Neutral Citation Number: [2022] EWHC 2843 (Ch)

Case No: PT-2022-000088

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

Rolls Building
Fetter Lane
London, EC4A 1NL

10 November 2022

Before :

SIR JULIAN FLAUX
THE CHANCELLOR OF THE HIGH COURT

- -

Between :

STEPHEN DAVID MARGULIES	**Claimant**
- and -	
MARCUS JONATHAN MARGULIES	**Defendant**

- -
- -

The Claimant in person
Conall Patton KC and James Gardner (instructed by **Peters & Peters Solicitors LLP**) for the **Defendant**

Hearing dates: 25 and 26 October 2022

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Approved Judgment

This judgment was handed down remotely at 10:00 on 10 November 2022 by circulation to the parties or their representatives by email and by release to The National Archives.

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Sir Julian Flaux C :

Introduction

1. The claimant and the defendant are brothers. The present litigation is the sixth set of proceedings between them concerning the estate of their late father Alexander Margulies, (to whom I will refer as "Alexander") who died in May 1991. The most recent previous proceedings ("the 1997 proceedings") were issued in November 1997 by the claimant (to whom I will refer as "Stephen") against the defendant (to whom I will refer as "Marcus") alleging that Marcus inherited Alexander's residuary estate subject to a secret trust in Stephen's favour. That claim was struck out as bound to fail by Carnwath J in 1998 and his decision was unanimously upheld by the Court of Appeal (Nourse, Auld and Tuckey LJJ) in March 2000.

2. The present claim was first intimated by Stephen in June 2020, when he sent Marcus draft Particulars of Claim alleging that Alexander expressly declared a trust of funds in an account with UBS ("the UBS account") in Switzerland "in late 1987/early 1988 if not before" in favour of Stephen. Marcus's solicitors pointed out that such a claim was barred because it was the same as the claim in the 1997 proceedings which had been struck out in 1998. The claim actually pleaded by Stephen in the Particulars of Claim issued and served in February 2022 was put somewhat differently, it being alleged at [33] that: "the particular arrangement or mechanism which resulted in assets being held by Marcus on trust for Stephen or being such that Marcus had a fiduciary power in relation thereto in Stephen's favour is not known to Stephen at this stage." Furthermore, whereas the 2020 draft pleading had alleged that, when the UBS account was closed in August 1990, the monies were retained by Alexander and passed to Marcus on Alexander's death, the pleading as served pleads an inference that, upon closure of the UBS account, the monies were directly transferred to Marcus before Alexander's death.

3. By an Application Notice dated 30 March 2022, Marcus applies to strike out the Particulars of Claim pursuant to CPR3.4(2)(a)-(c), alternatively for summary judgment in respect of the claim under CPR24.2. At the hearing of the application, Marcus was represented by Mr Conall Patton KC and Mr James Gardner, instructed by Peters & Peters Solicitors LLP. Stephen represented himself, although he had the assistance of a "McKenzie friend", Mr Richard Langley, a partner in the firm BDB Pitmans who has been Stephen's solicitor for a number of years. Towards the end of the hearing, Stephen explained that he had represented himself because only he knew his way round all the material before the Court. However, although he presented his case with great politeness and charm, he made a number of fairly outrageous submissions and allegations, particularly about Marcus and his former solicitor, Mr Martin Paisner of Paisner & Co. As I pointed out to Stephen, if he had been legally represented, I would not have permitted legal representatives to advance a number of these submissions and allegations, so that the Court gave Stephen considerable leeway.

The background

4. I will set out a summary of the background in so far as it is relevant to this application. In relation to events prior to the Court of Appeal hearing in December 1999, a more

detailed summary of the factual background and the material events is set out in the judgment of Nourse LJ at [7] to [47] and [67] to [77].

Events prior to the Court of Appeal hearing

5. Alexander was born in 1902 and his wife Stella, whom he married in 1935, was born in 1907. They had three children, Marcus born in 1942, Stephen in 1945 and Judith in 1948. Alexander built up a successful watches business, Time Products plc. Marcus spent all his working life with the company, becoming chairman in 1976. Stephen originally joined the company in 1966 but left of his own volition after six months. He has not worked for the company since.

6. Alexander and Stella made wills in 1971 which provided for their net estate to pass to their three children in equal shares. They both made new wills in 1978. In subsequent proceedings, to which I refer in more detail below, Rattee J found that Stella did not have testamentary capacity at that time (on the basis that she was already suffering from Alzheimer's disease) and ordered that her 1971 will be admitted to probate. However, although Alexander's 1978 will revoked his 1971 will, as Nourse LJ said at [14] of his judgment, at that stage in 1978, it remained clear that Alexander intended that Stephen should share equally with Marcus and Judith. Nonetheless, as Nourse LJ recorded at [16], Mr Martin Paisner (who had become Alexander's solicitor on the death of his father Leslie Paisner, who was Alexander's closest and oldest friend) gave evidence in the probate action before Rattee J which was broadly speaking accepted that, from June 1978 onwards, Alexander and Stella became increasingly concerned about Stephen's lifestyle and the influences on him in Peru, where he was then living. They had built up a valuable collection of works of art. Alexander was evidently concerned that any part of the collection should end up in Peru, which he regarded as an unsuitable jurisdiction. At that time, Marcus was married to his first wife Sally. Judith was married to Cesare Sacerdoti.

7. On 18 July 1980, Alexander wrote a manuscript letter addressed "To my children" which read:

> "To the Extent of all Interests I have abroad at the Date of my Death, I give the same to my son Marcus absolutely without any form of Trust or Obligation on him."

