Neutral Citation Number: [2021] EWHC 1458 (Ch)

Case No: HC-2016-000986

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 May 2021

Before :

MASTER PESTER

- -

IN THE ESTATE OF PATRICK SEALE DECEASED (PROBATE)

Between :

(1) ORLANDO SEALE	**Claimants**
(2) DELILAH SEALE	
(3) JASMINE SEALE	
- and -	
(1) RANA KABANI SEALE	**Defendants**
(2) ALEXANDER SEALE (acting by his litigation friend DR ANTHONY LARYEA)	

- -
- -

Richard Fowler (instructed by Alliun Law Limited, trading as Child & Child) for the Claimants
The First Defendant in person
Andrew Hunter QC (instructed by Simons Muirhead & Burton LLP) for the Second Defendant

Hearing dates: 11 and 12 May 2021

- -

APPROVED JUDGMENT

Covid 19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 2pm on Friday 28 May 2021.

MASTER PESTER

Introduction

1. The following applications are before the Court:

   i) An application by the Claimants, dated 19 March 2020, to strike out or dismiss the Defence and Counterclaim of the Second Defendant, and to grant summary judgment to the Claimants against the Second Defendant, together with other consequential relief;

   ii) An application by the First Defendant, dated 9 October 2020, seeking an order dismissing the application of the Claimants;

   iii) A further application by the First Defendant, dated 9 January 2021, again seeking an order for dismissal of the Claimants' application, together with directions for a stay of execution of an order dated 3 October 2017, directions enabling her to file an amended defence on undue influence and committal of the Third Claimant for contempt; and

   iv) A third application by the First Defendant, dated 9 February 2021, seeking an order "to reinstate First Defendant's Defence pleaded and particularised as to undue influence", and further relief.

2. The Claimants are represented by Counsel, Richard Fowler, and solicitors, Child & Child. The Second Defendant is represented by Leading Counsel, Andrew Hunter QC, and solicitors, Simons Muirhead & Burton. The First Defendant is acting in person.

The parties

3. These proceedings relate to the estate of Patrick Seale Deceased ("Patrick"), who died on 11 April 2014, age 83. Patrick was diagnosed with brain cancer in May 2013. He executed three wills in quick succession, the first two on 4 June and 13 June 2013, the final one being on 19 July 2013 ("the July 2013 Will").

4. The parties to the proceedings are members of the same family. Solely for the purposes of clarity, in this judgment I will refer to the parties by their first names, without intending any discourtesy.

5. The Claimants and the Second Defendant are the (adult) children of Patrick. The First Defendant ("Rana") is Patrick's widow. She is also the mother of the Third Claimant ("Jasmine") and the Second Defendant ("Alexander"). Rana is the step-mother of the First Claimant ("Orlando") and the Second Claimant ("Delilah").

6. Alexander and Rana live together at 2 St Ann's Villas, London, W11 4RX ("the Property"). On the unchallenged medical evidence before me, Alexander suffers from a range of serious medical conditions, including autistic spectrum disorder and epilepsy, the latter of which has worsened substantially during the course of these proceedings. He is represented by his litigation friend, Dr Anthony Laryea, and has been so represented since August 2020.

The Proceedings

7. The proceedings were begun by claim form dated 22 March 2016. In summary, the Claimants sought (1) probate under the July 2013 Will and (2) a declaration that Patrick had severed the joint tenancy of the Property by a letter dated 6

February 2014 ("the Notice"). The Claimants brought the proceedings in their capacity as the executors named in the July 2013 Will. The Claimants are also named in the July 2013 Will as beneficiaries of the estate, as are the Defendants.

8. By order dated 19 April 2016 (sealed on 22 April 2016), Deputy Master Lloyd requested the Official Solicitor to carry out an investigation into Alexander's health and mental capacity to participate in the litigation (a *Harbin v Masterman* investigation). Rana attended this hearing in person.

9. The Defendants then instructed Berwin Leighton Paisner LLP ("BLP") to act for them. A Defence and Counterclaim was filed on behalf of Rana by BLP (but not apparently on behalf of Alexander). By that Defence, Rana challenged the validity of the July 2013 Will, by reason of Patrick's lack of capacity, alternatively on the ground that Patrick did not know or approve the contents of the July 2013 Will. The same grounds were invoked to challenge the two earlier wills, both made in June 2013. The Defence also claimed that the Notice severing the joint tenancy of the Property was invalid, on the ground that Patrick lacked capacity to give instructions to sever the tenancy.

10. What then appears to have happened is that Master Price, by order dated 5 September 2016, revoked those provisions of the earlier order of 19 April 2016 directing a *Harbin v Masterman* investigation. The recital states "And it appearing that the Second Defendant does not lack capacity in respect of defence of this claim …". It is not clear to me why that happened. Pursuant to the directions of Master Price, the proceedings were listed for a 10 day trial, in a 5 day window from 27 November 2017.

11. The parties attended a mediation in February 2017. The mediation was unsuccessful. Shortly thereafter, BLP came off the record. Rana and Alexander were now unrepresented.

12. On 19 April 2017, at a hearing attended by Rana (but not by Alexander) Master Price made an unless order providing that unless Alexander filed a defence and gave standard disclosure within 14 days of the date of service of that order upon him he would be debarred from defending the claim. It appears that this unless order was sent to Alexander by email, but not by post or in hard copy.

13. By application notice dated 8 August 2017, the Claimants applied for summary judgment against Rana. Alexander was given notice of the application, but in terms indicating that he was debarred from participating in the proceedings.

14. The Claimants' summary judgment application was heard by Deputy Master Cousins on 3 October 2017. The hearing was attended by Rana in person; Alexander did not attend. The hearing before the Deputy Master was less than two months before the proceedings would have been heard at trial. By his Order dated 3 October 2017 ("the Cousins Order"), the Deputy Master ordered that:

    i) There be summary judgment for the Claimants and the Defence and Counterclaim of Rana be dismissed;

    ii) The court pronounced for the force and validity of the last will and testament dated 19 July 2013 of Patrick;

    iii) Probate of the July 2013 will was granted to the Claimants, as executors;

iv) It was declared that the joint beneficial tenancy of the Property was severed by the Notice;

v) Rana was ordered to pay the Claimants' costs of the action, to be assessed if not agreed; and

vi) Rana's permission to appeal was refused.

15. Appellant's Notices were filed on behalf of both Rana and Alexander, on 24 October 2017 and 27 October 2017 respectively. Judging from the handwriting, Alexander's Appellant's Notice appears to have been completed by Rana. The appeals did not progress far. Rana's Appellant's Notice was subject to an unless order made by Mann J dated 15 December 2017, to the effect that unless Rana filed an appeal bundle (to include a transcript of judgment appealed from) by 8 January 2018 the appeal would be struck out without further order. Alexander's Appellant's Notice was subject to a similar unless order made by Morgan J on 7 December 2017, but with the deadline for compliance being 3 January 2017. Both orders contain the following postscript:

> "Note to the Appellant: If you consider that you need to apply for a further extension of the time for lodging an appeal bundle then you should do so before the time limit referred to above expires, with proper evidence supporting the case for an extension."

16. Neither Rana nor Alexander complied with those unless orders, and so the appeals were struck out automatically. Rana (and Alexander) have stated that they were unaware of the unless orders made with respect to their appeals, and were unaware that their Appellants' Notices had been struck out.

17. The next important step in the litigation was a letter from Child & Child, dated 2 October 2018, to Rana and Alexander. That letter sought Rana's and Alexander's cooperation in relation to the sale of the Property, as well as the delivery up of a collection of paintings by a French artist, Emilie Charmy, which Patrick had collected during his lifetime ("the Artwork"). My understanding is that apart from three Charmy paintings, which were being exhibited and are stored by the Claimants, the Artwork is currently at the Property. The letter ended by indicating that should the Defendants fail to revert within 28 days of receipt of the letter with their cooperation, then an order for sale of the Property and delivery up of the Artwork would be sought.

