12. RB deny breach of duty and further contend that, in any event, the Walshes have suffered no loss as a result of any breach that may be established. Nevertheless they have issued proceedings against John Hall and Joanne Raines on the basis that, if any loss has accrued to Sharon and Scott Walsh because RB wrongfully acted on a fraudulent letter of instruction, then that fraudulent letter of instruction emanated from, or with the authority of, Mr Hall and/or Mrs

¹ But see paragraph 53 below in which reference is made to Sharon and Scott having made clear that they will give credit for £275,000 received so far as properly referable to the value of their portfolios.

Raines and therefore they (RB) should be indemnified in respect of any sums that they may be obliged to pay to the Walshes.

13. The issues in respect of both the claim against RB and that brought by RB are identical in the sense that the critical questions in both are i) where does the beneficial interest in the portfolios lie? and ii) was the letter of September 2010 genuine or not?
14. Of great importance in this case however is the fact that this is not the first occasion when those 2 issues have been the subject matter of litigation.

The First and Second Proceedings

15. In December 2013 John Hall and Joanne Raines took proceedings against Sharon and Scott Walsh² for a declaration that the beneficial ownership in the portfolios was vested in John Hall and/or alternatively Joanne Raines and that Sharon and Scott Walsh had no beneficial interest in those portfolios. I shall call these the “First Proceedings”.
16. RB were parties in the First Proceedings having been added by John Hall and Joanne Raines at some stage as an additional Part 20 defendant. However, RB were not expected to take any active part in the First Proceedings and indeed the Part 20 proceedings brought by John Hall and Joanne Raines made no allegations against RB. It seems to be accepted by all parties that they were brought into the First Proceedings in order that they were bound by its outcome and to enable the better disclosure of documents which might be relevant to the dispute between Hall/Raines on the one hand and Walsh/Walsh on the other.
17. That is not to say that even at that stage Sharon and Scott Walsh did not believe that they had a claim against RB for permitting the situation to arise whereby the designation of the portfolios was altered to their disadvantage.
18. A letter dated 9 September 2014 written by RB’s solicitors to Sharon and Scott Walsh’s solicitors included a cost budget which included costs “*incurred in relation to claims intimated against our clients by the claimants (set out in their letter of claim dated 15 November 2012)*”. Additionally, on 25 September 2013 the Walshes’ solicitors wrote to the solicitors acting for John Hall and Joanne Raines to the effect that “*RB is a defendant in our clients’ potential claim*”.
19. On 11 March 2014, and before having been served with the First Proceedings, Sharon and Scott Walsh brought their own proceedings against John Hall and Joanne Raines by which a declaration was sought to the effect that the beneficial ownership in those portfolios was vested in Sharon and Scott Walsh respectively. I shall call this the “Second Proceedings”.
20. Despite what they had said in their letter of 25 September 2013 and elsewhere and to which I have just referred, Sharon and Scott Walsh did not bring proceedings against RB. In a letter to RB’s solicitors of 12 March 2014, their solicitors stated;

“We have not issued against your client purely in the interest of saving unnecessary costs. The claim against your client remains outstanding but we are conscious that, on the face of it, if our claim is successful Mr Hall and Mrs Raines are likely to satisfy the claim.”

² For reasons which are not relevant to the applications with which I am concerned such proceedings were also taken against Sharon Walsh's husband, Kevin Walsh.

However, our clients reserve their position in relation to your client and specifically reserve the right to apply to join your client into the present proceedings or issue fresh proceedings against your client at a future date”.

21. Inevitably, ultimately the First and Second Proceedings were consolidated, directions were given and a 10 day trial was fixed to commence on 15 July 2016.
22. On 18 May 2016, not long before the trial was due to take place, a settlement was agreed (“the Compromise Agreement”) in which Sharon and Scott Walsh indicated that neither of them *“have any right, claim or interest in or to any shares monies or other assets of any nature that are the subject of the action held by Redmayne (Nominees) Ltd and/or RB LLP and (neither) shall hereafter assert any right claim or interest in the same”.*
23. In return Mr Hall and Mrs Raines agreed to the payment to the Walshes of £275,000. RB were not party to that agreement but John Hall and Joanne Raines and Sharon and Scott Walsh agreed to execute such documents as may be reasonably required to satisfy RB as to the *“relinquishment”*³ of the interest of Sharon and Scott Walsh in the shares, monies or other assets which were the subject of the consolidated action.
24. Not only were RB not a party to the Compromise Agreement, they did not even attend the settlement meeting. No criticism is made of them in respect of that. The evidence suggests that John Hall and Joanne Raines were positively opposed to RB’s attendance on the basis that it would simply increase costs, they had no direct interest in the outcome and were simply involved in these proceedings as holders of the portfolios.
25. That agreement has been executed. It was, as required by the Compromise Agreement itself, translated into a consent order that was ultimately approved by the court and Sharon and Scott Walsh have received the £275,000 agreed as a result of the compromise.
26. Of course, because of the compromise, the consolidated First and Second Proceedings were not tried and the central issues in that litigation, namely whether the letter of September 2010 was genuine or not and the question of the beneficial ownership of the share portfolios were not determined.
27. On 15 June 2016, after the Compromise Agreement had been reached, the Walshes’ solicitors emailed RB’s solicitors. The email included the following;

“For the avoidance of any doubt, the order compromising the present legislation, in whatever final form it may take is to compromise the causes of action pursued by the parties in [the First and Second Proceedings]... it will not compromise any cause of action not contained in these actions.

In particular, the potential negligence claim against your client intimated to you at the outset is not compromised by our client agreement (sic) the defendants.”

28. The response from RB’s solicitors came the following day by an email in which they stated:

“On the basis that you consider your clients’ potential negligence action against our clients remains live, we expect the order made will need to make provision to leave the costs are (sic) clients have already incurred in defending the claim at large.”

³ The word used in the settlement agreement in the context of the execution of the relevant documents

29. On 22 June 2016 an email from RB's solicitors to all the legal representatives involved in the First and Second Proceedings acknowledged that the Walshes had indicated;

“that the potential negligence claim by them against RB is not compromised by the agreement reached between the parties to the proceedings excluding RB.”

