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Case No: PT 2020 000726

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/12/2021

Before :

HH JUDGE DAVIS-WHITE QC (SITTING AS A JUDGE OF THE HIGH COURT)

- -

IN THE MATTER OF THE ESTATE OF KIM MARGARET MATTINGLEY (Deceased)

Between :

ANABEL MATTINGLEY	**Claimant**
- and -	
KAREN BUGEJA	
(Administratrix of the Estate of Kim Margaret Mattingley Deceased)	**Defendant**

- -
- -

Mr Nicholas Jackson (instructed by **Ozon Solicitors Limited**) for the Claimant
Mr Adrian Carr (instructed by **DMH Stallard LLP**) for the Defendant

Hearing dates: 30 November & 1 December 2021

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Approved Judgment

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

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HH JUDGE DAVIS-WHITE QC (SITTING AS A JUDGE OF THE HIGH COURT)

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The time and date for hand-down is deemed to be 10:00 am on 14 December 2021

HH Judge Davis-White QC :

Introduction

1. This is a case about an alleged "secret trust" of real property, situated in England, under a will. The question is whether the devisee under the will, the defendant, holds the deceased's interest in the property on trust so as to give the claimant, the deceased's daughter, a 37.5% interest in the property (or, more accurately, in the deceased's 71% beneficial interest in it). The daughter asserts this case. The defendant, her aunt, denies it.

2. As is explained in Lewin On Trusts (20th Edn, para 3-076), a secret trust is a trust:

> "*outside a will that affect[s] a beneficiary under a will. Equity has engrafted on ….common-law principles rules of its own, by which the primary donee taking under a will may be compelled to hold the gift on trust for a secondary donee under an arrangement with the testator taking effect outside the will. Such trusts are called "secret trusts" because one reason for creating them is to keep the ultimate beneficial interest out of the will, which is a public document. Secret trusts arise where a testator intends his gift to the primary donee to be employed as he, and not the primary donee, desires and tells the primary donee of his intention and (either by an express promise or by the tacit promise which is signified by acquiescence) the primary donee encourages the testator to bequeath his money in the belief that his intentions will be carried out*."

3. Kim Margaret Mattingley (the "Deceased" or "Kim") died from cancer on 28 June 2020. She had resided in both England and latterly, for some years, in Switzerland. She owned property within both jurisdictions. Her English will, dealing with her English property, was made on 31 May 2016 (the "2016 Will"). The named executor having renounced probate, letters of administration with will annexed (limited to the English assets of the deceased) were granted to the Defendant on 2 March 2020.

4. Under the 2016 Will, the Deceased left her residuary estate to her daughter, Anabel Mattingley ("Anabel"), the claimant, contingent on her attaining the age of 25. At the date of the 2016 Will, Anabel was 16 years old. Her birthday is 4 January. There is in fact little or no residuary estate. There is also provision in the 2016 Will that Karen will be the guardian of Anabel if she is a minor at the date of Kim's death.

5. The 2016 Will also provides that the Deceased's interest in 8 Crabtree Close, Kings Hill, West Malling, Kent (the "Property"), together with certain effects within it, is devised absolutely to her sister, Karen Bugeja ("Karen"). The 2016 Will expresses the wish that Karen will permit their mother, Mrs Joan White, to continue to reside there for the rest of her life. In fact, Mrs White was, at the time of the Deceased's death, residing in the property under a lease granted by the deceased to her for a 25 year term at a peppercorn rent. The lease is dated 14 April 1999 and made between the Deceased and Mrs White.

6. There is a dispute as to the value of the Property. There are two professional valuations of the freehold in evidence, each being by David Marcelline of Stiles Harrold Williams Partnership LLP. A probate valuation as at the date of the Deceased's death, 28 June 2016, ascribes a value to the freehold of £275,000. A market valuation for inheritance

tax purposes ascribes a value to the freehold of £250,000 as at 1 August 2019. An informal valuation, by email dated 24 July 2018, given by Jeanne Lindridge of local estate agents, Hicks Estate Agents and Chartered Surveyors, ascribes a value of £495,000 as at July 2018. The claimant in her evidence suggests that in the Swiss proceedings concerning the 2016 Will, a value of £522,500 was placed on the Property by a Swiss Administrator and this was not contested.

7. The Deceased's interest in the Property at the time of her death was a beneficial interest of some 71%. By a Deed of Trust dated 4 June 1999 she had declared a trust of the Property as to 71% for herself and as to the other 29% on trust for her sister, the Defendant.

8. In this judgment, I use the first names of a number of those involved for convenience, and as used before me at the trial, and do not thereby intend any disrespect.

9. The dispute in this case is almost entirely one of fact.

Legal representation

10. Before me, Anabel was represented by Mr Jackson of Counsel and Karen by Mr Carr of Counsel. I am grateful to them for their assistance in the case.

11. It is unfortunate that in this case the solicitors seemed unable to co-operate properly or to follow applicable guidance (for example as to the preparation and content of trial bundles). Thus:

    (1) I was provided with a main trial bundle and a separate supplementary bundle from the defendants.

    (2) The bundles contained several copies of more than one document.

    (3) Documents contemporaneous to the main relevant events were scattered around the two bundles. The main trial bundle contained the witness statements and exhibits in full (the latter often re-exhibiting documents already in evidence). Various documents were presented under the headings "Claimant's disclosure" and "Defendant's Disclosure" respectively.

    (4) The trial bundle contained separate versions, for the claimant and the defendant respectively, of a case summary and suggested trial timetable. The trial bundle contained a claimant's chronology and a more detailed chronology was only put forward in Mr Jackson's skeleton argument.

    (5) There had apparently been no discussion or agreement as to the conditions under which Ms Lansky, a witness giving evidence remotely from France as permitted by court order dated 3 November 2021, was to give such evidence. I was told that she only received electronic versions of the bundles shortly before the hearing and then instead of the trial bundle comprising one pdf it was sent in parts comprising some 5 or 6 separate pdfs. The effect of giving evidence in England and Wales had not been explained to her and that had to be done in the course of the hearing.

The respective cases of the parties

12. The claimant asserts that her mother, the Deceased, and her aunt, the Defendant, agreed (and Karen promised) that on the death of the Deceased, and subject to the right of Mrs White to live there for the rest of her natural life, Karen would hold a 26.625% interest in the Property on trust for Anabel. This promise by Karen is said to have preceded the making of the 2016 Will. The percentage interest is said to represent 37.5% of the 71% interest in the Property held by the Deceased at her death. It is said to be the percentage of the deceased's interest in the Property that would have passed to Anabel on the deceased's death, under relevant Swiss law, had the Property been situated in Switzerland rather than England. By way of fall-back the claim form in this case asks that relief be given on the basis of such other percentage interest as the court finds to have been the subject of the secret trust.

13. The defendant, on the other hand, denies that any such agreement was made or promise given. She says that the only comments made to her by the Deceased were to the effect that she did not want her estranged husband, Shaun Mattingley, to receive any interest in the Property and that she wanted to ensure that her mother, Mrs White, could live in the property for the rest of her life without any worry. In the event that a time came when Mrs White needed to go into care, then she wanted the Property to be sold so that the proceeds of sale could be used to pay for such care. Karen does accept that once her mother dies, the property or any proceeds of it then remaining, will be divided between her and Anabel. However, she says that there is no legal obligation on her so to divide the Property

14. As this is a Part 8 claim there are no formal statements of case. The relevant cases have to be extracted from the witness statements placed before the court. I therefore summarise the key matters bearing on the case.

15. As regards the agreement to and the terms of the alleged secret trust, the claimant, in her first written witness statement, relies by way of evidence on:

    (1) what she says that she was told by her mother in the last 6 months of her mother's life but especially on an occasion in March 2016. In her second witness statement she asserts that her mother told her that Karen was present with Kim while the latter had a telephone conversation with her English solicitors and that she must therefore have agreed to what her mother told them about her wishes regarding the Property.

    (2) what she understands is in the files of the solicitors who were involved in preparing the 2016 Will.

16. In the written evidence served and filed on Anabel's behalf, there is also a witness statement from her father, Shaun Mattingley ("Shaun"), who gives a description of a conversation that he says took place between himself and the Deceased in May or June 2016 on the telephone in which (among other things) the Deceased told him that she wanted Anabel to have a 37.5% share in the Property and that Karen had agreed to provide that 37.5% share. He also explains that the Deceased's thinking was that Anabel should receive in respect of the Property the share that she would have received had the Property been situate in Switzerland and subject to relevant Swiss law. He explains that right as being one to 37.5% of the Deceased's interest in the Property

(50% passing to a spouse and the remaining 12.5% being giftable at the discretion of the deceased). I note however that both he and Anabel speak in terms of the interest given to her under the secret trust as being a 37.5% interest in the Property rather than a 37.5% interest in the Deceased's 71% share (being an interest of 26.625% in the Property). That the actual claim is to a 37.5% interest in the Deceased's 71% interest was only clarified by the trial skeleton argument of Mr Jackson for the Claimant.