Stephen relied on and made submissions to me about this letter, but it is to be noted that submissions were made about it to the Court of Appeal by Stephen's then leading counsel, Mr Terence Etherton QC. I will return to those submissions in more detail below.

8. On 16 April 1982, Alexander made a new will revoking all previous wills and codicils and appointing Marcus and Mr Paisner as executors and trustees of the will, which gave the whole of his net estate to his trustees upon trust for Marcus absolutely. With the papers was a note in Mr Paisner's handwriting made at the time which read:

> "Executors. MJM / MDP Everything to Marcus. Private instructions to him to give whatever he thinks appropriate to Stephen and/or Grandchildren."

9. On 31 January 1984, Alexander wrote the first of two letters on which Stephen particularly relied before the Court of Appeal, the text of which is set out in full at [26]

of Nourse LJ's judgment so it is not necessary to repeat it here. The second letter on which Stephen particularly relied was the "Dear Children" letter dated 11 February 1986 but not communicated to any of the children until after Alexander's death. The passage on which Stephen particularly relied before the Court of Appeal and before me is quoted at [30] of Nourse LJ's judgment.

10. On 18 November 1987, Alexander wrote a third letter, addressed to Marcus, on which he particularly relied before the Court of Appeal, the relevant passage in which is set out by Nourse LJ at [32]. There was an issue before the Court of Appeal as to whether the 1987 letter was ever intended to be acted upon and, although Nourse LJ said at [92] that it was difficult to see why it was not intended to be acted upon, he went on to say that if the outcome of the appeal had depended on that question (which he held it did not), it could not have been satisfactorily determined without a trial.

11. By this stage Stephen had returned from Peru and, in August 1988, he married his wife Judith in Monaco. As Nourse LJ recorded at [34], between the civil wedding on 5 August and the religious wedding on 28 August 1988, Stella was given a power of attorney over the UBS account on 16 August 1988. Nourse LJ goes on to say:

> "By that time she must have been known to everyone as being wholly incapable of exercising such a power. But Mr Etherton submitted that the dates were significant, and that it was well possible that the granting of the power to the mother, with her well known affection for Stephen, was intended to associate her with a wedding gift to him, perhaps to match the one that had been made to Judith from the same source in 1976. That, said Mr Etherton, would be further evidence of the father's intention to treat Stephen equally with his other children."

The reference to the gift in 1976 was to the fact that, at that time, Alexander had made a gift to Judith and Cesare from funds held outside the United Kingdom, probably in Switzerland, to which Nourse LJ had referred in [9].

12. Stella died on 16 April 1990. As Nourse LJ recorded at [37], Alexander then claimed that, at the end of 1979 or the beginning of 1980, she had destroyed her 1978 will with the intention of revoking it, so that she had died intestate. Stephen entered a caution against the grant of letters of administration to Alexander and, on 15 October 1990, Stephen commenced the first set of proceedings, the probate action, in which, with the support of his sister Judith, he sought to propound Stella's 1971 will. Alexander died on 2 May 1991. Probate of his 1982 will was granted to Marcus and Mr Paisner on 4 December 1991.

13. In the probate action, Marcus contended that his mother's 1971 will had been revoked by her 1978 will, which she had then destroyed with intent to revoke it, so that she had died intestate. Had she done so, her share of the art collection which was the only substantial asset in her estate would have passed to Alexander and, under the terms of his will, exclusively to Marcus.

14. Marcus gave evidence in the trial of the probate action before Rattee J. Stephen relied in the 1997 proceedings on several passages in that evidence which Nourse LJ sets out at [39] to [41]. Later in his judgment Nourse LJ analysed that evidence at [76] and [77]. In

view of the fact that, in his submissions before me, Stephen relied on Marcus's evidence as somehow demonstrating that his father had given instructions to Marcus in imperative form to look after Stephen, it is necessary to quote that analysis in full:

> "76. Next, I must consider Marcus's evidence in the probate action. I start by expressing my belief, from everything I have seen and heard of this ill-starred family, that Marcus's statement that the father had a love for Stephen but that they just could not get on ("frustration" would be nearer the mark) is likely to be as accurate as any other that might be ventured. The most material points which emerge from Marcus's answers in cross-examination are the following. First, at the time the father made his 1982 will he did not intend to cut Stephen out totally from his estate; being very worried about Stephen, he wanted to protect the family assets and that was the reason for cutting him out as a residuary beneficiary. Second, the father did give instructions to Marcus; they were oral; they changed; there were various later conversations with Marcus on how the father wanted his estate dealt with and on one occasion, Marcus believed, with Mr Paisner also. Third, the father charged Marcus to look after Stephen in certain respects; that Marcus promised to do; he assured the father that he would always look after Stephen. Fourth, the father gave Marcus carte blanche; it was a request. Fifth, the father was the sort of man who never liked making decisions.
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> 77. I agree with the judge that it is not easy to interpret Marcus's evidence out of context. His earlier answers, sc. "I did have instructions" and "he charged me to look after Stephen", are suggestive of the father's language having been in imperative form. But later answers, sc. "my father gave me carte blanche" and "It was a request", are strongly suggestive of the contrary. Again there is nothing in any of Marcus's answers to suggest that any fiduciary obligation that there may have been related to one third of the father's estate."

15. In his judgment dated 15 July 1993, Rattee J found that Stella had not had testamentary capacity either when the 1978 will was made or when it was allegedly destroyed in late 1979 or early 1980. Accordingly, he ordered that the 1971 will be admitted to probate. In his submissions before me, Stephen relied on the fact that Rattee J had made serious criticisms of the conduct and evidence of Marcus and Mr Paisner, as had Johnson J in proceedings in the Family Division by Marcus's ex-wife Sally to set aside a consent order for ancillary relief, on the grounds of non-disclosure. It is to be noted that these criticisms were relied on by Mr Etherton QC before the Court of Appeal as recorded by Nourse LJ in [61].