18. Receipt of that letter prompted the Defendants into action. Blackfords LLP solicitors were instructed on behalf of Alexander. They issued an application, dated 8 November 2018, which sought to set aside (1) paragraph 5 of Master Price's order of 12 May 2017 and (2) the Cousins Order, or in the alternative for relief from sanctions from the order of Morgan J on 7 December 2017 striking out Alexander's application for permission to appeal. Under cover of his second witness statement, dated 10 December 2018, Alexander served a draft defence which challenged the admission of the July 2013 Will to probate and the effectiveness of the Notice.

19. Alexander's application was heard by Mrs Justice Falk on 31 January 2019. Before the hearing, the Claimants and Alexander had exchanged detailed skeleton arguments. No contested hearing took place before Mrs Justice Falk. Instead, the parties agreed, at the door of the court, a consent order dated 31

January 2019 ("the Falk J Order") which was then presented to Mrs Justice Falk for approval.

20. It is worth setting out the provisions of the Falk J Order in detail. The Falk J Order was made "by consent". Paragraph 1 of the Falk J Order varies paragraph 5 of the Order of Master Price to provide that "the Second Defendant shall file and serve a Defence (limited to the Claimants' claim in relation to severance of the joint Tenancy)…" in respect of the Property.

21. Paragraph 2 provides:

> "In respect of the Order of Deputy Master Cousins dated 9 October 2017:
>
> 1) Paragraph 4 is set aside as against the Second Defendant. For the avoidance of doubt, the Second Defendant (but not the First Defendant) shall be entitled to seek at trial a determination that the Joint Tenancy has not been severed and such further relief as may be appropriate upon such determination.
>
> 2) Paragraph 1 is varied so as to read as follows: "there be summary judgment for the claimant [sic] against the First Defendant and the Defence and Counterclaim of the First Defendant shall be dismissed.""

22. Paragraph 3 provides for the Claimant to serve any Reply within 14 days of receipt of Alexander's defence, provisions for a stay for mediation, and then

> "Upon expiry of the stay, there shall be a Case Management Conference on the first available date convenient to the parties and their legal

representatives, with a time estimate of 1 hour, to consider directions for trial."

23. There are two express references to the proceedings going to trial. It is also worth mentioning that there is an element of give and take in the Falk J Order. By the order, Alexander agreed to give up his challenge to the validity to the 2013 Will, and to the two earlier June 2013 wills; in return, the Claimants agreed, or apparently agreed, that his Defence would go to trial.

24. Alexander duly lodged his Defence on 7 February 2019, which was, as far as his Defence to the service of the Notice was concerned, in identical terms to the draft defence already provided to the Claimants in December 2018. The Claimants filed a Reply on 22 February 2019. I understand a mediation was held, but nothing was resolved.

25. The Claimants issued their application dated 19 March 2020, to strike out or dismiss Alexander's Defence and Counterclaim, and / or for summary judgment. The stated grounds of the application were that Alexander had no interest in the Property, which the Court had already determined was held by Rana on trust for herself and the Claimants in equal shares, and Alexander had no prospects of successfully defending the claim, and there was no other compelling reason why the case should be disposed of at trial.

26. On 10 June 2020, Blackfords applied for a stay of proceedings pending a medical examination and the appointment of a litigation friend for Alexander. Deputy Master Hansen granted the application.

27. Dr Laryea filed a certificate of suitability of litigation friend dated 20 August 2020. Appended to that certificate are letters of Alexander's treating clinician, Professor Matthew Walker, which state that Alexander needs a litigation friend in these proceedings. A subsequent report, dated 4 September 2020, from Dr Michael Alcock (a consultant forensic psychiatrist) concludes that each of Alexander's diagnoses are all associated with a degree of cognitive impairment and the combination made it impossible for him to represent himself in a fair and consistent manner. Dr Alcock was firmly of the opinion that Alexander required a litigation friend in these proceedings.

28. Rana then issued the two applications, dated 10 September 2020, and 9 January 2021, to which I have referred above.

29. The matter came before me at a Case Management Conference on 15 January 2021. I directed that the proceedings between the Claimants and Alexander be listed for a trial, with a time estimate of 7 days, but that the Claimants' application for strike out / summary judgment, together with Rana's various applications, should be heard by me at a two day hearing to be fixed for 11 and 12 May 2021. I also gave directions for the exchange of evidence in relation to the various applications.

30. Rana then issued her third application. I directed it should be heard together with the other applications in May 2021.

The Issues

31. On behalf of Alexander, it was submitted that the Falk J Order provides a complete answer to the Claimants' present application. It was said that the

Claimants' application to strike out Alexander's Defence, and to apply for summary judgment was both prohibited by the express terms of the Falk J Order and an abuse of process being an attempt to relitigate an issue which could and should have been, and indeed was, raised before Mrs Justice Falk, but which the Claimants chose to concede. It was also submitted to me that, in any event, this case was wholly unsuited to a summary determination and should go to trial.

32. On the other hand, the Claimants contended that the Falk J Order did not preclude their pursuing a summary judgment application. The court retains a power to manage proceedings actively. Further, they submitted that, on analysis, Alexander's Defence was clearly unsustainable, and that summary judgment should be entered against him, and/or the Defence and Counterclaim should be struck out.

33. I will refer to the first issue, regarding whether the Falk J Order is a complete answer to the Claimant's application as the Abuse Issue, and to the second issue as the Strike out / summary judgment Issue.

Issue 1: Abuse

The law

34. The relevant principles were recently summarised by the Court of Appeal in *Koza Limited v Koza Altin Isletmeleri AS* [2020] EWCA Civ 1018 ("*Koza*") per Popplewell LJ at [30] to [42]. In *Koza*, the Court of Appeal confirmed that:

i) There may be an abuse of process if (1) a party seeks to relitigate an issue which was brought or could and should be brought in earlier proceedings, or an earlier stage of the same proceedings (*Henderson*

abuse); or (2) there is a collateral attack on a final decision of another court (*Hunter* abuse);

ii) At [38]: *"There is a potential overlap between the Henderson and Hunter forms of abuse, and both may be engaged on the facts of any particular case. In the passage in Lord Bingham's speech in Johnson v Gore Wood quoted above he remarked that if the second set of proceedings amounted to a collateral attack on a decision in earlier proceedings it would be "much more obviously abusive".*

iii) At [41]: *"The Henderson and Hunter principles also apply to interlocutory decisions and applications."*.

iv) Also at [41], Popplewell LJ cited with approval a passage from *Holyoake v Candy* [2016] EWHC 3065 reviewing the authorities on successive interlocutory applications. This included:

a) The following passage in the Court of Appeal decision in *Chanel v Woolworth* [1981] 1 WLR 485, which involved an attempt to relitigate an interlocutory issue which had been conceded in an earlier consent order:

> *"The defendants are seeking a rehearing on evidence which, or much of which, so far as one can tell, they could have adduced on the earlier occasion if they had sought an adjournment, which they would probably have obtained. Even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter. The fact that he capitulated at the first encounter cannot improve a party's position."* (emphasis added)

b) The following passage in *Orb v Ruhan* [2016] EWHC 850 (Comm) per Popplewell J at [82] involving a failure to raise an argument (regarding discharge of an injunction) at a prior interlocutory application:

> *"That is fatal to this ground for discharge: see Chanel Ltd v FW Woolworth & Co Ltd [1981] 1 WLR 485. Mr Drake emphasised that that case involved a consent order. But the principle is well established, and often applied, in relation to contested interlocutory hearings. It is that if a point is open to a party on an interlocutory application and is not pursued, then the applicant cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief, absent a significant and material change of circumstances or his becoming aware of facts which he did not know and could not reasonably have discovered at the time of the first hearing. It is based on the principle that a party must bring forward in argument all points reasonably available to him at the first opportunity; and that to allow him to take them serially in subsequent applications would permit abuse and obstruct the efficacy of the judicial process by undermining the necessary finality of unappealed interlocutory decisions."* (emphasis added)

v) At [42] Popplewell LJ summarised the position as follows:

> *"… The Henderson and Hunter principles apply to interlocutory hearings as much as to final hearings. Many interlocutory hearings acutely engage the court's duty to ensure efficient case management and the public interest in the best use of court resources. Therefore the application of the principles will often mean that if a point is open to a party on an interlocutory application and is not pursued, then the applicant cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief, absent a significant and material change of circumstances or his becoming aware of facts which he did not know and could not reasonably have discovered at the time of the first hearing. This is not a departure from the principle in Johnson v Gore Wood that it is not sufficient to establish that a point could have been taken on an earlier occasion, but a recognition that where it should have been taken then, a significant change of circumstances or new facts will be required if raising it on a subsequent application is not to be abusive. The dictum in Woodhouse v Consignia that the principle should be applied less strictly in interlocutory cases is best understood as a recognition that because interlocutory decisions may involve less*

> *use of court time and expense to the parties, and a lower risk of prejudice from irreconcilable judgments, than final hearings, it may sometimes be harder for a respondent in an interlocutory hearing to persuade the court that the raising of the point in a subsequent application is abusive as offending the public interest in finality in litigation and efficient use of court resources, and fairness to the respondent in protecting it from vexation and harassment. The court will also have its own interest in interlocutory orders made to ensure efficient preparations for an orderly trial irrespective of the past conduct of one of the parties, which may justify revisiting a procedural issue one party ought to have raised on an earlier occasion. There is, however, no general principle that the applicant in interlocutory hearings is entitled to greater indulgence; nor is there a different test to be applied to interlocutory hearings. In every case the principles are those identified in paragraphs [30] to [40] above, the application of which will reflect that within a single set of proceedings, a party should generally bring forward in argument all points reasonably available to him at the first opportunity, and that to allow him to take them serially in subsequent applications would generally permit abuse in the form of unfair harassment of the other party and obstruction of the efficacy of the judicial process by undermining the necessary finality of unappealed interlocutory decisions.*

35. Mr Hunter QC, on behalf of Alexander, submitted to me that there was nothing in those passages that hinted that there was any different approach to be applied to successive applications to strike out, or for summary judgment.

36. The Claimants' position is that, even on its own terms, *Koza* did not mean that, on the facts of this particular case, the Claimants could not bring their application for summary judgment. After all, at [41], Popplewell LJ indicated that *"... the application of the principles will often mean that if a point is open to a party on an interlocutory application and is not pursued, then the applicant cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief ...".* Popplewell LJ did not say, be it noted, that the point could "never" be taken. If the Claimants were right, and the grounds for seeking to strike out or obtain summary judgment were compelling, then the overall

justice of the case required the court to determine the summary judgment application on its merits.

37. In fact, it was said that the justice of this case points to the Claimants' application not being a *Henderson* abuse situation at all. I was taken to an earlier authority, cited by Popplewell LJ in *Koza, Woodhouse v Consignia plc* [2002] EWCA Civ 275. There the Court of Appeal was dealing with an appeal by a claimant who had unsuccessfully sought to lift a stay and had applied for a second time, and both the district judge and judge held that he could not do so. The Court of Appeal allowed the appeal. While the details of that case are very different from the facts before me, the Court of Appeal in *Woodhouse v Consignia* said this, at [57]:

> *"To take an example: suppose that an application for summary judgment in a substantial multi-track case under CPR 24 is dismissed, and the unsuccessful party then makes a second application based on material that was available at the time of the first application, but which through incompetence was not deployed at that time. The new material makes the case for summary judgment unanswerable on the merits. In so extreme case, it could not be right to dismiss the second application solely because it was a second bite at the cherry. In those circumstances, the overriding objective of dealing with cases justly, having regard to the various factors mentioned in CPR 1.1(2), would surely demand that the second application should succeed, and the proceedings be disposed of summarily. In such a case, the failure to deploy the new material at the time of the first application can properly be reflected by suitable orders for costs, and (if appropriate) interest. The judge would, of course, be perfectly entitled to dismiss the application without ceremony unless it could be speedily and categorically demonstrated that the new material was indeed conclusive of the case."*

38. That statement of principle could not be clearer. What was being posited in *Woodhouse v Consignia* was a case where the second summary judgment application was "unanswerable", but where the material which made it so had been overlooked through "incompetence". In every case, the question for the

court is whether the second application, properly considered in light of all the circumstances, is abusive.

Application to the facts

39. I observe at the beginning that the relief now sought by the Claimants is not the same relief sought at the hearing before Mrs Justice Falk. At that hearing, the Claimants were the respondents to Alexander's application to set aside the Cousins Order, or in the alternative for relief from sanctions. The Claimants in 2020 made their own application for strike out / summary judgment. However, no one suggested that this made a material difference. The two applications are two sides of the same coin. On behalf of Alexander, it was submitted that every single point which is now being taken against him by the Claimants could and should have been made at the time of the hearing before Mrs Justice Falk, and that indeed the majority of them were. To determine whether that is so, it is necessary to examine the factual background to the hearing before Mrs Justice Falk in more detail.

40. Alexander's application dated 8 November 2018 was supported by Alexander's witness statement, dated 9 November 2018. That witness statement, particularly paragraph 43, suggests that Alexander's defence would be based on an allegation that his siblings, the Claimants, exerted undue influence on Patrick in order to induce Patrick to execute his will and to serve the Notice.

41. However, on 10 December 2018, a draft defence was served on behalf of Alexander (and exhibited to Alexander's second witness statement). That draft defence made it plain that Alexander's defence with regard to the Notice was based on two propositions. The first was the denial that Patrick provided valid

authority to Child & Child to serve the Notice. Alternatively, to the extent that valid authority was provided to Child & Child to serve the Notice, this was obtained via Jasmine, and such purported authority was invalid on the ground of a presumption of undue influence, such presumption not being rebutted.

42. Thus, at the time of the hearing before Mrs Justice Falk on 31 January 2019, the Claimants had had about seven weeks to consider Alexander's draft defence and the grounds for challenging the service of the Notice. This is further confirmed by the skeleton arguments which were exchanged immediately before the hearing. The Claimants clearly understood the case being advanced for Alexander. They had raised in their skeleton argument, dated 29 January 2019, and signed by both Leading and Junior Counsel, what are in substance the same arguments advanced before me on both undue influence, as well as Alexander's application being in substance an impermissible attempt to get round the Cousins Order. Even the argument on Alexander's lack of standing to bring his Defence and Counterclaim is found in that skeleton argument, albeit in a somewhat undeveloped form.

43. Having had sight of each other's arguments on Alexander's draft defence, the parties agreed the Falk J Order. There is in evidence a transcript of the hearing before Mrs Justice Falk. The transcript shows that the parties did not argue out their rival positions in court. Instead, they put the terms which they had agreed for approval before Mrs Justice Falk. Mrs Justice Falk was satisfied that it was appropriate to make the order in the agreed terms, including the express provision "for the avoidance of doubt" that Alexander should be entitled to seek at trial a determination that the joint tenancy had not been severed.