17. Finally, there is a witness statement from Tamara Lanksy, a retired lawyer and friend of the Deceased ("Ms Lansky"). In that statement she refers to a number of discussions between herself and the Deceased. Her understanding had been, in 2013, that the Deceased wanted to provide the entirety of the Property to Anabel after Mrs White had died and that she was trusting Karen to achieve this for her. No percentage share was mentioned. Despite Ms Lansky expressing her doubts as to the wisdom of taking this course and relying on Karen, the Deceased assured her that setting up a formal trust with professional trustees would be prohibitively expensive and that she could trust Karen who, with her husband, owned a number of properties and would not need the Property.

18. The written evidence on behalf of the Defendant comprises witness statements of Karen herself and her husband Philip.

19. In her 1st witness statement Karen denied that the deceased had ever asked her to give the Property (or her interest in it or any other interest) to Anabel on her, Kim's death. Mr Bugeja's key evidence was to the effect that, as far as he knew, during her lifetime Kim did not communicate the terms of any secret trust to Karen.

20. I deal with the evidence in more detail below but use the above as a short way of identifying the respective parties' cases as put in the evidence that they put forward.

The law of secret trusts

21. There was common ground as to the basic elements required to establish a secret trust. As set out in *Lewin on Tr*usts at paragraph 3-078:

> "*The primary donee will be subjected to a fully secret trust for the secondary donee where the secondary donee or his personal representative proves:*
>
> *(1) an intention on the part of the testator to subject the primary donee to an obligation in favour of the secondary donee;*
>
> *(2) communication of that intention to the primary donee during the testator's lifetime; and*
>
> *(3) acceptance of that obligation by the primary donee, either expressly or by implication."*

22. Further, a fully secret trust must comply with the three certainties applicable to express trusts, namely certainty of intention, certainty of subject matter and certainty of object.

The oral evidence generally

23. Each of the makers of witness statements gave oral evidence and adopted their witness statements as their evidence in chief.

24. I have had very much in mind the helpful guidance given in earlier cases and repeat below what I have said in other judgments that I have given.

25. Although the position remains that the "gold standard" for the ascertainment of the truth of witness evidence is the confrontation of a witness in the witness box by way of cross examination, the manner in which the court assesses the result has, in recent years, been the subject of judicial comment and explanation based on scientific research. In particular, the court has, on a number of occasions, given guidance as to the exercise of evaluating oral evidence and the accuracy/reliability of memory.

26. A convenient summary is set out in the judgment of Warby J (as he then was) in *R (Dutta) v General Medical Council* [2020] EWHC 1974 (Admin) at paragraphs 39 to 41 where he said (with emphasis removed, and inserting sub-paragraph numbers for bullets in the extracts from the judgment in the *Kimathi* case, referred to below):

> *"[39] There is now a considerable body of authority setting out the lessons of experience and of science in relation to the judicial determination of facts. Recent first instance authorities include Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3650 (Comm) (Leggatt J, as he then was) and two decisions of Mostyn J: Lachaux v Lachaux [2017] EWHC 385 (Fam) [2017] 4 WLR 57 and Carmarthenshire County Council v Y [2017] EWFC 36 [2017] 4 WLR 136. Key aspects of this learning were distilled by Stewart J in Kimathi v Foreign and Commonwealth Office [2018] EWHC 2066 (QB) at [96]:*
>
> *"i) Gestmin:*
>
> *(1) We believe memories to be more faithful than they are. Two common errors are to suppose (1) that the stronger and more vivid the recollection, the more likely it is to be accurate; (2) the more confident another person is in their recollection, the more likely it is to be accurate.*
>
> *(2) Memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is even true of "flash bulb" memories (a misleading term), i.e. memories of experiencing or learning of a particularly shocking or traumatic event.*
>
> *(3) Events can come to be recalled as memories which did not happen at all or which happened to somebody else.*
>
> *(4) The process of civil litigation itself subjects the memories of witnesses to powerful biases.*
>
> *(5) Considerable interference with memory is introduced in civil litigation by the procedure of preparing for trial. Statements are often taken a long time after relevant events and drafted by a lawyer who is conscious of the*

significance for the issues in the case of what the witness does or does not say.

(6) The best approach from a judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts. "This does not mean that oral testimony serves no useful purpose… But its value lies largely… in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth".

ii) Lachaux:

(7) Mostyn J cited extensively from Gestmin and referred to two passages in earlier authorities.[45] I extract from those citations, and from Mostyn J's judgment, the following:- ".

(8) "Witnesses, especially those who are emotional, who think they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason, a witness, however honest, rarely persuades a judge that his present recollection is preferable to that which was taken down in writing immediately after the incident occurred. Therefore, contemporary documents are always of the utmost importance…"

(9) "…I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective fact proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities…"

(10) Mostyn J said of the latter quotation, "these wise words are surely of general application and are not confined to fraud cases… it is certainly often difficult to tell whether a witness is telling the truth and I agree with the view of Bingham J that the demeanour of a witness is not a reliable pointer to his or her honesty.

iii) Carmarthenshire County Council:

(11) The general rule is that oral evidence given under cross-examination is the gold standard because it reflects the long-established common law consensus that the best way of assessing the reliability of evidence is by confronting the witness. However, oral evidence under cross-

> *examination is far from the be all and end all of forensic proof. Referring to paragraph 22 of Gestmin, Mostyn J said: "…this approach applies equally to all fact-finding exercises, especially where the facts in issue are in the distant past. This approach does not dilute the importance that the law places on cross-examination as a vital component of due process, but it does place it in its correct context.*
>
> [45] *The dissenting speech of Lord Pearce in Onassis and Calogeropoulos v Vergottis [1968] 2 Lloyd's Rep 403, 431; Robert Goff LJ in Armagas Ltd v Mundogas SA [1985] 1 Lloyd's Rep 1, 57."*

[40] This is not all new thinking, as the dates of the cases cited in the footnote make clear. Armagas v Mundogas, otherwise known as The Ocean Frost, has been routinely cited over the past 35 years. Lord Bingham's paper on "The Judge as Juror" (Chapter 1 of The Business of Judging) is also familiar to many. Of the five methods of appraising a witness's evidence, he identified the primary method as analysing the consistency of the evidence with what is agreed or clearly shown by other evidence to have occurred. The witness's demeanour was listed last, and least of all.

[41] A recent illustration of these principles at work is the decision of the High Court of Australia in Pell v The Queen [2020] HCA 12. That was a criminal case in which, exceptionally, on appeal from a jury trial, the Supreme Court of Victoria viewed video recordings of the evidence given at trial, as well as reading transcripts and visiting the Cathedral where the offences were said to have been committed. Having done so, the Supreme Court assessed the complainant's credibility. As the High Court put it at [47], "their Honours' subjective assessment, that A was a compellingly truthful witness, drove their analysis of the consistency and cogency of his evidence …" The Supreme Court was however divided on the point, and the High Court observed that this "may be thought to underscore the highly subjective nature of demeanour-based judgments": [49]. The High Court allowed the appeal and quashed Cardinal Pell's convictions, on the basis that, assuming the witness's evidence to have been assessed by the jury as "thoroughly credible and reliable", nonetheless the objective facts "required the jury, acting rationally, to have entertained a doubt as to the applicant's guilt": [119]."

27. The question of the significance of the demeanour of a witness has also been addressed by Leggatt LJ (as he then was) in *R (on the application of SS (Sri Lanka) v Secretary of State for the Home Department* [2018] EWCA Civ 1391:-

> *"[36] Generally speaking, it is no longer considered that inability to assess the demeanour of witnesses puts appellate judges "in a permanent position of disadvantage as against the trial judge". That is because it has increasingly been recognised that it is usually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth. The reasons for this were explained by MacKenna J in words which Lord Devlin later adopted in their entirety and Lord Bingham quoted with approval: "I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges, to discern from a witness's*

demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help." "Discretion" (1973) 9 Irish Jurist (New Series) 1, 10, quoted in Devlin, The Judge (1979) p63 and Bingham, "The Judge as Juror: The Judicial Determination of Factual Issues" (1985) 38 Current Legal Problems 1 (reprinted in Bingham, The Business of Judging p9).

…..

[39] …. empirical studies confirm that the distinguished judges from whom I have quoted were right to distrust inferences based on demeanour. The consistent findings of psychological research have been summarised in an American law journal as follows: "Psychologists and other students of human communication have investigated many aspects of deceptive behavior and its detection. As part of this investigation, they have attempted to determine experimentally whether ordinary people can effectively use nonverbal indicia to determine whether another person is lying. In effect, social scientists have tested the legal premise concerning demeanor as a scientific hypothesis. With impressive consistency, the experimental results indicate that this legal premise is erroneous. According to the empirical evidence, ordinary people cannot make effective use of demeanor in deciding whether to believe a witness. On the contrary, there is some evidence that the observation of demeanor diminishes rather than enhances the accuracy of credibility judgments." OG Wellborn, "Demeanor" (1991) 76 Cornell LR 1075. See further Law Commission Report No 245 (1997) "Evidence in Criminal Proceedings", paras 3.9–3.12. While the studies mentioned involved ordinary people, there is no reason to suppose that judges have any extraordinary power of perception which other people lack in this respect.