16. Nourse LJ sets out a summary of the other earlier proceedings at [44] to [47] of his judgment. It is not necessary to repeat any of that here. It was in that earlier litigation that it became known that Judith and Cesare had received a gift from Alexander of funds held in certain Swiss bank accounts and this seems to have prompted Stephen to make enquiries of various Swiss banks. After Carnwath J struck out the 1997 proceedings in

November 1998 and before the Court of Appeal hearing in December 1999, Stephen received a letter dated 26 January 1999 from UBS in response to his correspondence. In that letter, UBS said that Stella had exercised a power of attorney over two numbered accounts. One was opened on 17 September 1952. The power of attorney was granted on 17 November 1970 and the account was closed on 8 May 1979. The second account was opened on 1 March 1979. The power of attorney was granted on 16 August 1988 and the account closed on 31 August 1990. UBS was unable to provide any further information about the accounts without the necessary legitimisation.

17. In May 1999, Stephen issued a Request for Further Information under CPR Part 18, in which he sought details from Marcus of any other Swiss bank accounts held by Alexander. In his witness statement in support of that application, Stephen said that he was seeking information about whether Alexander had assets in Swiss bank accounts which he intended for Stephen. He put forward the theory set out in his pleading in the present proceedings that the power of attorney over the UBS account granted to Stella in August 1988, given that she was not capable of exercising it, was so that she could be symbolically associated with a future payment to Stephen of funds from that account. He also contended in the witness statement that the Swiss account(s) were a vehicle for tax avoidance or evasion and complained that Marcus was declining to say whether there had been a similar gift to him from the Swiss accounts to that made to Judith in 1976, points he is making in the current proceedings, so that these are not new points. However, that application for further information was refused by Master Bowles on 16 November 1999.

The Court of Appeal hearing

18. In the Skeleton Argument for the Court of Appeal on behalf of Stephen, Mr Etherton QC addressed a point Carnwath J had made which was that Alexander was someone who was used to acting on legal advice and that, if he had wanted to make legally binding provision for Stephen, there is no reason why it would not have been done openly and in appropriate legal form, as this was not one of those cases where, for example, someone was setting up a secret trust for an ex-mistress which they did not want to be public knowledge.

19. Mr Etherton QC submitted, at [9] of the Skeleton, that the judge had paid no regard to the evidence of the general conduct of Alexander and Marcus. He contended that Alexander was concerned generally with escaping tax, resorting to unlawful tax evasion schemes if necessary. He referred to Marcus's admission in cross-examination in the probate action that he and his father were agreeable for purported gifts of paintings to be made to Marcus and not reported to the Inland Revenue. He also referred to an attempt to evade estate duty and stated: "persistent enquiries on the part of Stephen have now revealed that the Testator may have had several secret bank accounts in Switzerland." He concluded on this point:

> "The effect of the Judge's decision is to accept at face value the evidence and explanations of Marcus/Martin Paisner and those supporting them, untested by cross-examination and without disclosure of documents. In the light of the strong criticism of the credibility and integrity of Marcus and Martin Paisner expressed by judges in other High Court proceedings, this does not appear to be a just approach."

These submissions bear a striking resemblance to those advanced by Stephen to this Court.

20. At [10] of the Skeleton Mr Etherton QC said:

> "Stephen's case, in a nutshell is that Marcus/Martin Paisner, taking advantage of Stella's disability, persuaded the Testator that, in the interests of flexibility and tax avoidance/evasion, his estate should nominally be left to Marcus under his will…but without any intention on the part of the Testator to prejudice the entitlement of Stephen/Stephen's family…The rationale in nominally leaving everything to Marcus is that he was someone whom the Testator trusted to manipulate matters so to arrange matters as best possible to avoid/evade as much tax as possible…"

Again essentially the same submission was advanced by Stephen to this Court.

21. In the Court of Appeal Skeleton of Marcus's then leading counsel, Mr Geoffrey Vos QC, it was contended that the allegations in [9] of Mr Etherton QC's Skeleton about Marcus's and Mr Paisner's conduct and motivation were irrelevant because the issue was whether the judge had been right to conclude that the allegations in the Particulars of Claim, based on the documents relied upon, did not provide an arguable basis for a secret trust. In relation to the allegation at [10] of Mr Etherton QC's Skeleton, Mr Vos QC submitted that this allegation was unpleaded and unsupported by evidence, so it should be disregarded. At the Court of Appeal hearing, Mr Vos QC withdrew the objection to Mr Etherton QC advancing submissions about the Swiss bank accounts and that tax evasion was the reason for the secrecy, notwithstanding that they were unpleaded.

22. The hearing in the Court of Appeal then took place between 13 and 15 December 1999. Mr Etherton QC made extensive oral submissions about those matters. He referred to what he described as the obvious inference from the timing of the power of attorney in August 1988 that the UBS account was in some way designated for Stephen, precisely the same point as Stephen was making in his submissions to this Court. Mr Etherton QC's submission about the 1980 letter is recorded by Nourse LJ at [19]:

> "That letter ("the 1980 letter") did not come to the notice of Stephen or his advisers until it was produced by Marcus in November 1999, shortly before the hearing in this court. Mr Paisner has said in evidence that the father gave it to him and told him to keep it for Marcus in case he should ever need it. Shortly after the father's death, he gave it to Marcus, who returned it to him indicating that it had become irrelevant. Mr Paisner kept it among his personal possessions until mid-September 1999 when he returned it to Marcus. Mr Etherton suggested that the 1980 letter was another instrument of potential tax evasion, on which the Swiss banks where it is now known that accounts were maintained (see below) might have been prepared to act in some way."