44. On 7 February 2019, Alexander served his Defence. The Defence as served is, as far as the challenge to the validity of the Notice is concerned, in identical terms to the draft defence served on 11 December 2018. The Claimants then filed their Reply, on or about 21 February 2019.

45. Nothing had changed between the making of the Falk J Order and the Claimants' application made in March 2020. It is not said that any further evidence has come to light, which the Claimants could not have obtained prior to the hearing before Mrs Justice Falk. In Jasmine's fifth statement, at paragraph 84, it is suggested that at the time of the hearing before Mrs Justice Falk, the Claimants simply did not know what any defence filed on behalf of Alexander might contain. In consequence, it was only after a defence was filed that a view could be taken as to whether the overriding objective required the case to proceed to a "… very expensive 7-day trial or whether it should be disposed of summarily". It is also said, in that same paragraph, that "… Alexander submitted a defence that was different to the one mentioned to Mrs Justice Falk, in that it alleged a presumption of undue influence whereas before he had alleged actual instances of undue influence". Those statements appear to me incomprehensible in light of the fact that Alexander's case on severance, in the Defence as served, was identical, in every particular, to what was found in the draft defence served in mid-December 2018. The only changes which had been made were that the references to the challenge to the validity of the July 2013 Will had been removed (in accordance with the agreement recorded in the Falk J Order).

46. What was said before me was that "on mature reflection" the view was taken that Alexander's Defence was susceptible to summary judgment and should not

go to trial. On that basis, it was submitted to me that the case was one that could and should be disposed of now, notwithstanding the terms of the Falk J Order.

47. It does seem to me that, in light of all the circumstances in this case, the Claimants' application is an abuse of process and can be dismissed on that ground alone. My reasons are as follows:

i) On the authority of *Koza*, the *Henderson* and *Hunter* principles apply to interlocutory hearings as much as to final hearings. There is no suggestion in the summary in *Koza*, at [42], that different principles apply where a summary judgment application is involved.

ii) The case before me is a paradigm example of *Henderson* abuse. No proper reason has been given as to why the Claimants chose not to fight the matter out on Alexander's application at the time of the hearing before Mrs Justice Falk. If, as seems possible, there was insufficient time to deal with the matter before her, then the matter could have been adjourned to be decided at a later date on an application by order.

iii) The Falk J Order contains two references, at paragraphs 2(2) and 3(3), to Alexander being entitled to raise his case at trial. To allow the Claimants to disregard that wording would amount to a collateral attack on the Falk J Order, without any change of circumstances.

iv) Importantly, the Falk J Order was made by consent. In that regard, it is similar to the earlier decision, applied in *Koza*, of *Chanel Ltd v FW Woolworth & Co Ltd*. However, as submitted by Mr Hunter QC, the position here is arguably worse than in *Chanel*, given that in *Chanel*, the

party seeking to relitigate an issue had overlooked an argument available to it. In this case, the Claimants' legal team had identified the points which they wished to run. They simply chose to abandon them, and agree that the matter should go to trial. As was said in *Chanel* (p. 492H):

> *"Even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become of aware of facts which he could not reasonably have known, or found out, in time for the first encounter. The fact that he capitulated at the first encounter cannot improve a party's position."*

48. It is correct that in *Woodhouse v Consignia*, at [57], the example was given of the court permitting a second application for summary judgment to be brought, at least in a case where the evidence discovered was "unanswerable". However, the situation posited in *Woodhouse v Consignia* involved a new argument being brought, which had been overlooked through "incompetence". That is very far from the situation before me. No point was overlooked through incompetence. Indeed, the Claimants had identified the majority of the arguments advanced before me.

49. It is also significant that the Claimants voluntarily abandoned their opposition to Alexander's application, in relation to the service of the Notice, the first time round. This is a fact I am entitled to take into account when assessing whether the arguments being run on a summary judgment application are truly "unanswerable". If the Claimants really believed that their arguments were "unanswerable", then it is astonishing that they voluntarily acquiesced to the terms of the Falk J Order.

50. Accordingly, I consider that the Falk J Order provides a complete answer to the Claimants' application as it relates to Alexander's Defence. The matter should go to trial.

51. Nevertheless, in case I am wrong on this first issue, and in recognition of the fact that the points were argued out before me, I go on to consider whether this case is actually suitable for summary judgment, notwithstanding that the abuse issue is, in my view, determinative.

Issue 2: Strike out / summary judgment

The Law

52. There was not much in dispute between the parties on the legal principles to be applied. The test for summary judgment pursuant to Part 24.2 of the Civil Procedure Rules is extremely well known. Rule 24.2 provides:

> "The court may give summary judgment against a … defendant … if –
>
> (a) it considers that …
>
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

53. There are extensive notes in the White Book setting out further judicial guidance as to the application of Rule 24.2. I was referred to the principles as set out by Lewison J (as he then was) in *Easyair Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) which has subsequently been approved by the Court of Appeal in *AC Ward & Son v. Catlin (Five) Limited* [2009] EWCA Civ 1098. In summary, the relevant principles are as follows:

> "(i) The court must consider whether the claimant (or defendant) has a 'realistic' as opposed to a 'fanciful' prospect of success;
>
> (ii) "A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable …
>
> (iii) In reaching its conclusion the court must not conduct a 'mini-trial' …
>
> (iv) This does not mean that the court must take at face value and without analysis everything that a claimant [or defendant] says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents …
>
> (v) … in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial;
>
> (vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case …"

54. Counsel for the Claimants in this case accepted that it must be a clear case and it was not the function of the court on the hearing of a summary judgment application to conduct a "mini-trial". It was common ground that it was important to take into account not only the evidence placed before the court on the hearing of the summary judgment application but also the evidence that could reasonably be expected to be available at trial.

55. As to strike out, CPR 3.4(2) gives the court power to strike out a statement of case which discloses no reasonable grounds for bringing or defending a claim or a statement of case which is an abuse of process. Where, on the material before the court, there are disputed issues of fact, the court should not strike out

a claim unless certain it is bound to fail: see per Peter Gibson LJ at [22] in *Colin Richards & Co v Hughe*s [2004] EWCA Civ 226. The test is similar but not identical to that for summary judgment where the court will not grant summary judgment, here in favour of the Claimants, unless the defence has no real prospect of success.

56. On behalf of Alexander, Mr Hunter QC's opening salvo was that the Claimants' application notice did not comply with the requirements for a summary judgment application pursuant to CPR Part 24. Practice Direction 24, paragraph 2(2) provides that the application "must" include a statement that it is an application for summary judgment made under Part 24, and paragraph 2(3) provides that the application notice or the evidence contained in or referred to in it "must … state that it is made because the applicant believes that on the evidence the respondent has no real prospect of succeeding on the claim or issue or (as the case may be) of successfully defending the claim or issue to which the application relates".

57. Those criticism are correct, although in the evidence filed in reply on behalf of the Claimants Jasmine does state that the Claimants believe that the defence that has been filed is "entirely lacking in merit and has no realistic prospect of success".

58. I was taken to the notes in the White Book, at 24.4.9, where reference was made to what Floyd LJ said in *Price v Flitcraft Ltd* [2020] EWCA Civ 850 at [86]:

> "The application for summary judgement made by Supawall did not comply with the mandatory procedural safeguards in the rule and practice direction. With respect to the Recorder, these procedural safeguards in the rule and practice direction are not "formal requirements" or "formalities" if by that

> it is intended to detract from their critical importance for ensuring a fair hearing of the application. The requirement to state in the application notice (or in the evidence contained or referred to in it) that it is made because the applicant believes that on the evidence the respondent has no real prospect of successfully defending the claim is an important one. It prevents a claimant making an application and claiming the case to be straightforward when, in truth, he knows otherwise."