[40] This is not to say that judges (or jurors) lack the ability to tell whether witnesses are lying. Still less does it follow that there is no value in oral evidence. But research confirms that people do not in fact generally rely on demeanour to detect deception but on the fact that liars are more likely to tell stories that are illogical, implausible, internally inconsistent and contain fewer details than persons telling the truth: see Minzner, "Detecting Lies Using Demeanor, Bias and Context" (2008) 29 Cardozo LR 2557. One of the main potential benefits of cross-examination is that skilful questioning can expose inconsistencies in false stories.

[41] No doubt it is impossible, and perhaps undesirable, to ignore altogether the impression created by the demeanour of a witness giving evidence. But to attach any significant weight to such impressions in assessing credibility risks making judgments which at best have no rational basis and at worst reflect conscious or unconscious biases and prejudices. One of the most important qualities expected of a judge is that they will strive to avoid being influenced

> *by personal biases and prejudices in their decision-making. That requires eschewing judgments based on the appearance of a witness or on their tone, manner or other aspects of their behaviour in answering questions. Rather than attempting to assess whether testimony is truthful from the manner in which it is given, the only objective and reliable approach is to focus on the content of the testimony and to consider whether it is consistent with other evidence (including evidence of what the witness has said on other occasions) and with known or probable facts.*"

28. These more recent iterations of judicial experience and scientific learning provide much of the rationale underlying the new regime governing witness statements, and best practice in relation to their preparation, in the Business and Property Courts (as from 6 April 2021). As paragraph 1.3 of the Appendix to Practice Direction 57AC sets out:

> "*1.3 Witnesses of fact and those assisting them to provide a trial witness statement should understand that when assessing witness evidence the approach of the court is that human memory:*
> *(1) is not a simple mental record of a witnessed event that is fixed at the time of the experience and fades over time, but*
> *(2) is a fluid and malleable state of perception concerning an individual's past experiences, and therefore*
> *(3) is vulnerable to being altered by a range of influences, such that the individual may or may not be conscious of the alteration."*

29. In this case, the warnings about recollections being unreliable over time and the effects of a constant revisiting of evidence have a particular resonance. The statements about the effect of going through proceedings are exacerbated by the fact that there have been preceding Swiss proceedings as well as the current proceedings.

30. I turn to the individual witnesses.

31. I should say right at the start that I found Ms Lansky to give the most honest, careful and accurate evidence. I accept her evidence entirely. However, her evidence was restricted to the situation in 2013 and therefore although useful background did not really bear upon the issue of whether a secret trust existed in relation to the disposition of the Property made by the 2016 Will.

32. As regards the other witnesses, the quality of the evidence from each suffered from the fact that there have been proceedings in Switzerland brought, as I understand it, by the curator of Anabel and/or her estate in Switzerland. The two main downsides were that the experience of the Swiss proceedings appeared to me to have polarised and hardened views such that objectivity and genuine recollection were clouded by the experience. There is clearly really bad feeling between Anabel and her father on the one hand and Karen and her husband on the other hand. I was shown a letter sent by Mr Mattingley some time after the conclusion of the Swiss proceedings (or a stage therein) which evidences great upset but equally says some hard things about Karen. I also heard, for example, from Philip, who referred to himself and his wife as "being hounded" over many years regarding the 2016 Will.

33. I should also add that another somewhat unsatisfactory matter concerning the Swiss Proceedings was that although it would have been easy to produce relevant evidence about them I was largely left with laypersons' assessment of those proceedings, what had happened and also as regards applicable Swiss law, even though those matters were to a greater or lesser extent apparently in contention. As I go onto explain, part of the claimant's case is that Kim left her interest in the Property on the basis that Anabel would receive a percentage of it by analogy with what she would have received under Swiss law had the Property been situated in Switzerland and possibly on the basis that it was owned jointly by her and Shaun. I had no proper evidence of Swiss law even though it was fairly clear that the position is (a) complicated and (b) one not agreed between the parties and (c) that, other than the conversation spoken to by Shaun, the case relied upon by the claimant is that her mother left her an interest in the Property, under a secret trust, by reference to what she might have been entitled to under Swiss law had the Property been situated in Switzerland. The latter point might, one would have thought, have resulted in some proper evidence of what the Swiss law position was. Secondly, various points going to credibility were sought to be raised regarding conduct in the Swiss Proceedings but I was unable to reach any conclusions about such matters. Mr Carr did not cross-examine on many of these issues (nor on a great many other factual issues regarding for example, the relationship between Philip and Kim and between Anabel and Kim). In my judgment he was right not to do so. There was no independent evidence on many of them and, other than as going to credit, resolution of such issues was largely irrelevant to the issues that I had to decide. Mr Jackson took a similar approach but did seek to cross-examine as to credit on some issues for example, as to whether Anabel did or did not spend 50% of her time with her mother as agreed under a separation regime between Kim and Shaun. The evidence was inconclusive on such matters and as it went to credit only I did not find it necessary to resolve the factual issues thus raised.

34. The proceedings in Switzerland apparently involved an attempt to bring inheritance issues regarding the Property (as well as issues regarding the Kim's Swiss will) before the Swiss courts. Ultimately the Swiss courts declined jurisdiction in relation to the Property and the 2016 Will. Nevertheless, as part of the proceedings, allegations were brought and cases put forward that the 2016 Will was invalid by reason of lack of testamentary capacity and/or undue influence and/or that it was subject to Swiss inheritance law which took priority. Further, it was asserted that the Property should be sold immediately to provide for Anabel which, on any view, was completely inconsistent with the basis upon which the Property had been left under the 2016 Will as a home for Kim and Karen's mother during her lifetime. Ultimately, as I have said, my understanding is that the Swiss courts declined jurisdiction in relation to the Property. I also understand that Kim's Swiss will was also challenged in the Swiss proceedings and as I understand it the challenges to that will were not upheld.

35. Anabel and her father, Shaun, made the point that the Swiss proceedings were controlled by the Swiss curator appointed in relation to Anabel by the Swiss authorities and not by them. Nevertheless, Karen and her husband understandably feel that the evidence and information leading to the Swiss proceedings and the allegations set out in them must largely have come from Anabel and/or Shaun.

36. The Swiss proceedings clearly involved many of the witnesses before me in considering many of the documents now before me in some detail and with legal input. This of

course has had its effect on witnesses' recollections and positions in relation to the documents. For example, in relation to one of the documents that I will come onto, Karen attempted to set out her construction as to the meaning of an email dated 30 May 2016 sent by Kim to her English solicitors (who prepared the 2016 Will) and into which she was copied. She said:

> "*The interpretation of that email was previously discussed by my own and Anabel's Swiss lawyers during the course of the Swiss proceedings and* [the interpretation that I have just set out] *was not contested further at the time by Anabel's Swiss lawyers during the course of the Swiss proceedings and this interpretation was not contested further at the time by Anabel*"

37. Ultimately, unless there is some special knowledge or reason for understanding a document in a particular way, a witness' views of the meaning of a document carry little or no weight. Given the manner in which the documents had clearly been studied and considered by the witnesses and with lawyers I found their reaction to the correspondence between Kim and her English lawyers to be of little assistance. Some evidence from the English solicitors might have been of assistance but was conspicuous by its absence.

38. As regards Anabel's evidence, as well as the factors mentioned above I also bear in mind her ages in 2013 and 2016 and the emotional and distressing circumstances in which she then was, in terms of her mother's illness and, in due course, death.

39. I found Anabel a reliable witness anxious to tell the truth and careful to be accurate as to what she said. What was noticeable is that, as I go onto explain, her oral evidence was significantly different in some key respects to that set out in her witness statement which had the air of being written by lawyers and derived from communications passing between Kim and her English lawyers. Of course it is possible that Anabel genuinely recollected matters and that separately her mother wrote about such matters to her English solicitors. However, the inference that I drew was that many of the matters said to have been said to her by her mother as set out in her witness evidence were matters that were culled from the documents obtained from the English solicitors rather than being matters genuinely recollected without such aid and merely confirmed by the Kim/Solicitor correspondence. In her first witness statement, Anabel set out her case and asserted that she "understood" that there were "file notes and emails on the solicitors file" bearing out her case. That is part of the picture of her case and evidence being built around the file notes rather than the file notes confirming her evidence.

40. I will deal with the evidence of Shaun later in this judgment when dealing with the relevant conversation that he gave evidence about. Ultimately that evidence has to be weighed against the documents and probabilities and the other evidence in the case. The relevant oral evidence and cross-examination boiled down to its essence was "Yes this happened", "No it did not, did it?", "Yes it did" . There is little useful that I obtained from hearing Shaun in terms of being able to assess the truthfulness or reliability of that evidence solely from what he said in the witness box.

41. So far as Karen is concerned, much was made by Mr Jackson of what he described as her "demeanour". As I have said, demeanour is an uncertain guide to assessing the truth and accuracy of a witness's oral evidence. To some extent though, as I understood

him, Mr Jackson was relying on more than demeanour and rather on the answers given. For example, he submitted that Karen untruthfully asserted that the Property belonged to her mother when it did not. I will return to this point, but ultimately my assessment was that this was an example where there was a problem stemming from use of vocabulary but that properly understood, Karen's evidence on this point was not untruthful or unreliable. I found Karen to be a truthful witness doing her best to be accurate. I find that her judgment as to the meaning of contemporaneous communications between Kim and Kim's English solicitors has been coloured by the passage of time and the consideration of that correspondence in two sets of proceedings. She was also somewhat confrontational in the style of her giving evidence: for example, initially countering a question as to whether Anabel had got upset at a meeting between them at a café after Kim's death by asking how counsel defined "upset". Nevertheless, I find her evidence to be essentially truthful.