Again, a very similar theory about the 1980 letter was put forward by Stephen in his submissions to this Court.

23. Later in his submissions, Mr Etherton QC referred to the "critical theme" of Stephen's case, as being "administrative arrangements made to maximise flexibility and maintain secrecy in order to evade taxes at the same time as Marcus's desire to advance his own interests and control of the family's assets" (a point repeated by Stephen before me). Mr Etherton QC complained (as does Stephen now) about the limited information Stephen had been able to obtain from Swiss banks about the accounts and how they would not know until disclosure and a trial whether Marcus had Swiss accounts and, if so when.

24. Mr Etherton QC went on to pose the question why, between 1980 (with the codicil to his 1978 will) and 1982 when Alexander made the 1982 will, the theme or policy of his life of treating his children equally changed. He said:

> "What was it that had happened that the father of a Jewish household should have cut him out completely? The learned judge was never able to answer that question because there is no answer. The other parties have declined to give an answer to that. But the reality is that absolutely nothing, objectively, had happened between 1978, 1980 and 1982 to warrant any disinheriting of Stephen, not out of a small sum of money, but out of a very substantial fortune."

25. As Mr Patton KC submitted, this was not a minor or peripheral point before the Court of Appeal, but part of Mr Etherton QC's central answer to Carnwath J's question as to why Alexander would have provided for Stephen in secret which was:

> "the necessity to manipulate the estate to satisfy the marriage letters, to keep the Swiss estate private from the eyes of the Revenue and to give Marcus maximum flexibility."

The same rhetorical question was repeatedly posed by Stephen in his submissions to this Court, as was the answer that this was all manipulation and flexibility for the purpose of cheating the Inland Revenue.

26. Mr Etherton QC returned to this theme of secrecy in order to evade tax in his reply submissions:

> "…it was not the secret trust in itself which created a fiscal advantage; it was the perpetuation of the ability to hide from the Revenue the Swiss assets. So when Mr Vos said: 'Well how would this secret trust assist…because you pay just as much [tax] on assets under a secret trust as not" - it totally misses the point. The point of the secrecy is…so long as you can hide the Swiss assets from the Revenue, then there would be overall a tax advantage."

The Court of Appeal judgment

27. Having set out the events up to the death of Alexander and a summary of the previous proceedings, at [60] Nourse LJ set out a summary of Stephen's case before the Court of Appeal as to the reason for secrecy (which I have set out in more detail above) stating:

> "An important consideration in the judge's mind was that there was no apparent reason for secrecy. As the case appears to have been put below, that was both a reasonable inference for the judge to have made and a telling point in Marcus's favour. However, at the start of his reply in this court Mr Etherton repeated the assertion he made in opening that tax evasion was the key to understanding what had happened in this case. He said that the reason for making Marcus the father's sole beneficiary was to give him the maximum flexibility in avoiding and, if necessary, evading the payment of tax. That in turn was the reason for the secrecy. Mr Etherton relied, amongst other things, on the 1966 and 1967 marriage gift letters, the 1980 letter and three recently discovered Swiss bank accounts maintained by the father or Marcus, the details of which remain obscure. For myself, I do not see the matter in that way. While there is certainly evidence of prospective and perhaps of actual tax evasion, and while not discounting the possibility that a different picture might emerge at a trial, I agree with Mr Vos QC, for Marcus, that the available evidence as a whole does not establish any real possibility of a causative link between tax evasion, actual or prospective, and a secret trust in favour of Stephen, alternatively in favour of him and his family."

28. At [64] Nourse LJ stated that it was accepted on all sides that the applicable principles in relation to secret trusts were set out by Peter Gibson LJ in *Kasperbauer v Griffith* (1997) as follows:

> "… the authorities make plain that what is needed is (i) an intention by the testator to create a trust, satisfying the traditional requirement of three certainties (that is to say certain language in imperative form, certain subject-matter and certain objects or beneficiaries); (ii) the communication of the trust to the legatees, and (iii) acceptance of the trust by the legatee, which acceptance can take the form of silent acquiescence. The crucial question in the present case is whether there was that intention and, as Brightman J said in *Ottoway v Norman* [1972] Ch 698, 711, it is an essential element that the testator must intend to subject the legatee to an obligation in favour of the intended beneficiary. That will be evidenced by appropriately imperative, as distinct from precatory language."

29. Nourse LJ then went through the evidence in detail. At [83] he recorded criticisms made by Mr Etherton QC of Mr Paisner's failure to disclose originals of the various letters earlier than he did, which Nourse LJ said was entirely justified. He noted that Mr Etherton QC relied upon this partly in support of broader submissions to the effect that this failure demonstrated: "that Mr Paisner (and inferentially Marcus) had shown themselves to be thoroughly unreliable and that the action could not fairly be disposed of without

discovery." At [84] Nourse LJ said in normal circumstances those broader submissions would have been of great force but the Court had an affidavit from Miss Lesley Sharpe, an assistant solicitor at Lovell White Durrant, the solicitors for Mr Paisner and Paisner & Co, detailing the extensive review conducted by her firm of some 51 Hays storage boxes of files from Paisner & Co. Nourse LJ quoted her conclusion:

> "The review of the files has now been completed. It has been carried out with great thoroughness on a page by page basis. It has occupied over 200 hours of my time. As a result of this review exercise we have found no further documents of a similar nature to the 1984 or 1987 letters of wishes nor any further documents which might be said to indicate an intention by Alexander to create a secret trust in favour of Stephen Margulies or to throw a different light on the documents already before the court."