The application to strike out

30. On 21 December 2018 an application for an order that the claim be summarily dismissed pursuant to CPR 24.2(a) and/or struck out pursuant to CPR 3.4(2)(b) was issued by RB's solicitors. It was supported by a witness statement of Hannah Newman (RB's solicitor) dated 17 December 2018. A similar application was made by Mr Hall's and Mrs Raines's solicitors on 5 June 2019. This was supported by a witness statement of Mr John Mackle, Mr Hall's and Mrs Raines's solicitor.
31. The applications are both made on 2 bases, namely that the claim has no real prospect of success and that, in any event, it is an abuse of the court's process. The applications are of course resisted by Sharon and Scott Walsh and the basis upon which they resist them is contained in a witness statement of their solicitor, Mr Robert Addlestone. This witness statement was in fact in response to the application of 21 December 2018 because it is dated 3 June 2019, though clearly it is equally apposite in respect of the Hall/Raines application.

No real prospect of success

32. The contention that the claim has no real prospect of success is premised on the basis of the joint submissions promulgated by Mr Wood and Mr Pipe that there is no realistic basis upon which the court could find that any act by RB, whether committed in breach of duty or not, caused any loss to Sharon Walsh and Scott Walsh because no act or omission by RB caused the beneficial interest in the assets within the portfolio to be lost by Sharon or Scott Walsh, even if the letter of September 2010 was not genuine.
33. The submissions are essentially that;
- a. RB only ever held the relevant share portfolios as trustees and did not and could not transfer the beneficial interest in those portfolios.
 - b. The beneficial interest could only be transferred by the beneficial owner⁴. If Sharon Walsh enjoyed beneficial ownership of the share portfolios and genuinely signed the letter in September 2010, then the transfer of the beneficial ownership in the relevant portfolios was effected with her authority and as a result of her wishes. If she did not genuinely give those instructions, then the beneficial ownership has not been altered. In that event, whoever was the beneficial owner before the re-designation remained the beneficial owner thereafter.
 - c. All that RB were capable of doing was to transfer the designation of the account (in this case from one designated for the benefit of Sharon and/or Scott Walsh to one designated in favour of Joanne Raines) but that re-designation was of no effect in transferring the beneficial ownership.
 - d. There was not even a transfer of the legal ownership, because both before and after the letter of September 2010 the legal ownership in the shares was vested in RB.

⁴ see s.53(1)(c) Law of Property Act 1925

- e. Once the dispute as to beneficial ownership emerged, RB continued to hold the shares as a neutral stakeholder and their status in the First and Second Proceedings was on a basis akin to that in a stakeholder claim under CPR 86.
- f. The assets in the portfolio were not disposed of or diminished in any way. The portfolios remained extant for the benefit of the beneficial owner.
- g. If Sharon and Scott Walsh have been disadvantaged by the Compromise Agreement then that disadvantage has been occasioned by the very fact that they entered into the Compromise Agreement and has not been caused by any action on the part of RB. RB did not encourage or cause Sharon and Scott Walsh to enter into that settlement agreement, indeed they were not even a party to it or the negotiations leading to it. The decision to enter into the Compromise Agreement was purely that of Sharon and Scott Walsh. Before agreement was reached, arguments as to the beneficial ownership of the portfolios remained open to all parties. Nothing which RB did or omitted to do caused any beneficial interest which Sharon or Scott Walsh had in the portfolios to be lost.
- h. Nor did RB do or omit to do anything which caused the dispute between Mr and Mrs Walsh, Mr Hall and Mrs Raines. A dispute would always have arisen between Sharon and Scott Walsh on the one hand and John Hall and Joanne Raines on the other where both sets of parties asserted a beneficial interest in the portfolios to the exclusion of the other.
- i. The nature of the settlement whereby the dispute in respect of the beneficial ownership of the shares was brought to an end in return for payment of £275,000 makes it impossible for the court to determine what value, if any, was given to whom by the Walshes foregoing their claim. It would be an impossible task for a trial judge to quantify the claim against RB bearing in mind that it is not clear how that sum was established, what its relationship is to the value of the portfolio and what relationship it has to the risks involved in the litigation and the costs incurred. In short, the Walshes' claim to the value of the fund, less the £275,000 received, is woefully simplistic.
- j. In any event, by virtue of the terms of the Compromise Agreement, an estoppel by contract arises which precludes Sharon and Scott Walsh from asserting that they had a beneficial interest in the portfolios. I was referred to the case of *Prime Sight v Lavarello* [2014] AC 436 and *First Tower Trustees Ltd v CDS Ltd* [2018] EWCA Civ 3096. This contention is based upon the wording of the Compromise Agreement by which Sharon and Scott Walsh declared that they had no "*right, claim or interest*" to the portfolios. It is asserted that it is clear that the agreement is not an assignment by which title was transferred. It was an agreed statement of the then position. In other words, it was declaratory, and essentially declared that they never had a beneficial interest and that, pursuant to the terms of the *Contracts (Rights of Third Parties) Act 1999*, RB are entitled to the benefit of that declaration. As a result, it is impossible for Sharon and Scott Walsh to assert that they have suffered loss arising out of the re-designation of share portfolios in which they have now declared they did not have an interest.

Discussion

34. Mr Cawson reminds me of the test for summary judgment. The obligation is upon the applicant to establish that the respondent has no real prospect of success and respondent need only satisfy an evidential burden to demonstrate that there is a real prospect of successfully pursuing (or defending) the action. The respondent does not have to establish a likelihood of being successful, it is enough to establish that the position taken by the respondent, whether it be to

prosecute a claim or to defend it, is one which is arguable in the sense that it is not illusory or fanciful. The hurdle therefore that has to be negotiated by the respondent is not a high one.