42. So far as Philip is concerned, I found him to be a truthful and accurate witness. His evidence was that he personally had not received any relevant communications from Kim which gave rise to a case that Karen had promised to provide Anabel with an interest in the Property. Further, Karen had not communicated any such thing to him and, had she done so, he would have expected her to do so. Necessarily therefore his evidence is of limited value in resolving the disputed factual position.

The Documentation

43. To some extent both sides relied upon the documents, largely communications between Kim and her English lawyers, in relation to the question of whether Karen had promised to Kim to give a 37.5% share in the Property (or of Kim's 71% share in the Property) to Anabel. Witnesses were, to a lesser or greater extent, cross-examined on those documents, in many cases with regard to their meaning. As I have said, this was of limited assistance in circumstances where the witnesses either did not see the documents at the time or could not remember doing so (Karen was copied in on some) and where any helpful spontaneous reaction to the documents or their possible meaning against the contemporaneous background had been lost by the great familiarisation with the documents and over time.

Acquisition of the Property and subsequent dealings 1995 to 1999

44. The Property was acquired by Kim (then Kim Laming) and her then partner, James Bramwell, in February 1995. It appears that the purchase price was in the region of £135,000. The Property was purchased with the benefit of a mortgage from the Halifax. A deed of trust records that the Property was held on trust for sale, the proceeds of sale, after discharge of the Halifax mortgage, to be paid as to the first £13,000 to Kim and thereafter between her and Mr Bradwell equally. The inference to be made is that the £13,000 represented Kim's contribution to the purchase price and that the remainder was paid by way of monies borrowed from the Halifax on mortgage.

45. Title to the property was transferred into Kim's sole name in May 1997. This followed the breakdown of the relationship between herself and Mr Bramwell.

46. In 1999, Mrs Joan White (Karen and Kim's mother), redeemed the mortgage on the Property. A statement from Halifax in February 1999 confirmed that the redemption figure was then some £98,538 as at 5 March 1999. The background to this was that at

that time Mrs White had divorced her husband and was looking for somewhere to buy (see email from Kim to M&M dated 21 May 2013). To have a nicer house she paid off the mortgage on the Property. At about the same time two transactions were entered into:

(1) First, Mrs White was granted a 25 year lease at a peppercorn rent of the Property. There is an insurance covenant by the tenant and the Lease is to determine if at any time Mrs White dies or ceased to use the Property as her main residence. There is no express repairing covenant. Mrs White has lived there ever since. It is in this sense that Karen asserted that the Property was Mrs White's property, although of course in strict legal terms that is not correct. The relevant lease is dated 14 April 1999.

(2) Secondly, by Deed dated 4 June 1999, Kim declared herself trustee of the Property for herself as to 71% and for her sister, Karen, as to 29% , as tenants in common. This reflected the fact that Kim had had the benefit from Mrs White of the mortgage being redeemed and this declaration of trust was seen as a way of sharing, at least to some extent, that "accelerated inheritance" with Karen. The basis upon which this was calculated was unclear to me.

47. Shaun gave evidence about being asked by Kim in 2001 to provide Karen with £30,000 from the Property in the event that Kim predeceased him and he took under the reciprocal wills made by him and Kim at about this time. This was said by him to be on the basis that the £30,000 would redress an imbalance of receipts from Mrs White by Karen and Kim during their lifetimes and on the basis that the Property was wholly owned by Kim and he would receive, under the 2001 will, the entire interest in the Property. This makes little sense given the 1999 Deed. I need not go so far as to say I do not accept Shaun's evidence on the point-he was not cross examined on the point, However, I do reject this account as having any bearing upon the position in 2016 and as providing any explanation or credence to a view that Kim considered in 2016 that Anabel should receive less than her, Kim's, full 71% interest in the Property because there was still a need to redress some "inequality" of inheritance from Mrs White.

2000-2013 and the 2013 wills

48. In January 2000, Anabel was born, the daughter of Shaun and Kim. In May 2001 Kim married Shaun. In the same year Kim and Shaun made reciprocal wills.

49. In 2003, Kim was diagnosed with melanoma.

50. In 2005, Kim, Shaun and Anabel emigrated to Switzerland where Karen already lived.

51. In 2008, Kim and Shaun separated. There seems to have been a reunion thereafter but by 2010 the couple were again separated and that remained the position thereafter.

52. In January 2013, Kim left the matrimonial home (which also had a separate apartment) to go and live with her sister Kim.

53. By the end of that month she had contacted English solicitors to act for her on a proposed transfer of the Property to Karen. This is confirmed by a letter dated 29 January 2013 from those solicitors, Matthew and Mathew Limited ("M&M"). That firm

is a Bournemouth firm which had previously acted for her and Shaun in drafting their 2001 wills. The letter confirms agreement of M&M to act (the individual with overall responsibility for the file being Emma King).

54. On 30 April 2013 Kim made a will. The terms of that will were as follows (but inserting some paragraph numbers and changing the formatting so that it is easier to refer back to):

> "*LAST WILL AND LEGAL TESTIMENT KIM MARGARET MATTINGLEY*
>
> 1. *To whom it may concern. I Kim Margaret Mattingley being of sound mind and intention on this day Tuesday 30th April 2013, TUESDAY THIRTY APRIL TWO THOUSAND AND THIRTEEN revoke all previous will instructions and previously nominated persons for inheritance and insurance payout upon my death in favour of my sister Mrs. Karen Patricia Bugeja of7c Ch. Du Lignolet, 1260 NYON, SWITZERLAND.*
>
> 2. *I also leave Mrs. Karen Patricia Bugeja all personal effects, jewelry and belongings to do with as she shall so wish.*
>
> 3. *I leave her my estate in total and explicitly request that Shaun Michele Mattingley received nothing from my estate or personal effects or gifts previously bestowed upon me.*
>
> 4. *In the event that it should be necessary to nominate a parental guardian for my daughter Anabel Mattingley, it is my explicit request that person is Mrs. Karen Patricia Bugeja the Aunt of Anabel and my sister.*
>
> 5. *With regard to the property 8 Crabtree Close of which Karen Patricia Bugeja has a part share I hand over full ownership if my death is before a full transfer into the name of Mrs. Karen Patricia Bugeja in order to provide for our mother Mrs. Joan Margaret White.*
>
> 6. *It is my request that Anabel Helene Mattingley continue her education at The International School of Geneva Founex and reside in Switzerland until she is of legal age to choose for herself.*
>
> 7. *If there is any objection to my last will and testament, I appoint Mdme. P. Michellod Advocate Nyon 1260 Switzerland who is currently acting as my legal advisor in Switzerland to execute my wishes in conjunction with Mathew and Mathew if necessary.*
>
> 8. *My request in favour of my-·sister Karen Patricia Bugeja and in relation as aunt to Anabel Helene Mattingley I trust that my sister Karen Patricia Bugeja will provide for her as she feels fit and appropriate.*"

55. A number of themes are important:

(1) First, the desire to secure her mother's position in relation to the Property;

(2) Secondly, her concern that Shaun should get nothing;

(3) Thirdly, the passing of property and responsibilities to Karen.

(4) Fourthly, the trust reposed in Karen to provide "as she thinks fit" for Anabel.

56. In a letter dated 13 May 2013, sent to M&M, Kim wrote as follows:

> "*For the record I am writing this letter to put my affairs in order.*
>
> *Please note that I am currently separated from my husband Mr. Shaun Michele Mattingley and have a change to my will which I enclose. With regard to my daughter Anabel Helene Mattingley (04.01.2013) she will be provided for by my sister Karen P. Bugeja as she sees fit and who I trust to have my daughter's best interests at heart.*
>
> *This is of importance now as I am under hospital treatment for stage four cancer. I am receiving treatment that in itself could be life threatening. All documents have been signed by doctors that know and treat me.*
>
> *Therefore and further, please find enclosed a request to transfer 8 Crabtree Close, Kings Hill West Malling, Kent. ME19 4FR into the name of Karen Patricia Bugeja my sister. This is to ensure the continuation of accommodation for my mother Joan Margaret White who is residing at this address. Once the property is in her name she can therefore manage this property accordingly.*
>
> *I trust that the documents are dear and cannot be contested. If there are any loop holes that would benefit my husband whom I erase as a beneficiary, I trust that you would advise me accordingly*."

57. It is unclear what the enclosure to this letter was.

58. By email dated 15 May 2013 to Emma King, Kim, among other things, expressed her concerns about Shaun:

> "*There is an urgent need to transfer the property over to my sister to secure our Mum's security in the event of my death my husband may try to force the sale of the property (if it is in my name/in my estate) and my mum out of the property and homeless.*
>
> *My husband and I are experiencing a breakdown in our marriage on top of my treatment and I expect separation divorce proceedings to commence soon and a chance that he may declare himself bankrupt in CH, fyi."*

59. Having earlier set out some information as to property she owned she also said:

> *" If it is prudent to draw up a new will with my sister as trustee and legal guardian for my daughter then please proceed. Thank you for pointing that out*."