59. Because Jasmine did state in her witness statement that the Claimants believes that the defence filed "has no reasonable prospect of success" I am prepared to approach the Claimants' application on the footing that it is brought under CPR 24.2 as well as CPR 3.4(2). The crucial point is that Alexander's legal team was not misled as to what provision of the CPR was being relied upon.

60. In addition, the Claimants submit that, under CPR 3.4(2), Alexander's Defence is either abusive or there is no reasonable grounds for bringing the claim.

Application to the facts

61. I was presented with a large volume of material, comprising many witness statement (by my count, 20 witness statements have been exchanged between the parties since the Cousins Order), five lever arch files comprising 1851 pages of documents, including various medical reports and solicitors' attendance notes, as well as a 50 page skeleton argument from the Claimants. In fairness, it can be said that a proportion of that material did not relate to the Claimants' application, but related to Rana's applications. Nevertheless, I was concerned at several points in the hearing that I was being asked to conduct something close to a mini-trial. In the course of writing this judgment, that feeling only accrued.

62. I begin with Alexander's Defence. By paragraph 5 of the Defence, Alexander does not oppose the grant of probate to the Claimants. There is no challenge by Alexander, to the validity of the 2013 Will. The Defence is focussed solely on the validity of the Notice. The Defence advances two propositions: first, a denial that Patrick provided valid authority to Child & Child to send the Notice (largely contained within paragraph 7(1) – (8)), and second, to the extent that any valid authority may have been provided to Child & Child via Jasmine, then such authority was invalid by reason of undue influence (paragraph 7(9)).

63. The Claimants' strike out / summary judgment challenge was based on four grounds:

i) Alexander will not be able to establish that the solicitors acting for Patrick at the time of the Notice lacked authority, and in any event, on the evidence already before the Court it can safely be concluded that Patrick ratified the service of the Notice by 27 and 28 February 2014 (Ground 1);

ii) Alexander cannot successfully establish a case on undue influence, within the parameters set out in the primary authority of *Royal Bank of Scotland v Etridge* [2002] 2 AC 773 (Ground 2);

iii) Alexander does not have a sufficient interest to challenge service of the Notice (Ground 3); and

iv) to permit Alexander to advance the Defence at trial would amount to a collateral challenge to the Cousins Order, which challenge would itself be an abuse of process (Ground 4).

64. It is convenient to analyse these points in turn.

Ground 1

65. The Claimants' first challenge to the Defence is based on the assertion that Alexander will be unable to establish any lack of authority in relation to the service of the Notice. Further, even if there was any difficulty with the authority of Child & Child prior to the service of the Notice, the Claimants will be able to rely on a subsequent ratification by Patrick.

66. I turn to the key documents to which I was referred. On 6 January 2014, Patrick met with Claudia Whibley, the solicitor at Child & Child who had prepared Patrick's wills in 2013 (including the July 2013 Will). There is a contemporaneous attendance note, prepared by Ms Whibley. Orlando and Jasmine were present at that meeting, although the note records that Ms Whibley asked Orlando and Jasmine to leave the meeting so that Ms Whibley could discuss matters with Patrick alone. The note records Patrick explaining that relations between himself and Rana had become very bad and that he would like to separate from her by way of formal separation but would not, at this stage, contemplate a divorce. The note also records Ms Whibley agreeing with Patrick that she would ask her colleague Katie Spooner to contact Patrick to discuss matters. When Jasmine and Orlando were asked to return to the meeting to collect Patrick, Jasmine indicated that she would like to have a brief word with Ms Whibley. This concerned another matter, namely, a possible need to take legal action against Rana in respect of a transfer by Rana of around £240,000 from an account in the joint names of Jasmine and Alexander, but over which Rana had signing power.

67. I have also read a witness statement of Ms Whibley, dated 4 May 2017 (made in these proceedings) where Ms Whibley states that at the meeting on 6 January 2014, Patrick gave her a handwritten note, dated 4 January 2017 (that must be a typographical error for "2014"). I have seen the note itself, which reads in full:

> "4 January 2014
>
> I wish to separate from my wife + sell our house at 2 St Ann's Villas, W11 4RX, which we own jointly. We would each receive 50% of the proceeds, and divide the contents of the house between us. I wish to retain my collection of books + paintings.
>
> With my share, or part of it, I wish to buy a property where I would live with two of my children, Alexander + Jasmine. Patrick Seale"

68. The Claimants submit that the serving of the Notice needs to be seen in the context of Patrick's expressed desire to separate from his wife and to sell the Property.

69. There is then a second attendance note, dated 23 January 2014. This records a meeting between Ms Spooner, of Child & Child, with Patrick and Orlando. This was the only meeting Ms Spooner had with Patrick before the Notice was served. After a reference to the very difficult situation which Patrick was facing at home, there is mention of a need to consider severing the joint tenancy of the Property. The attendance note ends by stating:

> "Discussing again the severance of the joint tenancy and explaining that if we did this it would give Patrick a little bit more control over his share of the family assets and help when and if we need to negotiate a deal with Rana particularly if she doesn't agree to leave the home and allow Patrick

> to see out his days there. Patrick agreeing that this was a very good idea. It being agreed that [Ms Spooner] would begin this process immediately."

70. Following the meeting on 23 January 2014, on 27 January 2014, Ms Spooner sent a retainer letter, addressed to Patrick, but sent to Orlando's and Jasmine's email addresses. It is Alexander's case that this retainer letter was never signed by Patrick, a contention which is met by a non-admission in the Reply.

71. I also note that by email dated 15 January 2014, Jasmine emailed a third party, stating that Patrick "… is suffering from brain cancer and is no longer able to manage his affairs …". As against that, neither Ms Whibley nor Ms Spooner expressed any concerns about Patrick's capacity in January / February 2014.

72. The Claimants accept that the various drafts of the letter which would ultimately be sent to Rana went through the Claimants. Ms Spooner was clearly relying on Orlando and Jasmine to obtain Patrick's instructions. In the Claimants' Reply, at paragraph 20c and d, the Claimants' case is that

> "Pursuant to and acting upon the Deceased's specific instructions Child & Child prepared a draft letter (addressed to the First Defendant about his desire to separate and divorce her and providing notice of severance of the joint tenancy of the Property) which was sent to the Deceased on 29 January 2014 (via the First and Third Claimants, as expressly instructed by the Deceased) for approval. The Deceased read and considered the draft letter and suggested amendments, following which he approved it and instructed that it be sent to the First Defendant. The Deceased gave his approval and confirmed instructions for Child & Child to issue the notice of severance through the Third Claimant."

73. Thus, there is a plea that the approval to issue the notice of severance was given "through" Jasmine. How that approval was given is not set out in the Reply, a failure which is criticised by Alexander. In Jasmine's third witness statement, made in support of the Claimants' summary judgment application, no further details of how the approval was given are provided, although reliance is place on the findings of Deputy Master Cousins (itself made on a summary judgment application). In contrast, in her fifth witness statement, Jasmine does give more detail about the way in which Patrick approved the various drafts. While it is not appropriate, on a summary judgment application, to recite what is said there in detail, the point is made that, despite the evolution in the various drafts, the passage concerning the severance of the joint tenancy of the Property remained the same, and were approved by Patrick. The Claimants also rely on *Carr-Glynn v Frearsons (a Firm)* [1999] 1 FLR 8, Court of Appeal, where it was held that solicitors who fail to advise a joint tenant about severance in connection with the preparation of a will may fall below the standard of reasonable care, and submit that in the context of contemplated divorce proceedings the same principle clearly applies.