35. I also remind myself that in the context of this application, while RB deny breach of duty, their application to strike out is not based upon the assertion that it is unarguable. It is based on the assertion that even if there has been a breach of duty, there has been no loss caused by it. For the purposes of this application therefore, and, as Mr Wood emphasised, only for the purposes of this application, breach of duty is not in dispute.
36. Against that background, Mr Cawson argues that the applications must fail not least because they are based upon a number of false premises. The most fundamental one being that the applications are premised to a significant extent on the basis that RB have not transferred any beneficial ownership in the share portfolios, they have simply re-designated them and that the legal and beneficial ownership has not been affected by that essentially administrative step. In short, that if the September 2010 letter was a forgery the beneficial interest in the share portfolios had not been transferred.
37. Mr Cawson took me to the pleaded case as between the Walshes and RB as pleaded by counsel other than those involved instructed on these applications. It is pleaded by the Walshes that, prior to the re-designation following the letter of September 2010, the share portfolios belonged legally and beneficially to Sharon Walsh and/or Scott Walsh⁵. At paragraph 93 of the Particulars of Claim it is pleaded that “*the effect of the said transfer (the 2010 letter) was to divest Sharon of her legal and beneficial interest in the share portfolio the subject matter of Sharon’s account and divest Sharon of the legal and Scott of his beneficial interest in the share portfolio the subject matter of Scott’s account*”. Mr Cawson points out that in paragraph 54 of the Defence it is admitted that the 2010 letter “*passed legal title in the share portfolios forming Sharon’s Account and/or Scott’s Designated Account to Joanne*”.
38. He argues therefore that RB’s pleaded case does not accord with the basis of their application to strike out. It is right to point out that Mr Wood immediately acknowledged that paragraph 54 of the Defence was clearly erroneous. It is not admitted nor has it ever, in reality, been admitted that RB’s re-designation of the accounts, if done pursuant to a fraudulent request, divested Sharon and/or Scott Walsh of any beneficial interest that they had in them. That, argues Mr Wood, is clear from the defence as a whole and the nature of the applications to strike out and the evidence in support. Not only that, Mr Wood and indeed Mr Pipe argue that there can be no question of Sharon Walsh holding the legal interest in the share portfolios. The assertion that she did so is simply unsustainable in law. The legal interest was always held by RB as nominees. The share portfolios were in their name, they had the power to buy and sell shares. It is trite that the share portfolios give rise to a trust situation in which the legal interest is held by RB as trustees.
39. I have to say that it is difficult if not impossible to see any basis to support the contention that any steps taken by RB transferred the legal interest in the portfolios. Mr Cawson took me to RB’s terms and conditions, but my attention was not drawn to any terms which might be seen to displace such a fundamental principle of law.
40. Equally I do not see how it is arguable that any act by RB pursuant to receipt of a fraudulent letter of September 2010 transferred the beneficial ownership in the portfolios. It seems to me

⁵ see paragraph 39 Particulars of Claim

to be unarguable as a matter of law that in those circumstances the beneficial ownership was changed, not least because s53(1)(c) *Law of Property Act 1925* does not permit that.

41. In any event, Mr Cawson further asserts that the premise which is postulated by the applicants and summarised at paragraph 33e above to the effect that RB held the portfolios as a neutral stakeholder is itself false. He deals with this in paragraph 14 of his skeleton argument where he states that prior to RB acting on the September 2010 letter the relevant portfolios were held on the basis that they belonged beneficially to Sharon and Scott Walsh but that thereafter they were held on the basis that they belonged beneficially to Joanne Raines.
42. I have to admit that I also have significant difficulty in this argument. I do not see how it addresses the assertion that RB were merely neutral stakeholders once the dispute between Mr and Mrs Walsh on the one hand and Mr Hall and Mrs Raines on the other arose. Indeed, the fact that they were neutral stakeholders is given weight by the fact that a deal for the resolution of the beneficial ownership in the shares was reached at a settlement meeting to which RB were not invited and at which they were not present. To use modern, if somewhat unpleasant, vernacular, it seems to be accepted that they “did not have a dog in the fight”. It was clear from the Compromise Agreement that it was not envisaged that RB would act otherwise than in accordance with the agreement.
43. In any event, whatever the position with regard to the legal interest, in response to the arguments of the applicants summarised at paragraph 33h above, Mr Cawson argues that the prospects of Sharon and Scott Ward being able to make good their assertion that they were the beneficial owners of the share portfolios was dramatically diminished by the conduct of RB in re-designating the accounts from Sharon Walsh’s name into Joanne Raines’s name.
44. Mr Cawson argues that the circumstances in which the share portfolios were set up in 2001 by John Hall, coupled with the presumption of advancement to which reference is made in paragraph 37 of the Particulars of Claim, would have been of considerable assistance to Sharon and Scott Walsh in successfully prosecuting their proceedings against Mr Hall and Mrs Raines and defending the Hall/Raines proceedings against them. As he puts it at paragraph 9 of his skeleton argument;

“John and/or Joanne would have faced a formidable task in seeking to assert that the true beneficial position was different from the position represented by the way that the accounts had been set up...”

The point is repeated at paragraph 16 of the skeleton argument.

45. He argues that the re-designation of the accounts considerably weakened Sharon and Scott Walsh’s position. He developed this in paragraph 13 of his skeleton argument in which he submits that;

“It was, of course, Sharon’s and Scott’s case as against Joanne and John in the Walsh v Hall Proceedings that the shares and other assets in question continued, notwithstanding, to be beneficially held by Sharon and Scott. However, rather than being able to simply point to Sharon’s account and Scott’s account as set up in Sharon’s name, and as constituted with Sharon and Scott as the beneficial owners thereof, and Sharon being able to require RB to act on her instructions, because the accounts had been closed down and the assets the subject matter thereof transferred to Joanne’s second account, it was necessary in consequence of RB’s breaches, for Sharon and Scott to commence the Walsh v Hall Proceedings against Joanne and John and to allege that some form of remedial constructive or resulting trust arose in their

favour given the fraudulent nature of, and circumstances behind the use of Sharon's signature in respect of the September 2010 letter."