60. The will process went ahead. At M&M this was dealt with on a day to day basis by David Webb. Emma King confirmed this position by email dated 16 May 2013.

61. By letter dated 16 May 2013, M&M sent to Karen (by email only) a transfer deed (TR1) to execute in relation to a transfer of the title to the Property to her. The declaration of

trust provisions in part 10 of that form were left blank. This indicates that the transfer was absolute and not in trust.

62. By letter dated 17 May 2013 sent by email. M&M thanked Kim for her instructions to prepare her will, sent a draft will for her to consider and explained the contents of the same and confirmed that the fee would be £85 plus VAT (total of £102).

63. By email dated 21 May 2013, Kim wrote to Emma King giving further details about the acquisition of the Property and the transfer of an interest in it to Karen following Mrs White having paid off the mortgage. Further information was clearly being sought by M&M to address the capital gains tax position. She went on to say, as regards the Property:

> "*We do not want the house sold and leave our mum homeless we are securing the continuation of a roof over her head or the funds for a nursing home should it be necessary regardless of what happens to me. If there is any residue funds, if my mother dies, and if I have died then as per my will they will be allocated to my daughter via my sister*."

64. On 29 May 2013, Kim executed a further last will and testament. The key clauses are as follows:

(1) Clause 1 involves revocation of former wills dealing with English assets.

(2) Clause 2 appoints Mr Webb (or the relevant firm of solicitors) as executor and trustee.

(3) Clause 3 appoints Karen as guardian of Anabel, if the latter should be a minor at the date of Kim's death, and expresses a wish as to the educational establishment that she should attend and that she should reside in Switzerland until of a legal age to choose for herself.

(4) Clause 4 devised and bequeaths her share and interest in the Property together with various household effects to Karen "and it is my express wish that my sister provides for our mother" Mrs White "absolutely".

(5) Clause 5 gives her residuary estate to Anabel or, if Anabel predeceases her, to Karen.

(6) Clause 6 confirms no provision for Shaun and states a "desire and intention" that he should not contest the will and that her decision to make no provision for him should be "read as final".

(7) Clause 7 incorporates the Standard Provisions and all of the Special Provisions of the Society and Estate Practitioners (2nd Edition).

65. It appears that the proposal that there be a lifetime transfer of the Property to Karen went off at about this time. By letter dated 19 June 2013, Mr Webb returned a cheque

for £100 being payment for the proposed transfer of the Property "*in the light of our discussions and the preparation of your new will*".

66. Ms Lansky gave evidence as to the position in 2013. She was one of the attesting witnesses to the will dated 30 May 2013. She was a friend of Kim and met her because their respective daughters both attended the same school and they struck up a friendship and became close friends.

67. One of the matters she dealt with in her witness statement was the relationship between Kim and Karen before 2013. In broad terms she said it was not a good relationship. Karen denied that. Karen was cross-examined about this as a matter of credit. It is a matter that I cannot come to a conclusion on and which does not help me in my assessment of Karen's evidence on the substantive issues.

68. Ms Lansky identified three motivations of Kim: first to ensure her husband did not receive anything; secondly, to make sure her mother remained secure in the Property and thirdly, that she wanted to make provision for Anabel. As regards this, Kim expressed concern that if Anabel received an interest whilst a child there was a risk that Shaun would take control. She said that Kim told her that she (Kim) had made arrangements with her sister to provide the Property (that is all of it) to Anabel when she was old enough to look after herself. Ms Lansky, a lawyer in the civil law system, qualified in Quebec and France, was wary of such an arrangement with Karen and expressed her unease to Kim. She said that she repeated her concerns repeatedly but that Kim told her there was nothing to worry about. The cost of professional trustees would be "prohibitive" and that she could trust Karen to carry out her wishes. I have doubts about the alleged expense point: the trustee would have been Karen, not a professional trustee.

69. In substantive terms, there is strictly no need for me to make formal findings about the 2013 will. However, it was accepted by Mr Jackson that there was no secret trust for Anabel in relation to either 2013 will. It follows that Kim must be taken to have been satisfied to leave the issue of Karen making provision for Anabel as one of informal arrangement based upon trusting her as set out in her two 2013 wills. Although Kim may have anticipated that her entire 71% interest would pass to Anabel once her (Kim's) mother had died, I do not find that there was any promise by Karen to that effect nor any communication of an intention to make the disposal of the Property to Karen under either 2013 will a condition of the gift. In short, the position under both 2013 wills was that Kim placed trust in Karen to provide for Anabel financially as she, Karen, thought appropriate even if there was a wish expressed that Karen would pass the entire 71% interest in the Property (or its remaining proceeds) to Anabel once Mrs White died and had no further need of the same.

70. Mr Jackson submitted that there was however a secret trust in relation to provision for Mrs White. It is not necessary for me to determine this but if I had to I would not agree with Mr Jackson. Again, it seems to me that Kim was simply prepared to trust Karen and that this was not a secret trust situation. The 2013 will is perfectly clear and there is simply no evidence of some form of secret trust.

71. As Ms Lansky could only deal with the situation prior to and, as I understood it, up to the making of the second 2013 will (or at most, shortly thereafter), her evidence, save

for providing background information, did not bear upon the alleged secret trust in this case arising under the 2016 will in the sense that it amounted to any positive evidence regarding those matters. It is however relied upon by Mr Carr as demonstrating that in 2013 Kim was prepared to trust Karen to provide for Anabel but without there being anything more than a moral obligation involved.

The 2014 Swiss Will

72. On 4 February 2014, Kim made a will dealing with all her property other than that located in England. I have been provided with what I understand to be an agreed English translation of that will.

    (1) Under article 2, she seeks for the application of English law to the administration of the estate and re-iterates that English law does not provide for Switzerland's statutory share for a surviving spouse.

    (2) Under article 3 she appointed Anabel as "the sole inheritor of my possessions".

    (3) Article 4 excludes Shaun from administration of such possessions and hands the administration to Karen.

    (4) Article 5 designated Karen as executor of Kim's estate with the broadest possible powers in association with Maître Patricia Michellod, a lawyer in Nyon with both able to act independently.

The 2016 Will

73. In March 2016, Kim got in touch with M&M and seems to have been seeking information about the Property which Mr David Webb provided by email dated 14 March 2016. The possibility of a lifetime transfer of the property again seems to have been in prospect and there also seems to have been a concern as to the security of Mrs White's position given Mr Webb's reassurance that, given the Lease registered against the title, "it would seem that your mother is adequately protected…and cannot be evicted". Kim replied saying (among other things) that her accountant was looking at asking questions at the tax office about the taxation effects of transferring the Property to Karen and that it was "clear" that she needed to change her will and would revert.

74. On 3 May 2016, Kim sent Mr Webb detailed instructions about changes to her will. Among the points to be noted are:

    (1) Her personal effects at Karen's house in Nyon were to be inherited by Karen without contest from Shaun or Anabel and those effects were not to be removed from that address by either Shaun or Anabel.

    (2) Her 50% share in the matrimonial home in Tarteginin held in joint names with Shaun was to go to Anabel but to be held in trust by Karen until Anabel was 25.

    (3) All JP Morgan Pensions for Anabel were to be held in trust by Karen until Anabel was 25. Kim's Zurich pension was to go directly to Anabel's bank account.

(4) Various paintings, jewellery and other personal effects were to go to various persons: her father ("via Karen"). Karen, Anabel (to be held in trust by Karen until Anabel reached 25), various children of Karen .

(5) Shaun Mattingley should not approach Karen for funding for Anabel whose inheritance should be protected until she reaches the age of 25.

(6) She wished to keep clauses 1, 4, 5, 6 and 7 of the original (2013) will.

(7) She wished Karen to take care of body and funeral arrangements "upon which she has been given instructions" ,

(8) The Property was to be "*at the residence of my mother until the end of her life at which time there is a split 30/70 Karen../Anabel to be held in trust until Anabel is 30, after costs and expenses for my mother's living, care and house selling fees*."

75. Mr Webb replied by email later that day. He said he would work though the instructions but noted that the pensions would pass outside Kim's estate and would not be dealt with under her will. He told her to contact the providers and make the relevant nominations. He also asked for further information regarding values and said the English (and Swiss) capital tax positions would need to be considered further.