30. He went on to say at [85] that, on the basis of her evidence the Court could be satisfied that full discovery had been given in relation to all documents on the files of Paisner & Co. Nourse LJ noted that Mr Etherton QC objected that the Court could not be sure that there were not other documents like the 1980 letter amongst Mr Paisner's personal possessions and that no discovery had been given by Marcus, matters to which he returned later in the judgment.

31. Nourse LJ then dealt with the issue as to whether the 1987 letter was intended to be acted on. I have already referred at [10] above to what he said about that. He then set out at [94] to [99] his conclusion as to why Stephen's claim was bound to fail and the appeal fell to be dismissed:

> "94. I return to the first requirement of a secret trust, as stated by Peter Gibson LJ in *Kasperbauer v. Griffith* . What is needed is an intention by the testator to create a trust, satisfying the traditional requirement of the three certainties: certain language in imperative form; certain subject-matter; and certain beneficiaries. As to these, all of which must be established, I proceed on the footing that an arguable case has been shown in regard to certainty of beneficiaries, at any rate in the shape of Stephen himself.
>
> 95. In regard to certain language in imperative form, I have said that it is possible to read the 1982 note as contemplating instructions in imperative form and that the language of the 1984 letter is in that form. On the other hand, the 1986 letter is suggestive of language in precatory form and the language of the 1987 letter, if it was intended to be acted upon, is simply incapable of imposing any fiduciary obligation on Marcus. Moreover, Marcus's evidence in the probate action, though initially suggestive of the father's language having been in imperative form, is later strongly suggestive of the contrary. Viewed as a whole, this material falls far short of establishing that any relevant communication made by the father to Marcus was expressed in certain language in imperative form.

96. I turn to certainty of subject-matter. Here Mr Etherton's submission was that there was no doubt. The subject-matter of the trust was one third of the father's estate. That submission can only be based on the father's manifest intentions up to 1982 and an assumption that, notwithstanding the provisions of his 1982 will, his intention remained the same thereafter. But how can such an assumption be justified? The plain fact is that the 1982 will put an end for ever to the principle of equality. So if we are to find an arguable case of a secret trust which preserved that principle, we must look for evidence of it elsewhere.

97. Search as we may, the evidence is just not there. I have been unable to find any indication that any trust or fiduciary power which may have been intended was intended to extend to one third of the father's estate. There is no such indication in the 1982 note; nor in the 1984 letter, which related only to paintings from the Collection and to paintings which were never specified. Moreover, for the reasons already stated, the 1984 letter serves only to confirm the father's intention to make Marcus the sole beneficiary under his 1982 will. Then take the 1986 letter and suppose that it refers to wishes in imperative form; again there is nothing to show that they were expressed in relation to one third of the father's estate. Similarly, with the 1987 letter, if it was intended to take effect, and Marcus's evidence in the probate action.

98. In my view Stephen has failed to establish any arguable case as to certainty of subject-matter. Indeed, everything points to any instructions given or wishes expressed by the father as having been entirely unspecific as to the property to which they were to relate. That in itself is probably enough to defeat the claim for a secret trust or fiduciary power. But it must be added that the lack of specificity inevitably reflects on the instructions or wishes themselves, enforcing the conclusion that they cannot have been given or expressed in language in imperative form. In holding that Stephen has failed to establish any arguable case as to that point also, I emphasise that even if the 1987 letter was not intended to take effect my views would be the same.

99. Adopting his approach that the father was someone who was well used to acting with legal advice and that no reason for secrecy has been shown, I have therefore come to the same conclusion as Mr Justice Carnwath. Stephen having failed to establish an arguable case that the father imposed or intended to impose a trust or any other fiduciary obligation in his favour, or any fiduciary obligation of any kind, the action is bound to fail. That I have arrived at that conclusion by a longer route than the judge is out of a recognition of the increased responsibility we bear in this court in disallowing the action to go forward and out

> of a consideration for the intensity of Stephen's feelings as communicated to us through Mr Etherton's argument…"

Events since the Court of Appeal hearing

32. It is clear that since the Court of Appeal hearing, Stephen has continued investigations into the UBS account and has convinced himself that he has some equitable entitlement to the funds in the account and that Marcus is concealing the true position to cheat Stephen out of that entitlement. His investigations are set out in detail in his witness statement in opposition to this application, in the Particulars of Claim and in his Skeleton Argument. His contentions centre round a British Virgin Islands ("BVI") company called Dulwich Inc which was set up in 1988 around the time that Stella's power of attorney over the UBS account was granted and of which he has some evidence from an employee of Citco, the BVI corporate management company which incorporated Dulwich Inc, that Alexander was the beneficial owner. It is to be noted that it is apparent, from a Notice of the Completion of Winding Up and Dissolution dated 4 February 1997 from the liquidator to the BVI Registrar of Companies, that Dulwich Inc had been wound up and dissolved by that date. The company was struck off the register.

33. In July and August 2006, Mr Langley of Bircham Dyson Bell, acting for Stephen, wrote to both Eversheds acting for Marcus and to Mr Paisner asking a series of questions about Dulwich Inc. Eversheds replied on 21 July 2006 that Marcus had known nothing of Dulwich Inc until seeing their letter and was not involved in its establishment. Eversheds stated that a company called Dulwich Overseas Limited was incorporated in the BVI on behalf of Marcus' ex-wife (i.e. Ingeborg ("Inge") Margulies) which held certain assets including shares in Time Products plc. On 10 August 2006, Berwin Leighton Paisner LLP wrote on behalf of Mr Paisner, stating that he had absolutely no knowledge of Dulwich Inc. Subsequent correspondence ensued between Bircham Dyson Bell and Eversheds, with the latter writing on 11 May 2007 that Marcus was not prepared to indulge Stephen further in a series of requests for information.