46. Mr Wood and Mr Pipe characterised this argument as in fact a claim for a loss of a chance. Essentially what Mr Cawson was arguing, they say, is that the re-designation of the share portfolios reduced the chances of Sharon and Scott Walsh being able to prove that they were the beneficial owners of those share portfolios.
47. It is argued that nowhere is a loss of a chance pleaded. It is suggested that this is a much more fundamental defect in the pleadings than the obviously erroneous admission made in paragraph 54 of the Defence. A loss of a chance claim is a specific claim which has not been presaged at all in the pleadings. Mr Wood and Mr Pipe argue that Mr Cawson is constrained to articulate the claim on this basis because of the fundamental difficulty he has with his argument that in fact the beneficial interest in the share portfolio was transferred when RB re-designated the portfolios pursuant to a fraudulent instruction.
48. I have to say that it is difficult to see how such a claim would actually be successfully advanced even if pleaded. True it is that the court hearing the First and Second Proceedings will have been presented with a situation where, at the time of the hearing, the shares were in an account in which Joanne Raines was the designated beneficiary, but the whole essence of the claim was whether that was appropriate or not. It is overwhelmingly difficult to see how the court would be assisted in reaching its conclusion as to where beneficial ownership in the shares portfolios reposed merely because at the date of the hearing they were designated for the benefit of one person rather than the other when the issue in dispute is whether they should have been so designated and who is the beneficial owner, whatever the designation.
49. There was a further basis upon which Mr Cawson contended that his clients had an arguable claim. Essentially, prior to the re-designation of the portfolio in Joanne Raines's favour, Sharon and Scott Walsh (or at least Sharon on behalf of Scott Walsh) had contractual rights in respect of the management of the portfolio. After September 2010 she did not have any such rights. The divesting of these contractual rights gives rise to a cause of action and the loss sustained is the loss of the value of the portfolio.
50. This too is an extremely difficult argument to run, in my judgment. The fact is that if the letter of September 2010 was a forgery then, whatever contractual rights Sharon and Scott Walsh had before that letter was written and acted upon, they continued to have thereafter. I am not satisfied that a contention to the contrary is even arguable especially where the share portfolios remain intact and their value has been undiminished. There is, for example, no evidence that Sharon or Scott Walsh sought to give any directions to RB after the re-designation of the account which RB refused to act on in light of the re-designation and that Sharon or Scott suffered loss as a result. The issue was simply the same as it had always been, namely whether Sharon and Scott Walsh had an interest in the portfolios which gave rise to the contractual rights to which Mr Cawson refers.
51. In answer to the point made at paragraph 33h above to the effect that the dispute would always have arisen, Mr Cawson argues that it is not inevitable that there would always necessarily have been a dispute between Mrs Walsh and Mr Walsh on the one hand and Mr Hall and Mrs Raines on the other had the portfolios not have been re-designated. It is a point that is made not just in oral submissions but also in paragraph 16 of his skeleton argument (albeit that the claim is not pleaded in quite those terms and it appears to be contradicted by paragraph 47 of Mr Addlestone's witness statement in response to the applications).

52. It strikes me however that that argument is simply unsustainable. The fact is that when it became clear that Mrs Walsh was asserting a beneficial ownership in the portfolios, Mr Hall and Mrs Raines made their claim for a declaration as to the ownership. The complaint made against RB is essentially that they did not investigate the genuineness of the September 2010 letter before they acted upon it. Had they done so, it is argued by Mr Cawson, they would have learnt that Mrs Walsh disputed that she had written it and things would have remained as they had before in terms of the designation of the portfolios. In my judgment it is unrealistic to conclude that Mr Hall and Mrs Raines would have accepted that, indeed it is empirically clear that they would not have just let things lie. It was they, after all, who took the initial proceedings for a declaration as to the ownership of the portfolios.
53. As regards the impact of the earlier proceedings and their compromise, Mr Cawson argues that merely because in the Second Proceedings Sharon and Scott Walsh elected simply to sue Mr Hall and Mrs Raines does not mean that their claim against RB is lost. Indeed, he argues that the proceedings brought against Mr Hall and Mrs Raines were simply an effort to mitigate the loss caused to Mrs Walsh and Mr Walsh by the actions of RB. To that extent RB benefited from that action because in the claim now launched against them credit will be given for the £275,000 received in so far as properly referable to the value of the portfolios.
54. Nor, he argues, can RB pray in aid the fact that those proceedings were compromised because that is open to a litigant who is seeking to mitigate his loss. In support of his mitigation argument I was referred to *Pilkington v Wood* [1953] Ch 770 and *British Racing Drivers' Club v Hextall Erskine and Co* [1996] PNLR 523.
55. *Pilkington v Wood* is authority of the proposition that the duty to mitigate does not usually extend so as to oblige a party to sue another potential defendant on the basis that it is

“no part of the plaintiff’s duty to embark on litigation in order to protect the defendant from the consequences of his own carelessness”.

Of course, at the time of settlement RB were actually a party to the consolidated litigation, although it has to be said, not at the behest of Mr and Mrs Walsh.

56. However, to the extent that *Pilkington* helps Mr Cawson, it seems clear that the view expressed in it is clearly not immutable. In the more recent case of *Walker v Geo H Medlicott & Son* [1999] 1 WLR 727 the Court of Appeal took the view that a person who had suffered loss as a result of the negligence of a solicitor in failing to carry out a testator’s instructions should first have applied for rectification of the will rather than taking proceedings for negligence against the solicitor. At page 739F Sir Christopher Slade observed that;

“notwithstanding the decision in Pilkington v Wood, this is a situation in which, as a general rule, the courts can reasonably expect the plaintiff to mitigate his damage by bringing proceedings for rectification of the will, if available, and to exhaust that remedy before considering bringing proceedings for negligence against the solicitor”.

57. Be that as it may, in addressing the point made by the applicants which I summarise at paragraph 33g above, the essence of the point made by Mr Cawson, as I understand it, is that it is not open to the applicants in this case to argue that the compromise of the initial action was somehow a subsequent step which essentially breaks the chain of causation. In this context the case of *British Racing Drivers* is cited as being of relevance. The defendant solicitor who caused loss to the claimant by giving it wrong advice argued that the settlement which had been reached by the claimant to extricate it from the consequences of that wrong advice was too disadvantageous. I was referred by Mr Cawson to 543D to F of Carnwath J’s judgment as

authority of the proposition that the courts will essentially take a benevolent view of the terms of a party's compromise and will be very slow to conclude that a compromise was unreasonable.