76. Later that day, Kim sent a further email dealing with certain personal chattels which she proposed to deal with herself or which had already been taken care of and could therefore be taken out of the will. On this basis "*the Will seems much unchanged*". She also pointed out that the Swiss matrimonial home was:

> "*being strongly fought for by my Husband and he insists I have no claim on it I have to wait for the court to decide. However if I die before a decision is made a portion automatically will be granted to Anabel by law. Perhaps I should leave that house out of the will? I may not contest his right to it under my current health situation."*

77. The detail was then sent by Mr Webb to Ms Janet Batley at M&M to deal with.

78. On 10 May 2016, Ms Batley sent an email to Kim. She explained that she was helping Mr Webb with the drafting of Kim's will and pointed out the apparent inconsistency between Kim's instructions regarding the Property:

> "*Regarding your property 8 Crabtree Close, K1ings Hill, West Malling ME19 4F your current Will passes the property to your sister Karen with a wish that Karen provides for your mother - you have confirmed you wish to keep this clause.*
>
> *However the penultimate paragraph from your email of 3 May states <u>The UK house to be at the residence for my mother until the end of her life at which time there is a split 30/70 Karen Bugeja/Anabel Mattingley to be held in trust until Anabel is 30, after costs and expenses for my mother's living, care and house selling fees.</u>*

> *Mr Webb has reviewed the clause to allow for your mother to reside at the property up until her death. For clarification purposes please confirm at the end of the trust whether your sister is to receive the property or it is to be a 30/70 split as above."*

79. Kim's response was given later the same day:

> "*Sorry for the confusion I wish the property to be secured for my mother until the end of her life then I wish for the property to be passed to my Sister 100%."*

80. This response appears to have removed any uncertainty and clearly expressed the position that Anabel was to have no legal entitlement to Kim's beneficial interest (or any part of it) in the Property. Mr Jackson submitted that this was just the public response to M&M and that, separately, Kim did intend to impose a trust upon Karen. I reject that submission. As a generality, it seems to me that Kim was like most lay people in not knowing about secret trusts and thus in considering that legal obligations would be imposed under the will or not at all. I accept that such a view or belief by the testator is not necessarily incompatible with a relevant binding promise (express or implied) being made by a primary donee such as to trigger a secret trust in due course but in my view, in the scenario I have outlined that is likely to be unusual.

81. By letter dated 11 May 2016, Mr Webb sent Kim a new draft will for her to consider. He also confirmed that the costs of preparation would be £95 plus VAT (a total of £114). Among other things he explained that:

(1) Clause 5 gifts your property 8 Crabtree Close, Kings Hill, West Malling MEI9 4FR to your sister Karen with the express wish that your sister allows your mother to reside at the property for the remainder of her life.

(2) Clause 6 provides for your remaining estate (once all specific bequests and debts have been paid together with any IHT discharge) to pass to your daughter. In the event that you daughter should predecease you your estate will pass to your sister Karen."

82. On 24 May 2016, Kim telephoned M&M. The attendance note of Janet Batley records that Kim was then in hospital and that her health was "critical". A number of questions and answers were put and given. Again, so far as relevant these included:

> "*1. What age is considered to be no longer a minor?*
>
> *18*
>
> *2. Appointing sister and guardian what rights does her living father have over that appointment?*
>
> *Full parental rights.*
>
> *3. Can her ex-husband touch her daughters inheritance from her pension?*
>
> *Policies/all outside of Will, query nomination form -KM confirmed she has completed a nomination form and her daughter will receive all pension funds*.".

83. Also on 24 May 2016, Kim sent an email to Janet Batley (copied to Karen). For present purposes the relevant portion is as follows:

> " *Dear Janet, Thank you for my updated draft will.*
>
> *Re Item 3.*
>
> *Anabel now has a place at Felsted School, Felsted Dunmow CM6 3LL UK for two years commencing this September 2016 to take her IB. We are all happy including Anabel with this choice. She has a two year full scholarship education and board.*
>
> *I am more concerned that her financial inheritance (with guidance from my Sister) to remain Anabel's to use for purchasing property, a horse (not upkeep or horse riding lessons) a car (not driving lessons or maintenance). Full control of her money upon 25.*
>
> *Her further higher education and expenses should full be provided by her Dad, Shaun. Michele, Mattingley and that he should be restrain in any attempts to access her inheritance or approach my Sister for contributions for her welfare or activities*."

84. There was some discussion before me as to the meaning of this letter, Mr Carr suggested that the whole letter was governed by the heading, "Re Item 3" being the clause dealing with the appointment of Karen as guardian. Having heard all the evidence in the case my conclusion is that the letter is not so restricted. However, I do not consider that the letter clearly shows that there was a secret trust of Kim's interest in the Property. The reference to inheritance could have been general (that is to her inheritance under both Swiss and English wills). Karen was, after all, handed administration and executorship under the Swiss will. Even if that is wrong, and the comments regarding financial inheritance are limited to the English inheritance, it is not clear to me that at this stage Kim had fully understood or even that the position at this time was that there would be no residue. In this connection I refer to the letter of 26 May 2016 dealt with below but also refer to the fact that her earlier letter setting out the contradictory positions under the will had referred to Anabel taking the interest in the Property at 30 not 25. Finally, and in any event, what is said is consistent in my judgment with any "inheritance" from the Property not being a matter laid down in law but being an aspiration/expressed wish. Kim clearly treated the 2016 Will as passing "the Property" to her mother via Karen (see e.g email of 30 May referred to below) but in fact (a) there was no legally binding obligation in the will regarding the Property and her mother but only an expression of intent and (b) the wishes encompassed provision of a home and/or monies for care and living from the Property but no ownership right which could be transferred by Mrs White. An "inheritance" from the Property (for Anabel), if that is what this letter envisages, would, on this basis, not signify a binding trust of a specific interest in that Property for Anabel.

85. On 26 May 2016, a letter dated 25 May 2016 and a new draft will were sent to Kim. The letter referred to various amendments and asked for a comprehensive list of assets within the UK. It also re-iterated the point that Anabel's natural father would and did have all parental rights first and foremost. However he would have to apply "*to your Trustees for funding*". Clause 6 of the draft will dealing with residue, had been altered

to provide that Anabel's entitlement was contingent upon her attaining the age of 25 years.

86. On 27 May 2016, Janet Batley sent the new will in word format to be printed out in Switzerland so that Kim could sign and have it witnessed.

87. On 29 May 2016 Karen sent an email to M&M (the email was in terms sent by Karen on Kim's behalf). The email stressed the urgency of getting the will to Kim to sign given how unwell she was. Janet Batley was at this point away until 6 June so the email with a further covering email was sent on the same day to another staff member of M&M.

88. On 30 May 2016, Kim sent a further email to Janet Batley, Mr Webb and Karen. So far as relevant she said:

> "*I would like to double and tripple ensure that the property known as 8 Crabtree Close, Kings Hill, West Malling, Kent ME19 4FR passes in full upon my death and fully thereafter to Karen P. Bugeja and thereafter to Mrs. J.M. White of 8 Crabtree Close, Kings Hill, West Malling, Kent, ME19 4FR. I leave no inheritance or part of this property to Anabel Helene Mattingley specifically. The outline of the previous will to remain the same as with regard to personal effects removal of property. The inheritance due to Anabel Mattingley from 8 Crabtree Close to be managed by Karen P. Bugeja. as per her rightful allocation and proportion normally distributed under Swiss Law of a property in joint names, Kim Margaret Mattingley and Mr. Shaun Michelle Mattingley*."

89. There was much discussion before me about what this email meant.

90. It is noticeable that the email refers to the Property going to Karen and "thereafter" to Mrs White when Mrs White was clearly not given any legal interest in the Property. In my judgment, it is a layperson's description of Karen being able to use the Property for Mrs White's benefit, that is it is a description of how Mrs White's needs and interests are catered for (through Karen) but not a statement of the legal position (no interest in the Property passed to Mrs White under the 2016 Will).

91. Turning to the end of the communication that deals with Anabel, Mr Carr suggested (as did Karen) that the penultimate sentence was one starting "The inheritance due" and ending with a full stop after the words "Karen P. Bugeja", with the "as per" being a new sentence. The difficulty with that is that "as per" and the words following (which was said to be a reference to Anabel's inheritance under Swiss law) then becomes a subject with no verb or object and makes no sense. I am satisfied that the "as per" is referring to Karen managing any inheritance from the Property but that, taken on its face, it is unclear whether the "as per" is a reference simply to Karen's management (and comparing it to her management of Swiss properties) or whether the idea is that the management of the English property would involve Karen managing the English property to give Anabel a limited percentage of Kim's interest in the Property. The latter seems unlikely. There was every reason to think Kim was hoping that her full 71% would be passed to Anabel. Be that as may be, it seems to me that the lack of clarity would have been apparent to M&M (as had the earlier lack of clarity when Kim said that she wished previous provisions of her 2013 will to be repeated in her 2016 will but then appeared to contradict that by referring to specific provisions about the

Property). Any lack of clarity was, in my view, ironed out on 31 May 2016 in a conversation between Kim and M&M.