34. In a witness statement dated 25 March 2022, Marcus confirmed that he had never heard of Dulwich Inc, as distinct from Dulwich Overseas Limited, save as a result of the correspondence with Stephen and his solicitors. In a witness statement also dated 25 March 2022, Mr Paisner refers to arranging the acquisition of an off the shelf BVI company, Dulwich Overseas Limited, by Inge, who transferred her shareholding in Time Products plc into that company. He confirms that he too had never heard of Dulwich Inc, save as a result of the correspondence with Stephen and his solicitors.

35. Stephen relies upon a series of conversations he had between 2003 and 2006 with Inge in which she said, amongst other things, that Alexander told her that Marcus was to deal with Stephen fairly after his death and would give him his share. However, what is clear is that she has no personal knowledge of Alexander's intentions either generally or specifically in relation to the UBS account. In an attendance note of Mr John Wood of Herbert Smith, then Stephen's solicitors, of 29 March 2004, it is recorded:

> "IM did not know specifically about AM's estate or wills which he made. However, she did think that AM had said to MJM words to the effect of 'Marcus you will do what I told you to do and I trust you.' Generally, IM was not very precise on this point and had no documents to back this up."

36. Stephen also relies on a conversation with Inge on 10 November 2005 when she reported on what Baron J had asked Marcus' counsel at a hearing the previous day in the divorce proceedings: "but is this your client's money or is it his brother's?" His Note of the conversation records that Inge did not explain the context in which the comment was made. Stephen sought to investigate this further with Mr Raymond Tooth of Sears Tooth who acted for Inge in the divorce proceedings. Mr Tooth wrote on 18 September 2006 that he had advised his client not to voluntarily give information about confidential documents in those proceedings. At a much later stage in July 2017, Mr Langley made a Subject Access Request to Mr Tooth under section 7 of the Data Protection Act 1998, seeking information as to whether Stephen's personal data had been processed by Sears Tooth and, if so, the nature of that data. Mr Tooth replied on 3 October 2017 that for the purposes of the Act they were a Data Controller and the data held was obtained during the course of legal proceedings (obviously the divorce proceedings). Accordingly, they relied on the statutory exemption from disclosure of data that is subject to legal professional privilege.

37. In the meantime, Stephen also sought copies from HMRC of the Inland Revenue accounts for Alexander's estate and any corrective accounts filed and details of the gross and net values of the estate. HMRC refused to disclose that information and that decision was upheld on appeal by the Information Commissioner's Office in 2009.

38. Soon after the Court of Appeal hearing, on 22 June 2000, Stephen made a complaint to the then Office for the Supervision of Solicitors ("OSS") about the conduct of Mr Paisner. By a decision of 23 June 2003, the OSS decided to reprimand Mr Paisner severely. Kingsley Napley on behalf of Stephen then complained to the Legal Services Ombudsman that the case should have been referred to the Solicitors Disciplinary Tribunal ("SDT"). At the recommendation of the Legal Services Ombudsman the Reconsideration Panel of the Law Society reconsidered the decision of the OSS and, by a decision dated 6 July 2005, decided to refer the case to the SDT. Mr Paisner appealed against that decision and, by a decision of 17 November 2005, the Adjudication Panel allowed his appeal.

39. Stephen referred to and relied upon that decision of the Adjudication Panel in his submissions to this Court. At [2] the Panel set out the allegations made by Stephen against Mr Paisner. At [3] the Panel said that due to the passage of time they concentrated on four matters which they considered the most serious:

> "(i) the criticism of Mr Paisner by two Judges acting independently (Rattee J in July 1993 and Johnson J in December 1994), despite neither Judge having referred their criticisms to the Law Society;
>
> (ii) the circumstances surrounding the taking of instructions for and the preparation of Mrs Stella Margulies' will in 1978 and its subsequent delivery to Mr Alexander Margulies, apparently without her specific instructions;
>
> (iii) the preparation of the Power of Attorney given by Mrs Stella Margulies and its subsequent use to effect the transactions involving 2 and 4 Sidmouth Road; and

> (iv) the possibility that Mr Paisner misled the Inland Revenue about the extent of the late Alexander Margulies' assets when preparing the Probate papers following his death in 1991 (with particular reference to the alleged existence of Swiss or other overseas funds)."

40. In relation to (i) to (iii) the Panel found that there was prima facie evidence of professional misconduct as alleged so that Mr Paisner had acted in breach of 21.1 and 21.2 of the Guide to Professional Conduct (1974) and Principle 14.01 of the Guide to Professional Conduct of Solicitors (1990) and Rule 1 of the Solicitors Practice Rules 1990. The Reasons set out at [5] focused on the fact that he should have been aware of Stella's capacity, which was the criticism levelled against him by Rattee J. The Panel concluded, on that basis, that his overall conduct constituted conduct unbecoming a solicitor. Importantly, in the light of the case now put forward by Stephen, the Panel was not satisfied that there was prima facie evidence of professional misconduct in respect of the allegation at [3(iv)].

41. Overall, the Panel considered that if [3(i) to (iii)] had been determined at an earlier stage, it is likely that a referral would have been made to the SDT for a proper hearing of the evidence, but they were satisfied, upon consideration of the evidential and public interest tests applicable to all decisions to refer to the SDT after 1 June 2004, that it was no longer in the public interest to make a referral. Accordingly they rescinded the decision of the Reconsideration Panel and substituted a decision to reprimand Mr Paisner severely in respect of the matters referred to at [3(i) to (iii)].