58. I turn to Mr Cawson's arguments dealing with the points made at paragraph 33j. Mr Wood and Mr Pipe argue that the Compromise Agreement declares that Mrs and Mr Walsh had no beneficial interest. The argument is that, if that is the case, then clearly they have suffered no loss as a result of any act or omission by RB. Mr Cawson argues that a perfectly respectable interpretation of the agreement is that it affects interests going forward. He points out that paragraph 2(4) of the agreement specifically makes it clear that Mrs and Mr Walsh will not assert any rights et cetera "*hereafter*". He also points out that paragraph 3 of the agreement talks about the Walsh's *relinquishing* their interest. This is itself suggestive, he argues, of the proposition that they had an interest before they relinquished it.
59. The argument put forward by the applicants is that the Compromise Agreement is clearly not an assignment and that an assignment would have been necessary if Sharon and Scott Walsh believed that they had an interest. It is a powerful argument in support of the proposition that, as a result, Sharon and Scott Walsh never had an interest and it is one which may or may not succeed if this matter went to trial. However, for the purposes of this application I am not satisfied that it is unarguable that the Compromise Agreement only declares rights going forward from the date of the agreement and that the agreement is not determinative of issues relating to beneficial ownership before the date of the agreement.
60. The same applies to Mr Cawson's arguments as to the effect of the *Contracts (Rights of Third Parties) Act 1999*. It seems to me that it is arguable that this does not provide a basis for RB asserting that contractually they are entitled to the benefit of any declaration made in the Compromise Agreement. I accept that it is questionable whether the agreement meets the requirement of section 1(1)(b) of the Act.
61. The same also applies to the argument that the settlement has made it impossible for the court to assess damages in the event that it becomes necessary to do so. It is not usually the case that a court will dismiss a claim simply because the assessment of damages is difficult. The court will do what it can to fairly assess damages. If a payee party by their actions has made the exercise difficult it may mean that the approach the court takes to assessment may be one which is more conservative than the payee might like but I do not think the court will refuse to do what it can to assess damages.
62. Finally, I accept Mr Cawson's argument that it is arguable that the Compromise Agreement did not break the chain of causation in the sense suggested by Mr Pipe and Mr Wood

Conclusion regarding summary judgment

63. In my judgment, however, it does not matter that Mr and Mrs Walsh may have an arguable case on the issue of whether the Compromise Agreement was declaratory or not or whether, if it was, RB can take advantage of that. Nor, in my view, does it matter that an assessment of damages in the event that Mrs Walsh and Mr Walsh are successful albeit it might be difficult, is nevertheless possible or that they can arguably pray in aid *Pilkington* or *British Racing Drivers*.
64. I say that because, in my view, they have no real prospect of success in their action against RB because I agree with the contentions of Mr Pipe and Mr Wood that the contention that they have lost the value of this portfolio by virtue of the acts and/or omissions of RB is simply unsustainable.

65. It seems to me to be axiomatic that only the true owner of the beneficial interest could transfer it and that the only basis upon which the re-designation by RB of the accounts could reflect a change in the beneficial interest is if they changed the designation in pursuance of a genuine letter from Sharon Walsh requesting that they do so. If RB sought to change the designation and, hence, ostensibly mark a change in the beneficial interest in pursuance of a fraudulent letter, then their efforts to do so were simply of no effect. The beneficial interest stayed where it had previously been. Thus, if the letter was genuine it is difficult to see how any claim against RB can be made out. If the letter was not genuine it had no effect. That seems to me to be the fundamental point and one which in my view fatally undermines the basis of this claim however arguable or otherwise peripheral points may be.
66. The situation may well have been different of course if, following re-designation of the portfolios in favour of Joanne Raines, Joanne had then instructed RB to liquidate the portfolio and send her the money, which was then dissipated. In that event it would very much be arguable that Sharon and Scott Walsh had suffered loss. That however is not the position here. The portfolios have remained wholly intact and their value has not been diminished by any of the acts or omissions which figure in this case.
67. I do not accept that it is even arguable that the transfer of the designation weakened the claim that Scott and Sharon Walsh sought to make in respect of the beneficial ownership of the portfolio. I say that for the reasons set out in paragraph 48 above. Nor do I accept that the acts or omissions of RB caused Sharon and Scott Walsh to lose any contractual rights save to the extent that they did so because Sharon genuinely wrote the letter of September 2010. I say that for the reasons set out in paragraph 50 above.
68. I really need not address in greater detail the question of mitigation and whether any loss sustained arose by virtue of Sharon and Scott Walsh's agreement to the terms of the compromise in 2016 of the earlier proceedings, rather than any action or inaction by RB. As I have said, I am prepared to accept that it is arguable that the settlement reached was reasonable but I do not think that that makes any difference in light of the fundamental problems faced by the respondents to this application which I have identified above.
69. It is as a result of that fundamental difficulty in establishing that any act or omission by RB caused any loss that I have concluded that it is appropriate to determine this claim on a summary basis. For the reasons set out above I am simply not satisfied that this claim has any real prospect of success because of the insuperable difficulty in establishing causation of loss, even if breach of duty is established.
70. Indeed, I conclude that had I reached the opposite conclusion I would have been doing Mrs Walsh and Mr Walsh no favours whatsoever. Had they survived this application and the application to strike out as an abuse then it seems to me inevitable that their claim would have been dismissed at trial when many thousands of pounds more had been expended in costs.

Abuse of process

General Principles

71. In the light of the conclusions that I have reached above it becomes unnecessary to consider whether this action is an abuse but I shall do so in the event that I am wrong in my conclusion as to summary judgment.
72. Perhaps the starting point on questions of abuse is *Henderson v Henderson* (1843) 3 Hare 100 pursuant to which parties are prevented from raising matters in subsequent proceedings which should have been raised in earlier proceedings.

73. In the context of this case however, the application is perhaps more squarely founded on the principle enunciated in *Barrow v Bankside Agency Ltd* [1996] 1 WLR 257 and *Johnson v Gore Wood* [2002] 2 AC 1. It is designed to ensure that parties, and indeed the court, are not troubled twice by identical matters and that the administration of justice is not brought into disrepute by different findings on identical subject matter.

74. It was said by Sir Thomas Bingham MR (as he then was) in *Barrow* at 260B that the rule in *Henderson* is based on

“the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is an abuse at which the rule is directed.”

75. In *Johnson* Lord Bingham stated at 31A-B :

“The underlying public interest is the same: there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all.”