74. In the event, the Notice was served by email on Rana on 6 February 2014. Service of the Notice was arranged for a time when Patrick was not in the Property, as he had left to go to his house in France with friends. The friends, Carol Cattley and Nicholas Claxton, have given witness statements in the proceedings. They both say that Rana rang them each whilst they were in France. Mrs Cattley says that Rana gave her an earful about how she was going to "bring him down in the last six months of his life". Mr Claxton recalls that Rana made it clear that she was very angry about the way in which Patrick made

the decision to sever the tenancy "which was why she wanted to destroy him". Rana then instructed solicitors of her own, who (amongst other things) sought to "reinstate" the joint tenancy.

75. A further development occurred on 27 and 28 February 2014. On 27 February 2014, Ms Spooner met again with Patrick, this time accompanied by Alexander, following what the relevant attendance note, prepared by Ms Spooner, describes as a "bizarre telephone call" from Alexander and Rana that morning. The attendance note begins by stating that Patrick told Ms Spooner that things had become very difficult at home, and that Rana was very upset about the severance of the joint tenancy of the Property. The attendance note also records that Ms Spooner explained at that meeting about severance of the joint tenancy. On one reading, that is a slightly surprising comment, given that Ms Spooner had already, during the meeting on 23 January 2014, explained the effect of a severance of a joint tenancy. The attendance note ends by stating that "It was agreed that we would continue along the same route as we were. Patrick again stating that this all seems like a very good idea and we needed to keep the momentum going."

76. Yet another attendance note, also dated 27 February 2014, has Ms Spooner recording that Patrick rang her, initially stating that he needed to change his instructions regarding the severance of the joint tenancy, but the line going dead. There was then a further telephone call from Patrick, and following a further explanation from Ms Spooner in relation to the severance of the joint tenancy, Patrick indicated that "he thought it was a very good idea to keep it as it was".

77. Further, on 27 February 2014, Alexander emailed Ms Spooner, writing that "the joint tenancy needs to be put back please. My father hopes it doesn't raise problems for you."

78. Yet again, an attendance note, dated 28 February 2014, indicates that Ms Spooner met with both Patrick and Alexander for a second time, this time with Orlando also in attendance. The attendance note records that at this meeting Patrick confirmed his instructions regarding the severance.

79. This was followed by another email from Alexander to Ms Spooner, on 28 February 2014, stating that "… the atmosphere is quite toxic at home and I was under pressure yesterday. I trust you fully with the case."

80. The Claimants submit that it is quite clear from the attendance notes, and the emails, what was going on at this juncture. Patrick, and Alexander, were under enormous pressure from Rana to reverse his decision on the tenancy. Once removed from Rana's influence, Patrick had no doubts about what he wanted to do. And it was submitted to me that, even if the Court harboured any doubts about Child & Child's authority to serve the Notice as at 6 February 2014, I could be satisfied that the Claimants could succeed on ratification, in light of the subsequent meetings on 27 and 28 February 2014.

81. On Alexander's behalf, it is submitted that the accuracy of the attendance notes is not accepted. It is said that even taking them at face value, they are very far from being unequivocal, and that expressions such as "the plan is a good idea" are far from being conclusive as to Patrick's intentions.

82. The question of whether Patrick approved the sending of the Notice, and Child & Child's authority, is a question of fact. I do not doubt that Alexander will face difficulties at trial in challenging the Claimants' narrative of events. But, in an application for summary judgment, the overall burden of proof rests on the applicant to establish that there are grounds to believe that the respondent has no real prospect of success and there is no other compelling reason for a trial. If the applicant for summary judgment adduces credible evidence in support of their application, the respondent becomes subject to an evidential burden of proving some real prospect of success (or some other reason for trial). See the notes in the White Book, volume 1, at 24.2.5.

83. Some of the key points are as follows:

i) The absence of a signed the retainer letter.

ii) Contemporaneous attendance notes by solicitors are entitled to a great deal of weight when it comes to weighing up the evidence. However, there is a danger in treating solicitors' attendance notes as though they are verbatim transcripts as to what occurred. I mention a small example. In her witness statement of May 2017, Ms Whibley states that Patrick passed her the hand-written note of 4 January 2014. However, there is no record of this having occurred in the accompanying attendance note dated 6 January 2014.

iii) Jasmine's own email, dated 15 January 2014, and sent to a third party, refers to Patrick no longer being able to manage his affairs. It seems to me that there is at least a triable issue, in light of that email, that Patrick was in a vulnerable position.

iv) At the hearing before me, Alexander's Counsel submitted that new details were given in Jasmine's fifth statement which had not been made previously. The submission was made that at any trial there were several points for cross-examination which could be made to challenge the accuracy of the account put forward by Jasmine. I accept that.

v) The sequence of events on 5 and 6 February 2014, and again on 27 and 28 February 2014, will need to be looked at carefully, in light of all the evidence, at greater length and having heard and assessed the oral evidence of the witnesses. Whilst I note what is said in the various witness statements served on behalf of the Claimants, none of that evidence has been tested in cross-examination.

84. My view is that Alexander has discharged the evidential burden on him. Having reviewed the contemporaneous documentary material, the various witness statements, and heard the parties' submissions, it seems to me that this is not a suitable case for summary judgment with regard to the solicitors' authority to serve the Notice.

Ground 2

85. The Claimants also seek to challenge Alexander's case on undue influence, as set out in the Defence, at paragraph 7(9). The submission is that Alexander cannot bring himself within the parameters set out in the primary authority of *Royal Bank of Scotland v Etridge* [2002] 2 AC 773. The Claimants' position is that, as actual undue influence is not being alleged, the case is one of presumed undue influence. In order to establish that, one needs to show both a relationship of trust and confidence, and a transaction calling for an explanation.

86. The Claimants submitted to me that:

i) Viewed in the round there was not between Jasmine and Patrick such a relationship of trust and confidence as to call into play the doctrine. A child – parent relationship is not such a one as to call into play any presumption. As the matter is put in *Snell's Equity* (34th ed.), para. 8-025, there is no deemed relationship of influence by a child over a parent: any such relationship must be established on the facts. See also *Coles v Reynolds* [2020] EWHC 2151 (Ch), at 115, where HHJ Paul Matthews said that "Where a parent is vulnerable that is a factor which (with others) may lead to the conclusion that that person reposed trust and confidence in the child, or that actual undue influence was practised on him or her. But it does not apply to all cases."

ii) In any event, this was a case where there was not even a transaction, let alone one calling for an explanation. The service of the Notice was not a contract on disadvantageous terms, nor a gift, which are the sort of transactions which can be set aside under the doctrine. There was no disadvantage to Patrick in serving the Notice and severing the joint tenancy at the Property.

87. In response, what was submitted on behalf of Alexander was that, as Lord Nicholls made clear in *Etridge*, whether a transaction was brought about by the exercise of undue influence is a question of fact (at [13]). The court must take into account all the circumstances of the case, including the nature of the alleged undue influence, the personality of the parties, their relationship and the extent to which the transaction could readily be accounted for by ordinary motives of

ordinary persons in that relationship. It was submitted that it would be peculiarly inappropriate to determine the matter on a summary basis.

88. I do not feel it appropriate to strike out, or determine on a summary basis, Alexander's case on presumed undue influence. It seems to me that the following are the key points.

89. First, on the question of whether there was a relationship of trust and confidence, given that Alexander must prove a relationship of undue influence outside the special class necessarily involving influence, the question is whether there is sufficient evidence to go to trial to support that plea. There clearly is. It is true that Patrick was not living with Jasmine at the relevant time: he was living with Rana and Alexander at the Property. On the other hand, there is evidence to suggest that Patrick was at least vulnerable, and in mid-January 2014 Jasmine is writing to say that her father cannot manage his affairs. Jasmine was acting for Patrick in his financial affairs, and using his email. Patrick was accompanied by Jasmine and / or Orlando to his meetings with Child & Child (save for the meeting on 27 February 2014, when he was accompanied by Alexander). There is a sufficient case, in my view, to go trial on the question whether there was a relationship of trust and confidence.