42. Stephen also relied on a discussion he had with his cousin Willy Margulies on 16 November 2012 when Willy (now deceased) was 91 years old. Stephen's note of the conversation reveals that Willy was initially very reluctant to talk about the matter, only agreeing to do so on the strict understanding that Stephen said nothing until after his death. Stephen agreed to this reluctantly. Willy said he wanted nothing more to do with Margulies family squabbles. He said if Stephen did talk about it before his death, he would deny having spoken to him. Willy said that he recalled Mr Paisner talking to him about Alexander's change of will in 1982 and briefly checking what Mr Paisner had told him with Alexander himself. Willy was clear in his own mind that the reason for the change was an extremely serious problem with Cesare, to whom Alexander was no longer talking, and the change had nothing to do with Stephen. Willy said Alexander had stated that he had given Marcus and Mr Paisner strict instructions that Stephen was to receive his full share. Willy refused to put any of this in writing.

43. So far as the UBS account itself is concerned, Stephen has been in regular contact with UBS and sought information from them. Over the years, they had agreed to preserve any documents they held. In both January 2013 and September 2018 he made serious allegations to the effect that there had been sanitisation of files at the behest of Marcus, so that the documents in the files no longer reflected his "share". On 21 March 2019, UBS wrote to Stephen pointing out that they had invested a great deal of time and effort investigating and replying to his requests of the previous 20 years, but they had thoroughly examined his allegations again. They reminded him of the strictness of Swiss banking secrecy laws, which prohibit Swiss banks from disclosing customer-related information to third parties, unless a third party provides satisfactory documentary proof that they are the legal representative of the client or unless there is an order of a Swiss court, which may include an order made in response to a foreign authority's request for

assistance. Their research showed that they did not have documents on record relating to Stephen's entitlement to receive information on Alexander's estate which would allow them to release information to him, if any. Previous correspondence with the Bank showed that he was only an heir of his late mother Stella. No order to disclose had been made through judicial assistance channels.

44. On 27 November 2019, Stephen's solicitors wrote to Marcus saying they were instructed to apply to the High Court for a letter of request under the Hague Convention, requesting that the Swiss Court order UBS to disclose a copy of the power of attorney granted to Stella in August 1988 and any associated documents explaining the circumstances in which it was granted and any documents the Bank had retained which specifically identified Stephen. The letter enclosed a draft witness statement of Stephen's in support of the proposed application. That referred to the UBS records as: "possibly the only remaining source of independent information from which to obtain the necessary evidence to commence a claim". The draft witness statement recorded Stephen's belief that Alexander had created a trust over the contents of the UBS account and instructed Marcus and Mr Paisner that they were to hold it for Stephen's benefit.

45. In response, Peters & Peters for Marcus stated that the jurisdiction of the Court in relation to letters of request under the Hague Convention was confined to requests for evidence for use at a trial which was directly relevant to the issues in the case. They pointed out that there were no proceedings and no forthcoming trial. In the event, no application was made. Instead on 8 June 2020 Stephen wrote to Marcus enclosing the draft Particulars of Claim to which I referred at [2] above.

46. [24] of that draft pleading quotes a letter Alexander wrote to Stephen on 16 February 1988 about letting bygones be bygones and starting afresh. [25] then pleads that, if not before, then within weeks of that letter, Alexander gave Marcus instructions that he intended Stephen to benefit from the funds standing to the credit of the UBS account and/or that Stephen should receive such benefit through Dulwich. In [32], Stephen refers to the closure of the UBS account on 31 August 1990 when his father was gravely unwell. He said that he was not sure whether the credit on the account was transferred to Alexander, Dulwich or Marcus. He posits three possibilities:

(1) That if the funds were transferred to Alexander he held them on trust for Stephen until his death, at which point Marcus received the legal title to the funds under Alexander's will, but subject to the trust of which Marcus became the sole trustee;

(2) If they were transferred to Dulwich, Alexander continued to hold the share capital of that company on trust for Stephen until his death at which point Marcus received the legal title to the shares under the will, but subject to the trust of which Marcus became the sole trustee;

(3) If they were transferred to Marcus, he took them subject to Stephen's beneficial interest in them and thus became sole trustee of the trust on 31 August 1990.

47. In a detailed letter of 17 July 2020, Peters & Peters pointed out why they contended that this proposed claim was precluded by the doctrines of res judicata or abuse of process. They pointed out that the claim alleges that Marcus holds property received from Alexander subject to an express trust in Stephen's favour, which was identical to the cause of action in the 1997 proceedings struck out by Carnwath J and the Court of Appeal.

As I have already noted at [2] above, the pleading eventually served seeks to put the matter in a somewhat different way. The alternatives at [46(1) and (2)] above] are no longer pleaded and what is pleaded at [33] which I quoted in [2] above is, in effect, the possibility referred to at [46(3)] above.

Res judicata and abuse of process: the law

48. Mr Patton KC submitted that the decision of the Court of Appeal in the 1997 proceedings created a res judicata barring Stephen's claim by way of cause of action estoppel or by way of issue estoppel. In the alternative he contended that the claim should be barred as an abuse of process, applying the principle in *Henderson v Henderson* (1843) 3 Hare 100. The law in relation to res judicata is well established, the general principles having been set out by the Supreme Court in the judgment of Lord Sumption JSC in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160 at [17]-[22].