92. On 31 May 2016 the 2016 Will was executed. Before it was executed Kim telephoned M&M. The M&M attendance note is, so far as relevant, in the following terms:

> "*MRC engaged attending Karen Bugeja on her telephoning.*
>
> *Kim was now awake and ready to sign her Will. She has a legal question that she needed to ask. Karen passed the phone to Kim.*
>
> *She had the final copy of the Will now printed off, as Mandy had sent*
>
> *to her.*
>
> *She wanted to check Clause 5 and 6.*
>
> *Clause 5- Discussing her sister getting the property but allowing her mother to live there for the rest of her lifetime. She just does not want her (ex)- husband to get it Advised that there is always the chance that he could contest the Will which she was aware of. She confirmed that she wants to leave the property to her sister and her mum is to reside there.*
>
> *Clause 6- Residuary estate is for her daughter. She is 16. The funds would be held on trust for her until attaining the age of 25 with DRW as the trustee.*
>
> *I enquired what the UK assets are- there is: the property (gifted in clause 5) and nothing else. Kim has emptied her bank account already. So technically her daughter will not receive any of her UK assets. Kim advised there is an equity share in the property- she trusts her sister to give this to her daughter.*
>
> *Kim has prepared a Will in Switzerland. There is a property in Switzerland that her daughter will get a share of, so she won't go completely without.*
>
> *Kim is still married to Shaun and things are not amicable. She has a very good Swiss lawyer.*
>
> *She was happy with the Will as it is and will now proceed to sign. She has two independent witnesses- her lawyer and the doctor. She will then get it sent back to us."*

93. As I read this attendance note: Kim clarified that her wish was that Anabel should receive in due course her entire interest in the Property (and not some proportion of it that Kim would have been entitled to under Swiss inheritance law had the property been situated in Switzerland and subject to such law). Secondly, she confirmed what she had said time and time again, namely that the Property in its entirety was, as a matter of law, to be gifted to Karen. She trusted Karen as to how she Karen would deal with it but she was not seeking to impose (and did not anticipate the imposition of) any legal obligation rather than a moral obligation on Karen. Just as she did not impose any legal obligation regarding provision for their mother from the Property but left the matter as one of expressed wish and trust, the same was true in relation to Anabel.

94. It was suggested by Mr Jackson that Kim was acting on the basis of an express promise by Karen that Karen would give effect to Kim's wish and that whilst she did not want to put this in her will nevertheless a secret trust arose. I do not accept this. First, it seems to me inconsistent with the email referring to there being no specific gift of an interest in the Property to Anabel. There is no reason why Kim would not have explained the position to M&M. Secondly, in the clarification process that must have taken place between M&M and Kim on 31 May 2016, it seems to me that Kim made clear (as she had done before) that she was not leaving anything specifically to Anabel. If she had said that she wanted Karen to give a specific proportion (or all) of her interest in the Property to Anabel I am sure the attendance note would have said so and M&M would have explored with her the question of making specific provision in the 2016 Will to provide expressly for that. The suggestion of Mr Jackson that Kim would have kept the obligation a secret from M&M because she was worried that their costs would escalate (when they had apparently agreed to a flat fee for the of the 2016 Will of £95 plus VAT of £19) makes little sense. Thirdly, any such secret trust would have involved trust provisions protecting the prior "interest" of Mrs White in respect of the Property and its proceeds. Yet it is difficult to see that any such trust would be compatible with the express non-imposition of a trust in relation to Mrs White by the terms of the 2016 Will itself. This latter point may not be decisive by itself. A power to provide for Mrs White (by way of accommodation and/or for care and other costs) might have been expressly agreed or implied over Kim's 71% beneficial interest as part of any secret trust for Anabel. However, the need for detail makes the imposition of a trust less likely.

95. The 2016 Will was executed on 31 May 2016. Clauses 5 and 6 as executed were as follows:

> "5. **I DEVISE AND BEQUEATH** free of any charge or mortgage secured thereon and free of Inheritance Tax or any other tax payable all my share and interest in the freehold property known as 8 Crabtree Close Kings Hill West Malling ME19 4FR ("the property") **TOGETHER WITH** the furniture curtains carpets and other articles of household use or ornament in it ("the effects") to my said sister **KAREN PATRICIA BUGEJA** absolutely and it is my express wish that my sister allows our mother **JOAN MARGARET WHITE** to continue to reside there for the rest of her life absolutely.
>
> 6. I **GIVE** all my property both real and personal of whatsoever nature and wheresoever situate not otherwise disposed of by this my Will to my Trustees upon trust to realise !the same and to pay my debts funeral and testamentary expenses and any Inheritance· Tax or any other tax payable in respect of my estate and to stand possessed of the residue (hereinafter called "my residuary estate") **UPON TRUST** for such of my daughter **ANABEL HELENE MATTINGLEY** contingent upon her attaining the age of *25* years absolutely **PROVIDED THAT** in the event of my daughter predeceasing then my sister **KAREN PATRICIA BUGEJA** shall take the share of my residuary estate my daughter would have taken had she survived me absolutely."

Events after the making of the 2016 Will

96. Kim also executed on 31 May 2016 a document setting out dispositions of personal property, such as items of jewellery, watches and computer items, "in addition to her will". That document was also witnessed by the witnesses to the 2016 Will. However, as I understand that document has been treated as part of the dispositions under Swiss inheritance law rather than as part of Kim's English testamentary dispositions and that makes sense given the 2016 Will is limited to English property and, on the evidence that I heard, the personal property items dealt with in the additional document were situated in Switzerland.

97. After execution of her will, Shaun says that Kim had a conversation with him which he says in oral evidence took place on 2 June 2016, to which I shall have to return.

98. In July 2016, there was a meeting between Karen and Anabel at the Café Migros at Nyon. Again, I shall have to return to this matter.

99. Following Kim's death, Anabel did indeed receive a one half share in the matrimonial property in Switzerland, being Kim's entire interest. Further she received the pension monies that I have referred to. One lot of those amounted to something in the region of £73,000. There is a dispute as to whether and to what extent Karen and Shaun were respectively involved in facilitating payments of the pension sums to Anabel but I need not resolve that dispute. Anabel and her father now have, as I understand it, bought a property in Switzerland in which they live together and own half each beneficially.

100. As I understand it, a Swiss Administrator was appointed over Kim's estate, replacing those appointed under the Swiss Will. A curator was also appointed in relation to Anabel and/or her estate.

101. I have mentioned the Swiss proceedings. The detail that I have received about them is sparse. There did not seem to be any challenge or denial that the proceedings involved the claims that I have referred to in relation to, at the least, the 2016 Will. In oral evidence, Anabel confirmed that the question of a secret trust was not raised in the Swiss proceedings.

102. The issue of a secret trust appears first to have been raised after the Swiss courts declined jurisdiction in relation to the 2016 Will. In relation to the Swiss proceedings there is in evidence a highly charged and emotional letter from Shaun dated 4 June 2019. The letter was apparently sent to Karen. The letter refers to the Bugeja family's "laughing on the court steps today" and I infer that to be a reference to the last stage of the Swiss proceedings.

103. The contents of that letter are significant because they deal with the conversation relied upon by Shaun as having taken place days after the making of the 2016 Will. In that document he states (among other things):

> "*Kim telephoned my a week before her death, and said that she was sorry that lawyers had "taken over the show" but I should not worry as "Karen will look after Anabel like her own when I am gone and everything is in place to make sure of that." Indeed she did put down words on paper to say Karen should provide for Anabel as is fair and appropriate way*".

The communication then goes on to complain that Karen was not prepared to give Anabel "*something – just something to give her a little bit of financial security in her future."* He then refers on a number of occasions in the communication to a figure of 20% (of the Property) said to have been offered but then withdrawn by Karen.

The oral evidence on behalf of the claimant

104. As I have said, the first factual event relied upon outside the contemporaneous documents that I have referred to is the account of Anabel, set out in her witness statements regarding a meeting involving herself, Karen and Kim when Kim was in hospital in March 2016.

105. As regards that, Anabel's evidence set out in her first witness statement made on 30 March 2020 was that at a time when she was, understandably very emotionally upset and wanting the conversation to end quickly, her mother set out a little more detail about the provision that was to be made for Anabel on her mother's death. Having said that Anabel would receive 50% of the matrimonial home in Switzerland because that was what she was allowed to leave her as a matter of Swiss law, Anabel went on in her witness statement to set out what she was told about the English property:

> "*18. My mother told me that I would receive a share of the English property which was commensurate to what Swiss law would have required if the property had been in Switzerland. However, she said that my aunt would be the one to provide it to me. My mother explained that there were complications and legal technicalities which made her believe that it would be better to bequeath the house to her sister, and to rely upon her sister to ensure that I received my share. My mother told me that she had made desires clear to my aunt, and that my aunt had agreed to abide by her wishes*"

106. In her oral evidence, Anabel was far less certain about what her mother told her in March 2016. Given she was 16 at the time and the situation was extremely emotional that is not surprising. The gist of her evidence was that her mother told her that she would receive "a portion" of the English property and that Karen would "look after her". Her mother trusted Karen to do this. She was unable to identify the "complications and legal technicalities" that her mother was said to have referred to, other than that she, Kim, did not want Shaun to have any of the English property. She was unable to identify why her mother would have said she should only get a proportion to which she would have been entitled under Swiss law if the property had been in Switzerland.

107. In her second witness statement, she raised a new point of evidence which was that Karen came into the room after the conversation with her mother and confirmed what Kim had told Anabel. How this was suddenly "remembered" was not clear to me. Her second witness statement explains how Anabel is said to have remembered her mother telling her Karen remained in the room with her on 31 May 2016 when speaking with her English solicitors in May 2016. I deal with this below but as far as I can see there is no real explanation as to why Karen returning to the hospital room in March 2016 was left out of the first witness statement but inserted into the second witness statement. However, and in any event, that evidence did not go very far as Anabel accepted that the English property was not mentioned in terms when Karen returned to the room.