90. Second, on the question whether there was a transaction calling for an explanation, again that is a factual issue which cannot be determined on a summary judgment application. I do not think it correct, as a matter of law, to hold that the severance of a joint tenancy can never be a transaction for the purposes of a claim in undue influence. No authority was cited for that

proposition. While the severance of a joint tenancy is a unilateral act, so is the making of a gift, which can be set aside following a claim for undue influence.

91. It was submitted to me that the impugned severance is perfectly reasonable, logical and explicable in the context where both Patrick and Rana wished to divorce. That all depends on the facts established at trial. The severance of the joint tenancy (were it to stand) would operate to provide a financial gain to the Claimants, as well as Alexander, because once the joint tenancy was severed, it would pass under the 2013 Will to the beneficiaries of that will (which include both Alexander and Rana, as well as the Claimants). However, I think there is force in the submission made on Alexander's behalf that in considering whether there is here a transaction calling for an explanation, one needs to look at the matter from a broader perspective. As at February 2014, Alexander lived at the Property. He was being cared for by Rana. Any severance of the joint tenancy put at risk Alexander's continued ability to live at the Property. On one view, given what is said about Patrick's expressed desire to provide for Alexander, the decision to sever the tenancy at the Property calls for an explanation. I do not think I can summarily decide the point.

92. The Claimants' challenge to Alexander's defence has also raised what I consider to be a difficult point on Alexander's ability to bring himself within the typical undue influence situation at all. Claims to set aside transactions for undue influence are, generally, brought either by the victim against whom the undue influence was exerted (see the *Etridge* case) or by those claiming via the victim's estate (for example *Coles v Reynolds* [2020] EWHC 2151(Ch)). They

cannot be brought by a complete stranger to the transaction in question, which is what the Claimants submitted Alexander is.

93. However, there is another set of cases which appear to suggest that a claim for undue influence can be brought by one who would, absent the transaction, have benefited from the victim's estate: see for example *Birmingham City Council v Beech (Howell)* [2014] EWCA Civ 830; and *Hart v Burbidge* [2013] EWHC 1628 (Ch); affirmed on appeal at [2014] EWCA Civ 992. Those cases, which were determined at trial, are very different from the present. But they do raise the question what is meant by benefit in this context. It is clear that Alexander would stand to benefit financially if the joint tenancy remained severed, because in those circumstances, 1/5 of Patrick's share in the Property would devolve to Alexander. But it is at least arguable that regard needs to be had to the fact that the Property was Alexander's home, to Patrick's expressed desire, at the time of the 2013 Will, that Rana was to be entitled to 100% of the Property, and that Rana cared for Alexander at the Property. What was submitted to me on behalf of Alexander was that the severance adversely affected his interests, it benefited the Claimants financially, and that it had the effect of "obviously prejudicing" his care.

94. There are repeated references to undue influence being a highly fact sensitive area of the law. Ultimately, I do not accept that a difficult point of law should be determined before the full factual position has been established.

Ground 3

95. On the Claimants' submission, there is a related point. Not only does Alexander not have any right to assert a claim to challenge the validity of the Notice by

reason of (presumed) undue influence, as Alexander never had an interest in the Property, it is submitted more generally that Alexander has no enforceable right in law to an enforceable remedy against the Claimants in respect of the Property.

96. I think this point is plainly wrong, for the following reasons.

97. The first answer to it is that the Claimants recognised Alexander's interest in being heard in the proceedings when they joined him as a defendant to the claim in the first place.

98. The second answer to it is that Alexander is plainly interested in the issue, given that he resides at the Property, where he is cared for by Rana. It is also said that he is Rana's sole heir, and thus stands to inherit whatever her interest in the Property is (whether that be 50% + 10%, as the Claimants contend, or 100%).

99. As to the remedy which could be granted to Alexander, assuming he is successful in his Defence, Alexander could be granted effective relief by, for example, an order providing for rectification of the land register to reflect that the tenancy had not been severed or a permanent injunction restraining the Claimants from asserting that it had been in any action against or affecting Alexander.

100. Finally, one returns to the Falk J Order itself, which gave Alexander the right pursuant to paragraph 2 to contest the validity of severance of the joint tenancy of the Property. In the hearing before her, the Judge said, as shown in the transcript, that part of her reason for approving the consent order was:

> "Essentially, on the grounds of realism, [the Claimants] accept that Mr Seale, the second defendant, would need to be heard at some stage, either

> in relation this application or any defence or in relation to possession of the property, and I agree that the order, as drafted, is the appropriate way forward."

101. Accordingly, I do not think the argument on lack of interest as a basis for strike out or summary judgment has any validity.

Ground 4

102. Finally, the Claimants submit that to permit Alexander to advance the Defence at trial would amount to a collateral challenge to the Cousins Order, and such a challenge would itself be an abuse of process. What was said was that the Cousins Order is conclusive as against Rana. Paragraph 4 of the Cousins Order provides that the joint beneficial interest in the Property was severed by the Notice. The judgment of Deputy Master Cousins raises an estoppel against Rana. And it was said that to allow Alexander to bring his Defence to trial would not benefit Alexander, but it would benefit Rana, and therefore that to allow Alexander to challenge it at trial necessarily involves a collateral challenge to the Cousins Order.

103. The Claimants sought to buttress their submission on this point by reference to *Carl Zeiss Stiftung v Rayner & Keeler (No 2)* [1967] 1 AC 853 at p. 936, where Lord Reid said:

> "There does, however, seem to me to be a possible extension of the doctrine of privity as commonly understood. A party against whom a previous decision was pronounced may employ a servant or engage a third party to do something which infringes the right established in the earlier litigation and so raise the whole matter again in his interest. Then, if the other party

> to the earlier litigation brings an action against the servant or agent, the real defendant could be said to be the employer, who alone has the real interest, and it might be thought unjust if he could vex his opponent by relitigating the original question by means of the device of putting forward his interest. …"

104. I consider this point to be misconceived. There are, at least, two things which can be said in answer.

105. First, regard must again be had to the Falk J Order. Given the express terms of the Falk J Order, in particular, the express reference at paragraph 2 "for the avoidance of doubt" to Alexander being able seek at trial a determination that the joint tenancy has not been severed and "such further relief as may be appropriate upon such determination", it cannot be open to the Claimants to assert at this stage that allowing Alexander to advance his own Defence amounts to a collateral attack.

106. Second, the passage cited in *Carl Zeiss Stiftung* case does not assist the Claimants. The facts of that case are wholly removed from the present case. Alexander is not Rana's privy.

Further disclosure

107. I would end this section of my judgment by saying that I am fortified in my conclusion on summary judgment by considering the current position on disclosure. The Claimants submitted that a very extensive series of steps had been taken to produce a list of documents for standard disclosure in March 2017 in advance of the original trial. The Claimants retained KrolLDiscovery to assist with electronic disclosure and, as well as a laptop, several webmail accounts were searched, using specified keyword search terms over specified date ranges,

as well as a review for hard copy documents and mobile telephones. These searches produced a large volume of material. The Claimants submitted to me that, given the work that had previously been carried out, it was improbable that any further material documents would come to light that might change the complexion of the case.

108. On behalf of Alexander, it was pointed out that the electronic searches carried out produced 4,044 documents "which were then reviewed for relevancy". Relevancy can only be determined by examining the issues as set out in the statements of case. Alexander's Defence is not the same as Rana's Defence. In particular, Alexander is raising a defence based on undue influence.