In the same speech (at 32H-33A) Lord Bingham stated:

“An important purpose of the rule is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter. A second action is not the less harassing because the defendant has been driven or thought it prudent to settle the first; often, indeed, that outcome would make a second action the more harassing.”

76. The question of abuse was also considered in detail in the important case of *Aldi Stores Limited v WSP Group Plc* [2008] 1 WLR 748. The facts of this case as well as the principles enunciated in it are apposite because the court gave guidance as to the proper course to be taken by a party in complex commercial multi-party litigation where that party wishes to pursue other proceedings whilst preserving a right in existing proceedings. It will be recalled that in the present case Sharon and Scott Walsh took proceedings against Mr Hall and Mrs Raines whilst specifically intimating that they wished to reserve their rights against RB.

77. The guidance given in *Aldi* is clear that in such a situation the court should be advised in the course of the first proceedings of the fact that a right has been reserved to take subsequent proceedings. At paragraph 30 of the judgment in *Aldi* Thomas LJ stipulated that this was necessary in order that;

“The court would, at the very least, have been able to express its view as to the proper use of its resources and on the efficient and economical conduct of the litigation.”

At paragraph 31 Thomas LJ makes it clear that:

“if a similar issue arises in complex commercial multi-party litigation, it must be referred to the court seised of the proceedings. It is plainly not only in the interest of the parties, but also in the public interest and in the interest of the efficient use of court resources that this is done. There can be no excuse for failure to do so in the future.”

78. The case also makes clear (at paragraph 16 of the judgment of Thomas LJ) that an application to strike out on the basis of an abuse is not a matter for judicial discretion. It is a matter which involves an assessment of a large number of factors. There must be a merits based approach and there can only be one correct answer as to whether subsequent proceedings are an abuse of process.

79. *Aldi* has been a point of reference in many abuse cases since. In *Stuart v Goldberg Linde* [2008] 1 WLR 823, at [96], the Master of the Rolls had this to say:

“For my part, I do not think that parties should keep future claims secret merely because a second claim might involve other issues. The proper course is for parties to put their cards on the table so that no one is taken by surprise and the appropriate course in case management terms can be considered by the judge. In particular parties should not keep quiet in the hope of improving their position in respect of a claim arising out of similar facts or evidence in the future. Nor should they do so simply because a second claim may involve other complex issues. On the contrary, they should come clean so that the court can decide whether one or more trials is required and when. The time for such a decision to be taken is before there is a trial of any issues. In this way the underlying approach of the CPR, namely that of co-operation between the parties, robust case management and disposing of cases, including particular issues, justly can be forwarded and not frustrated.”

80. In *Gladman Commercial Properties v Fisher Hargreaves Proctor and Others* [2014] PNLR 11 the court also had occasion to consider the *Aldi* guidelines. Briggs LJ (as he then was) explained at [64] that the court in *Aldi*

“plainly regarded the requirement to refer a contemplated future claim for case management directions in the earlier claim as mandatory, and as serving the public interest in the efficient use of court resources.”

Briggs LJ went on to acknowledge that the court in *Aldi* had considered a failure to make such a referral as inexcusable and he cited with approval the observations of Sir Anthony Clark MR in *Stuart v Goldberg Linde* to which I have referred above.

81. In *Otkritie Capital International Ltd v Threadneedle Asset Management Ltd* [2017] 2 Costs LR 375 consideration was given (at [53]) to the question of prejudice as one of the circumstances to which regard must be had in establishing abuse. It is authority of the proposition that if an applicant can show prejudice that is a factor to be taken into account but it is not determinative.

82. Finally, in *Clutterbuck v Cleghorn* [2017] EWCA Civ 137 at paragraph 81 it was said by the court that these *Aldi* guidelines are mandatory and that

“an inexcusable failure to comply with them is a relevant factor to be taken into account in assessing whether, having regard to the relevant private and public rights and in light of all the facts of the case, a party is abusing the process of the court by seeking to raise before the court an issue that it could have raised in prior proceedings.”

83. Finally, I was referred to *Manson v Vooght* [1999] BPIR 376, at page 387, as authority of the proposition that *“if in all the circumstances the bringing of the claim in the succeeding action is an abuse, the court will strike it out unless there are special circumstances”*. Of course, I recognise that before that step is taken the court must be satisfied on a merits based approach that there has been abuse; non-compliance with the *Aldi* principles, albeit that such compliance is mandatory, is simply one of the factors to be taken into account.

The application of these principles to this case

84. Counsel for both sets of applicants argue that there has been a failure to comply with the mandatory *Aldi* guidelines. No excuse or explanation has been offered for that failure. It is indeed not disputed by Mr Cawson that the court was not advised during the course of any directions hearing in the earlier proceedings that Sharon and Scott Walsh had reserved their rights to bring separate proceedings against RB at a later stage. This is so even though in fact RB were a party to these earlier proceedings albeit that they had been brought into them by Mr Hall and Mrs Raines rather than by Scott and Sharon Walsh.
85. But, says Mr Cawson, it is by no means accepted that the *Aldi* guidelines actually apply in this case. They apply to complex commercial multi-party litigation. It is argued that this is not complex commercial multi-party litigation but rather is a fairly simple case.
86. Of course I accept that there will be many cases with a more complex factual and legal matrix but that does not necessarily make this case so straightforward that the *Aldi* guidelines do not apply. Indeed, it has to be said that it seems to me that this is just the sort of case in which the *Aldi* guidelines would be applicable. I have no doubt that the court would have appreciated being advised of the possible claim that Mrs Walsh and Mr Walsh envisaged against RB when it was giving directions in relation to the earlier proceedings. The trial of those proceedings was listed for 10 days. Even if a listing of that length is not indicative of some sort of complexity sufficient to meet the criteria when *Aldi* becomes engaged, that time estimate involved the significant allocation of court resources and I have no doubt the court would have been significantly interested to know that there may subsequently have been another case which would last at least as long, dealing with predominantly the same issues, namely beneficial ownership of the share portfolios and the genuineness or not of the 2010 letter. I remind myself that the principles in *Aldi* are not just devised for the purpose of assisting a party not to be “*twice vexed*” by the same dispute. They have also been devised for the purpose of assisting the administration of justice generally and access of other court users to court resources.
87. Mr Cawson questions whether advising the court would have made a difference. He argues that there was good reason not to bring RB into the Second Proceedings. If Mr and Mrs Walsh’s claim had succeeded against Mr Hall and Mrs Raines then such proceedings would not have been necessary. It is unlikely that the court would have required Mrs Walsh and Mr Walsh to bring proceedings against RB in those circumstances especially since, if Sharon and Scott Walsh lost their claim against Mr Hall and Mrs Raines, then a claim against RB would have been unlikely to be sustainable. In so far as the assessment of quantum became more difficult as a result of a settlement, for the reasons set out above, that in itself, submits Mr Cawson, is unlikely to have persuaded the court to conclude that bringing them into proceedings was necessary.
88. Mr Cawson also points out that the claim against RB had a greater degree of complexity about it which justified it being held in abeyance. The success of a claim against RB depends upon a finding of a breach of duty. This is an added and more complex dimension than was involved in the case against Mr Hall and Mrs Raines, which merely depended on a determination of beneficial ownership pre-and post September 2010 and the genuineness or otherwise of the September 2010 letter.
89. The applicants argue that this submission is simply unrealistic. The issues to be resolved in the current action are overwhelmingly those that had to be resolved in the earlier actions. Insofar as there were issues relating to breach of duty which were only referable to the case brought by the Walsh’s against RB, it is contended that by far the greater part of the trial in a claim against RB will be the determination of the beneficial ownership in the portfolios pre- and post