108. Having considered the evidence carefully I draw the following conclusions and make the following findings:

(1) In her evidence to the court, Anabel was seeking to tell the truth but her recollection and the quality of her evidence had been hopelessly compromised by the process of the Swiss and then the English proceedings;

(2) Her written evidence smacks of having been influenced by the documents and outside sources rather than being a genuine recollection of what had occurred. Thus, some of what she says seems to be parroted directly from correspondence between Kim and her English lawyers.

(3) Her oral evidence was more considered and did not go so far as her written evidence. At least so far as the March 2016 conversation was concerned, I find that Kim was anxious to re-assure her 16 year old daughter that, after her death, Anabel would be looked after both financially and otherwise by her aunt, Karen. Anabel's oral evidence was that her mother told her that she would receive an (unspecified) portion of the English property and that Karen would "look after her". Anabel was unable to identify the "complications and legal technicalities" that her mother was said by her to have referred to, other than that Kim didn't want Shaun to have any of the English property.

(4) The most that was said when Karen was in the room was that Karen would look after Anabel, in the most general of terms. I find that at most Kim wished, without imposing any obligation or extracting any promise from Karen, that Karen would give Kim something derived from the Property. That there was no obligation is reflected by the vagueness of what was promised which is also fatal to one of the certainties of a trust, namely certainty of subject matter. As the authorities illustrate, an absence of one or more of the certainties for the creation of a trust is likely also to be relevant to the question of whether there was a certainty of intention to impose a trust at all. Here the subsequent correspondence between M&M and Kim demonstrates that Kim's wishes were in a state of flux including what interest she wished to pass to Anabel and when.

109. In her second witness statement, made on 3 March 2021, Anabel referred to a later conversation with her mother in May 2016, after the conversation with M&M as evidenced by the attendance note of the conversation of that date. She said that the process of disclosure had reminded her that her mother had told her that Karen was in the room throughout the conversation that her mother had with M&M. Karen in fact denies this. This then becomes the second occasion when a conversation with her mother is relied upon by Anabel. The element that makes this particular evidence somewhat suspect is that it emerged so late in the day and at a time when disclosure is said to have triggered the memory but the relevant disclosure was, as agreed before me, of a document that was disclosed by the claimant in her own disclosure. It is also difficult to see why Kim would have been triggered to tell Anabel about this. I find that Karen was not present during the conversation and accept her evidence on the point.

110. Even if I am wrong about Karen's non-presence, looking at the 31 May 2016 attendance note it does not seem to me to record clearly any sort of promise given to Kim by Karen that she, Karen, would provide Anabel with a fixed percentage interest in the Property.

Nor indeed does it record any promise from Karen. All that is recorded is that Kim trusted Karen. Trust was the basis of the 2013 wills but that, it is accepted, did not involve the imposition of any secret trust. The claimant relies upon the wording to the effect that Kim trusted Karen to give Anabel her, Kim's, interest in the Property. This appears to be a reference to her entire interest rather than the modified interest that she would have had to give her under Swiss law if the Property had been situated in Switzerland and subject to Swiss inheritance law. This conversation took place after the email of 30 May which, perhaps confusingly, both referred to nothing specific being left to Anabel in respect of the Property but also to Karen "managing" Anabel's inheritance from the Property "as per" her rightful allocation etc, under Swiss law. I have dealt with the attendance note and the earlier email earlier in this judgment. As I have said, I do not regard them as evidencing necessary elements of a secret trust and therefore Anabel's oral evidence that Karen was present when the conversation took place adds little. Ironically, even if Karen was present, Mr Jackson's submission that M&M would not have had explained to them any secret trust confirms that her presence would not have fixed her with or evidenced her agreement to or acquiescence in any secret trust.

111. The third matter relied upon by Anabel was a conversation between herself and Karen at the Café Migros in Nyon, after Kim's death. In her witness statements, Anabel said that Karen accepted that she had an obligation ultimately to provide Anabel with "her" (Anabel's) share of the Property but that she then asserted that Anabel would get nothing. Karen accepted that she may have gone so far as to use the word "entitled". Again, all seems to me to turn on context. Having heard the witnesses and considered all the evidence in the round, it seems to me that any obligation or entitlement which was acknowledged was a moral one, not a legal one.

112. Finally, a key piece of evidence is from Shaun regarding what he says was a conversation between him and Kim within days of the execution of the 2016 Will.

113. Given the documentation I do not accept that the conversation took place in the terms stated by Shaun. Whilst I am prepared to accept there was some conversation and that some re-assurance may have been given that Anabel would be provided for, I do not accept that precise percentages of the Property were mentioned or that Kim told him that Karen had agreed to receive the Property on the basis that she would provide the relevant percentage interest to Anabel.

114. First, to tell Shaun about an entitlement of Anabel to an interest in the Property would undermine the only realistic reason identified as underlying the secret trust: namely that Shaun should not know about it so that there was no risk of him seeking in some way to lay claim to the same on behalf of Anabel or to badger Karen about it. Secondly, it would have been much easier for Kim to have identified numbered percentages rather than a formula regarding entitlement under Swiss law. She did not identify percentages in her earlier correspondence on the subject with M&M, rather she used a formula. That suggests she did not know the percentages and that she would not have mentioned them to Shaun. Finally, such a detailed and precise account is a considerable embellishment on what Shaun said in his letter dated 4 June 2019 that I have referred to above.

115. Finally, and a matter of generality, it is in my judgment telling and highly relevant that the claims advanced in these proceedings were raised so late in the history of the disputes involving Karen.

Overall Conclusions

116. Having considered items of evidence separately and altogether, my conclusion is that there was no secret trust in this case and that Kim trusted her sister Karen to make provision from the Property or its remaining proceeds for Anabel once Karen and Kim's mother had died and no longer needed the Property (or its proceeds) either to live in or as a source or potential source of finance for living and care arrangements and expenses.

117. One of the general points that I should make at this point is the general lack of reason for there to be any secret trust or at the very least, to hide it from her solicitors. It was suggested that the reason that Kim did not trouble her English solicitors with setting the trust out in her 2016 Will was because it would cost a lot or cause her stress and pressure. These points make little sense and are unconvincing. The costs of the Will preparation were extremely modest and there is no suggestion that Kim even asked her English Solicitors whether further cost would be involved: indeed at one early point in 2016 in her ambiguous email she did seem to suggest that she might wish to impose a trust over her interest in the Property for Anabel, but she then resiled from that position or clarified that it was not what she wanted.

118. The most reliable evidence is the contemporaneous documents, largely communications between Kim and her English solicitors. Although at various points they show the wish of Kim that provision should be made by Karen from the Property, the precise form of provision and the date when Kim hoped that Anabel would take was somewhat vague and changed over time. The position was largely unchanged from 2013 when Kim hoped that Karen would make suitable provision for Anabel and it was a matter for Karen as to whether and what provision she made.

119. When Kim gave instructions to her English Solicitors as to the contents of what became her 2016 Will it was that Will that set out her desire as to the position that would obtain as a matter of law. There is no evidence that she made that 2016 Will (or did not revoke it) on the basis of a promise (express or implied) from Karen that Karen would pass the specific percentage interest in the Property (or its then proceeds) as alleged or any other percentage interest. Kim trusted Karen but not by way of relying on a specific promise binding Karen to pass a particular interest to Anabel.

120. As regards the evidence from Anabel and Shaun, in my assessment, that evidence is unreliable and in the detail incorrect. However now genuinely believed to be true, the written witness statements reveal that they have managed to persuade themselves, over time and by considerable study of the documents, that Kim told them things that went beyond what she in fact told them.

121. I am also not satisfied on the evidence that Karen made any promise, express or implied, that she would definitely deal with the Property (or its proceeds) in a certain way so as to give Anabel any interest in the same after Mrs White's death. I agree with Mr Carr that the second witness statement of Anabel reads as a lawyer's attempt to try and plug a hole in the evidence that there was little to no evidence that Karen had ever agreed to deal with the Property so as to provide an interest for Anabel and that the two pieces of

evidence regarding Karen returning to the hospital room in March 2016 and to being present throughout the telephone call with M&M on 31 May 2016 were inserted accordingly. As I have said, the latter does not in the event add anything and the second I have found did not happen but if I am wrong, falls far short of proving Karen agreed to give Anabel a 37.5% share in Kim's 71% share gifted under the 2016 Will. Karen's evidence was unequivocal and, I have found, reliable.

122. Finally, I consider that, if I am incorrect and something was conveyed to Karen it lacked the certainty of subject matter (and/or object) in that it was unclear what portion of Kim's interest in the Property was subject of any trust in favour of Anabel or as to when it would vest in Anabel (at least two possible ages of Anabel being possible). These uncertainties reinforce the view there was no intention to impose any trust.

123. It follows that the claim must be dismissed. I invite Counsel to agree a minute of order so far as they are able. If there are any consequential matters that cannot be agreed there will have to be a further short hearing. The parties should approach the court in that respect if they are unable to agree a full minute of order dealing with all matters by noon on 14 December 2021.