109. I accept the submission from Mr Hunter QC that it is possible that further searches, this time carried out by reference to the Practice Direction 51U, may produce further disclosable material. A decision on a summary judgment application is to be determined not only on the basis of the evidence which is actually before it but also by reference to the material which can reasonably be expected to be available at trial: see the principles found in *Opal Telecom*.

110. In all the circumstances, therefore, I have determined that the Claimants' application for summary judgment / strike out fails and should be dismissed. The claim must go to trial, as originally agreed by the parties under the Falk J Order.

Rana's applications

111. Rana made three applications which were heard before me. The first two, dated 9 October 2020 and 8 January 2021, were not pursued at the hearing. Both applications sought in substance that the Claimants' summary judgment application against Alexander be struck out. Those applications were not

properly brought. Alexander was separately represented, and it is not for one respondent to seek an order that relief sought against another be refused. Given that Alexander was separately represented before me, Rana did not, at the hearing before me, persist in her opposition to the Claimants' application for summary judgment.

112. That leaves Rana's third application, dated 9 February 2021. That application sought the following relief:

> "Reinstate First Defendant's Defence pleaded and particularised as to undue influence pursuant to directions of Master Pester to be heard at Hearing of 10–12 May 2021."

113. Rana has filed several witness statements in support of her application, including ones dated 9 February, 12 March, 20 March, 26 March, 22 April and 29 April 2021. I have reviewed what is said in those statements, although several of those statements were filed in disregard of the directions I made on 15 January 2021 for the sequential exchange of evidence. Much of that material consists of submission, rather than evidence. Her witness statements and other communications to the Court frequently involve accusations of impropriety, and threats, made against the Claimants, various professionals (both those who have acted for the Claimants, as well as those who have acted for Rana and her son in the past), as well as members of the court staff.

114. I have taken account of the points raised in Rana's written and oral submissions. In essence, Rana seeks to set aside the Cousins Order, with permission to advance a claim that Patrick's 2013 Wills were procured by undue influence (Rana claims that Patrick's only valid will was one dated 15 November 2010). Rana submitted to me that Deputy Master Cousins was clearly biased against

her, by reason of her gender and religion and ethnicity. She also contended that Deputy Master Cousins was wrong to conduct what was in effect a mini-trial, and that summary judgment should not have been given in probate proceedings where testamentary capacity was put in issue. Finally, she submitted that a video clip of Patrick, taken by Jasmine on 3 June 2013, fatally undermined the conclusions reached by Deputy Master Cousins as to capacity, applying the well-known test in *Banks v Goodfellow* (1870) LR 5 QB 549. I have watched the allegedly new video clip which she maintains fatally undermines the conclusions underpinning the Cousins Order. I do not accept the submission that that video clip, either taken on its own or in the context of the witness evidence to which she referred me, demonstrates either that Patrick lacked capacity at the time of making the various wills in 2013, or that Patrick's mind had been "unduly influenced against Alexander".

115. Accordingly, Rana invited me either to set aside the Cousins Order in its entirety, or to grant her permission to appeal it. I do not have jurisdiction to do either:

i) If Rana's application were to be categorised as an application pursuant to CPR r. 3.1(7), it is clear that r. 3.1(7) does not apply to a final order disposing of a case, since the interests of justice, and of litigants generally, required that a final order remains unless proper grounds of appeal existed: *Roult v North West Strategic Health Authority* [2010] 1 WLR 487, Court of Appeal, at [15]. The Cousins Order is a final order. Rana has provided no proper or sufficient grounds for taking the wholly exceptional course of setting aside the court's final judgment.

ii) Likewise, I do not have jurisdiction to grant her permission to appeal the Cousins Order, the decision of another Master.

116. In any event, and this is the point I would stress, Rana's challenge to the Cousins Order can only be made by way of an appeal. The difficulty facing her is that she did appeal the Cousins Order at the time, by her Appellant's Notice dated 24 October 2017. That appeal was struck out automatically, pursuant to the order of Mann J dated 15 December 2017, when Rana failed to file an appeal bundle. Her case, as I have set out above, is that she never received the Mann J order, or the Morgan J order in similar terms, which struck out Alexander's appeal. She told me orally that she had been checking CE-file at the time as to the progress of that appeal.

117. It would be surprising if the order of Mann J had not been served on Rana. In any event, Rana should have been progressing her appeal. She is not shy about issuing applications. She issued an application for a stay of the Cousins Order on 4 October 2017, which was dismissed by consent, following a hearing before Mr Justice Marcus Smith on 10 October 2017 (at which hearing, as is recorded in that order, Rana received assistance from Chancery Litigants in Person Support Scheme). Even if she was not aware of the order of Mr Justice Mann at the time, she certainly was aware that her appeal had been struck out by, at the latest, October 2018, when the Claimants' solicitors wrote to her, seeking the sale of the Property. That letter prompted Alexander to issue his own application, challenging the Cousins Order. However, Rana did not at that time either issue her own application, or take any steps to revive her appeal.

118. Accordingly, I will simply dismiss Rana's third application. Her only route is to seek permission to appeal from a High Court Judge, which appeal would be

very out of time, in circumstances where Rana has previously issued an appeal which was not pursued.

119. By way of postscript, after the hearing was over, I received further written submissions from Rana. Rana had no permission to file those further submissions. However, given her status as a litigant in person, and because I am concerned to give her every reasonable opportunity to make those points she wishes to make, I have read those further submissions. Nothing said in those submissions gives me any reason not to dismiss her application. I note that in a document headed Aide Mémoire dated 14 May 2021 she indicates that she could not progress her appeal earlier because she only received an approved transcript of the judgment of Deputy Master Cousins in September 2019. However, that means there is then a further period of delay on her part between September 2019 and February 2021, before she issued her application. I would therefore repeat that any challenge to the Cousins Order can only be made by way of an appeal.

The Claimants' application for delivery up

120. There is one final head of relief sought by the Claimants which is free-standing, and needs to be decided on its own merits. The Claimants seek the delivery up of the Art Collection (33 paintings by Charmy) on the grounds that Patrick bequeathed that it be held on trust by the Claimants as trustees.

121. The delivery up application was expressed to be made against both Rana and Alexander. In his submissions to me, Alexander's counsel pointed out that there was no basis to seek any relief with regard to the Art Collection against Alexander as Alexander was not in possession of the art collection. In correspondence filed by the Claimants' solicitors after the hearing, the

Claimants indicated that the relief they sought in relation to the Art Collection was no longer sought as against Alexander. But it was still being sought as against Rana.

122. Factually, it is not disputed that the Art Collection is at the Property. Pursuant to clause 4.1 of the July 2013 Will, Patrick bequeathed the Art Collection to his Trustees (that is, the Claimants). In a letter of wishes, dated 19 July 2013, Patrick indicated that he wished the Art Collection to remain as one unit, so far as possible.

123. There is no existing challenge to the validity of the July 2013 Will. Alexander, by his Defence, accepts the validity of the July 2013 Will. Rana wishes to challenge the validity of the July 2013 Will, but her only route to do so is by way of an appeal.

124. Accordingly, it is right to order Rana to deliver up the Art Collection, in so far as it is held at the Property. I understand that what is sought is delivery up in a good state on 14 days' notice, and I so direct.

Conclusion

125. For the reasons set out in this judgment, I hold as follows:

i) I dismiss the Claimants' application, in so far as it seeks to strike out or obtain summary judgment as against Alexander;

ii) I dismiss all three of Rana's applications; and

iii) I order that Rana should deliver up, on 14 days' notice, the Art Collection in a good state.

126. I will hear from the parties on a date to be fixed what further consequential matters or directions arising from this judgment remain to be decided.