September 2010 and the genuineness or otherwise of the September 2010 letter. As I mentioned in paragraph 3 above, it is argued that there has been an implied acceptance of that by Mr Cawson because he now consents to consolidation of the actions.

90. In those circumstances, it is argued that it is simply not tenable to suggest that the court would not have required all those issues to be litigated at the same time because the factual issues to be determined were overwhelmingly similar if not identical, the evidence necessary to determine the central factual issues was identical and it would be absurd to have 2 trials covering the same ground which could possibly lead to 2 conflicting outcomes. Furthermore, it is argued that this is particularly so bearing in mind that RB were actually already a party to the proceedings.
91. I agree that the ground covered by 2 trials would have been very much the same. Insofar as there is an added dimension in the current proceedings in the context of a consideration of concepts of breach of duty, the evidence common to both claims relating to beneficial ownership in the genuineness of the 2010 letter is, in my view, of much greater significance and, as Mr Wood pointed out, if RB had been actively joined into the earlier proceedings in a capacity other than simply as stakeholders, questions of breach of duty could have been carved out to be dealt with on a separate occasion (before or after the trial of common issues).
92. But, argues Mr Cawson, it was in any event open to RB's solicitors or indeed Mr Hall and Mrs Raines solicitors to raise this issue with the court. After all, RB had been put on notice that claims against them were reserved. I have referred to the correspondence in which that was done from paragraph 20 above. He accordingly argues that there has been breach of the *Aldi* guidelines by the applicants.
93. Mr Pipe and Mr Wood argue that this is equally unrealistic. It is true that in 2014 there was some correspondence in which the respondents' solicitors made it clear that their clients were reserving their position but it was simply not accepted by RB that they had any liability to Sharon and Scott Walsh and if they seriously intended to make a claim against RB then it was incumbent upon Sharon and Scott Walsh to make that clear to the court. As Mr Wood puts it in paragraph 60 of his skeleton argument "*there was no reason for RB to bring to the court's attention a potential claim against it which it believed could never actually arise.*"
94. It is argued by the applicants that there is real prejudice both to RB and to Mr Hall and Mrs Raines if this action is allowed to proceed. It will involve a long delay in the resolution and determination of allegations which would have been resolved in the summer of 2016 but which actually relate to matters going back to 2001. It will also involve cost for both applicants, some which will no doubt be irrecoverable even if an order for costs is obtained.
95. If the proceedings against RB had formed part of the earlier proceedings then, save for the relatively discrete issue about the extent of the breach of duty, they could have sat back whilst the real parties to the dispute "*slugged it out*" as Mr Wood put it. Now they are obliged to become an active participant.
96. Even more fundamentally, from the point of view of Mr Hall and Mrs Raines, they were entirely justified in believing that the 2016 settlement in which they made a payment of £275,000 saw an end to their involvement in this saga involving Mrs and Mr Walsh and the share portfolios. They have now been dragged into the proceedings again.
97. Insofar as it is argued that that has nothing to do with Mrs Walsh and Mr Walsh because their proceedings are only against RB, it is argued by Mr Wood and Mr Pipe that, once again, this is entirely unrealistic. They argue that it was absolutely inevitable that, where proceedings were

instituted against RB in circumstances where it is alleged that they wrongfully acted on a fraudulent letter of instruction, they would join in the perpetrator of that fraudulent letter of instruction in order to ensure that they had an indemnity against any liability that might be established against them. This, it is argued, is the clearest possible example of a party being “*twice vexed by the same matter*”. It is argued that it cannot matter that actually Mr Hall and Mrs Raines have not been brought into the proceedings by the respondents where, as here, the Walshes’ action in bringing proceedings against RB has made it inevitable that Mr Hall and Mrs Raines would be dragged back into proceedings which they thought they had settled with the respondents.

98. In my view this is an extremely powerful argument. I accept that any competent lawyer advising RB would advise them to bring proceedings against Mr Hall and Mrs Raines. This is because the claim against RB is premised on the basis that they acted on a fraudulent letter in circumstances where to do so was a breach of duty. It follows as night follows day that, if RB’s liability could only be established on the basis that they acted on the basis of a fraudulent letter, they would bring into the proceedings the persons who it is alleged generated the fraudulent letter. It seems to me that when Mrs Walsh and Mr Walsh instituted their proceedings against RB therefore that it was entirely foreseeable that that would happen.
99. The effect is that the settlement negotiated in 2016 has essentially been negated. In reality Mr Hall and Mrs Raines have not capped their exposure to £275,000 as they had expected. Just as was the position in the earlier proceedings, their exposure remains the value of the whole of the share portfolios because it is difficult to see how, if the court concludes that the letter of September 2010 was not genuine and that, in acting upon it RB have breached their duty to Mrs and Mr Walsh in a manner which has caused the loss, RB would not have an unassailable claim against the perpetrators of the dishonest document on which they acted, namely Mr Hall and Mrs Raines.
100. In his final oral submissions Mr Cawson raised a number of other factors in support of his contention that this action brought by his client was not an abuse. I have carefully considered them all but feel it is only necessary to make specific comments on some.
101. He pointed out that this case involved different parties and he refers me to the judgment of Clarke LJ in *Dexter Limited (in receivership) v Vlieland-Boddy* [2003] EWCA Civ 14 at paragraphs 49 onwards, summarising the principles to be derived from *Johnson*. It is cited in *Aldi* at paragraph 6.

“49 (i) Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process. (ii) A later action against B is much more likely to be held to be an abuse of process rather than a later action against C. (iii) The burden of establishing abuse of process is on B or C as the case may be. (iv) It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. (v) The question in every case is whether, applying a broad merits based approach, A’s conduct is in all the circumstances an abuse of process. (vi) The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C.

50 Proposition (ii) above seems to me to be of importance because it is one thing to say that A should bring all his claims against B in one action, whereas it is quite another thing to say that he should bring all his claims against B and C... in one action. There may be many entirely legitimate reasons for a claimant deciding to bring an action against B first and, only later (and if necessary) against others...

52 *It seems to me that the courts should be astute to ensure that it is only in a case where C can establish oppression or an abuse of process that a later action against C should be struck out.*"

102. In fact, this case does not involve different parties. All the parties involved in this case were also involved in the previous proceedings. Nevertheless, I accept the proposition that it is not necessarily an abuse to raise matters in separate proceedings and consideration must be had to all the circumstances and a merits based decision made as to whether the circumstances justify a finding of abuse.

103. One of the other factors which Mr Cawson prays in aid in support of his contention that the court cannot make a finding of abuse is that the other parties knew that claims against RB had been reserved, and, importantly no attempt had been made by Mrs Walsh and Mr Walsh to conceal their intentions from either RB's solicitors or Mr Hall and Mrs Raines solicitors. As a result, it is argued, it ill behoves them to argue abuse when notwithstanding that there was a settlement, proceedings are subsequently issued into which they are dragged.

104. I have to say that I am not convinced by that argument. It is a circumstance but when one drills down it seems to me to be far less compelling than Mr Cawson would have me believe. I have already referred to the relevant correspondence. In so far as that correspondence predates the Compromise Agreement it is correspondence from early 2014 and it does not explain the basis upon which a claim against RB is to be mounted. Certainly, it is not clear to me that it would have been possible for Mr Hall's and Mrs Raines's solicitors to conclude that the inevitable consequence of such a claim being made was that their clients would be dragged back into the fray in a way which essentially negated the Compromise Agreement which was negotiated just short of 2 years later.

105. Insofar as claims are reserved against RB in correspondence dating from 2016, it seems clear that all these postdate the Compromise Agreement. Obviously, in those circumstances, they are dated at a time when Mr Hall and Mrs Raines were committed to that agreement whether they liked it or not. Absent perhaps some finding of misrepresentation, realistically it would not have been open to Mr Hall and Mrs Raines to resile from the agreement at that point just because further proceedings were in the offing.

106. Another point made by Mr Cawson is that a second trial will not actually involve going over old ground because there has been no first trial owing to the fact that those earlier proceedings were settled. This seems to ignore the observations of Lord Bingham in *Johnson v Gore Wood* which I record at paragraph 75 above where he observes that harassment (which is the mischief that a strike out for abuse is intended to address) can be present even if the first action has been settled. Indeed, Lord Bingham observes that in those circumstances a second action may be more harassing.

107. Mr Cawson makes the point that the application alleging abuse comes a considerable period after the claims have been issued and that it was never previously intimated to the Walshes' solicitors that any action brought by the respondents against RB would be considered to be an abuse of process. That might be true but it strikes me as being largely irrelevant when one has to apply a merits based test as to whether, in fact, a claim is abusive or not.

Conclusion as to abuse

108. Having applied the merits based test which I am required to apply by considering all the factors I have concluded, for the reasons set out above, that these proceedings are an abuse of process. There was in my view, an obligation on the Walshes to comply with the *Aldi*

guidelines and that has not been done but that is not by any means the determinative issue here. In the end, this seems to me to be a clear case of a party being “*twice vexed*” by the same litigation. That applies to RB but in my judgment it applies even more so to Mr Hall and Mrs Raines who by virtue of these current proceedings instituted by Mrs and Mr Walsh are once more and inevitably involved in litigation concerning ownership of share portfolios which they had every right to believe had been resolved.

109. It is no answer to say that they have been brought in by RB, because it was inevitable that RB would take that step. There would be no basis for RB to take action against Mr Hall and Mrs Raines on the facts of this case if Mrs and Mr Walsh had not taken proceedings against them. In the end, to a very great extent in this case RB’s liability is covered. Either the claim against them would have failed or would have succeeded on the basis that they wrongfully acted on a fraudulent instrument and loss was suffered as a result. If the latter, it is impossible to see how they can fail to recover on an indemnity basis from the perpetrator of the fraudulent instrument. To that extent, whether Mr and Mrs Walsh like it or not, or indeed intended it, RB are, in reality, no more than a conduit for a further attack on Mr Hall and Mrs Raines. That seems to me to be an abuse when they have settled in good faith an action regarding the same issues. Nor can it be said that in those circumstances Mr Hall and Mrs Raines should just seek to strike out RB’s action against them. RB’s action against Mr Hall and Mrs Raines is entirely appropriate whilst RB are a defendant in the proceedings brought by Sharon and Scott Walsh.
110. I remind myself of the observations in *Manson v Vooght* to which I have referred above to the effect that where an abuse is found the court will strike out the abusive case unless there are special circumstances. I see no special circumstances in this case to justify a different outcome to the default outcome.
111. Despite therefore the characteristically impressive efforts of Mr Cawson QC to seek to convince me otherwise, had I not been minded to give summary judgment to the applicants, I would have struck this claim out as being an abuse of process.

Final Remarks

As I have said, but wish to repeat, I am very grateful to all 3 counsel for their very able assistance in this matter.

HHJ Saffman