49. A cause of action is a factual situation the existence of which entitles a person to obtain a remedy from the court, consisting of every fact which the claimant must prove: see the statement of Millett LJ in *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All ER 400 at 405, referring to the earlier authorities. As Millett LJ went on to say: "The selection of the material facts to define the cause of action must be made at the highest level of abstraction." See also per Barling J in *The Manchester Ship Canal Company Ltd v United Utilities Water Ltd* [2019] EWHC 1495 (Ch) at [78]-[80]. In considering what was the cause of action in earlier proceedings, the court can take account not just of the particulars of claim, but of all the material before it: *Spencer Bower and Handley: Res Judicata* (5th edition) [7.16].

50. A cause of action estoppel arises where the cause of action in the later proceedings is the same as the cause of action in the earlier proceedings. It is an absolute bar in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action: see *Virgin Atlantic* at [22]. Cause of action estoppel is absolute unless the earlier judgment was obtained by fraud or collusion: *Arnold v National Westminster Bank* [1991] 2 AC 93 at 104D per Lord Keith of Kinkel.

51. Issue estoppel is defined by Lord Sumption JSC in *Virgin Atlantic* at [17] as: "the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties". The determinations which will found an issue estoppel may be of law, fact or mixed fact and law: *Spencer Bower and Handley: Res Judicata* [8.04]. Issue estoppel is not absolute but as Lord Sumption JSC said at *Virgin Atlantic* at [22(3)]:

> "Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised."

52. As is stated in *Spencer Bower and Handley: Res Judicata* at [8.32]:

> "The issue estoppel stands if there was no newly discovered fact, if the party had only just realised its importance, where it was discoverable with reasonable diligence or the new fact was not sufficiently material…The exception [of special circumstances] should be kept within narrow limits to avoid undermining the general rule and provoking increased litigation and uncertainty."

53. This last point was emphasised by Lord Neuberger PSC in *Virgin Atlantic* at [62]:

> "When seeking to justify a conclusion that, though it applies, res judicata does not preclude a point being taken, it can be dangerous to invoke the observation of Lord Keith in *Arnold* [1991] 2 AC 93, 109B, that estoppel is intended "to work justice between the parties", because it is only too easy to fall back on it as an excuse for an unprincipled departure from, or an unprincipled exception to, the rule."

54. The principle of abuse of process derived from *Henderson v Henderson* precludes a party from raising in subsequent proceedings matters which were not, but which could and should have been raised in the earlier proceedings: per Lord Sumption JSC in *Virgin Atlantic* at [17]. The applicable principles, in so far as they are relevant to the present case, are helpfully summarised by Simon LJ in *Michael Wilson & Partners v Sinclair* [2017] EWCA Civ 3; [2017] 1 WLR 2646 at [48(1)-(3)]:

> "(1) In cases where there is no *res judicata* or issue estoppel, the power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated; see Lord Diplock in *Hunter's* case [1982] AC 529, Lord Hoffmann in the *Arthur JS Hall* case [2002] 1 AC 615 and Lord Bingham in *Johnson v. Gore Wood* [2002] 2 AC 1. These interests reflect unfairness to a party on the one hand, and the risk of the administration of public justice being brought into disrepute on the other, see again Lord Diplock in *Hunter's* case. Both or either interest may be engaged.
>
> (2) An abuse may occur where it is sought to bring new proceedings in relation to issues that have been decided in prior proceedings. However, there is no prima facie assumption that such proceedings amount to an abuse, see *Bragg v. Oceanus* [1982] 2 Lloyd's Rep 132; and the court's power is only used where justice and public policy demand it, see Lord Hoffmann in the *Arthur JS Hall* case.
>
> (3) To determine whether proceedings are abusive the Court must engage in a close 'merits based' analysis of the facts. This will take into account the private and public interests involved, and will focus on the crucial question: whether in all the circumstances a party is abusing or misusing the court's process, see Lord Bingham in *Johnson v. Gore Wood* and Buxton LJ in *Taylor Walton v. Laing* [2008] PNLR 11."

The parties' submissions

55. In his submissions on behalf of Marcus, Mr Patton KC drew attention to the change in the way the case was pleaded between the draft pleading sent in June 2020 and the pleading actually served, which he submitted was being done to get round the fact that the 1997 proceedings had been struck out in respect of what was the same cause of action. He submitted that even as the claim was now put, the critical fact on which it depended was that Alexander had made some declaration of trust in Stephen's favour.

56. Having cited, correctly, the applicable legal principles in relation to res judicata and abuse of process which I have summarised above, Mr Patton KC noted that, at [9] of his Skeleton Argument, Stephen said that he was not seeking to set aside the judgments of Carnwath J or the Court of Appeal for fraud, though Stephen submitted that what Aikens LJ said in *Royal Bank of Scotland plc v Highland Financial Partners LP* [2013] EWCA Civ 328; [2013] 1 CLC 596 should still be taken into account. Mr Patton KC submitted, relying upon what Lord Neuberger MR said at [38]-[40] of *Edgerton v Edgerton* [2012] EWCA Civ 181; [2012] 1 WLR 2655, that a party could not simply allege that a previous judgment had been obtained by fraud, but had to make formal application to set aside the judgment which had either been granted at the time of the second action or was before the court hearing the second action. There was no such application by Stephen in the present case.

57. In any event, Mr Patton KC submitted that the relevant test set out by Aikens LJ in *Highland Financial* at [106] (approved by the Supreme Court in *Takhar v Gracefield Developments* [2019] UKSC 13; [2020] AC 450 at [56]-[57]) was simply not satisfied in the present case:

> "The principles are, briefly: first, there has to be a 'conscious and deliberate dishonesty' in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned. Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be 'material'. 'Material' means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did. Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence."

58. Mr Patton KC submitted that there was no credible basis for saying that the Court of Appeal had been deceived into looking at irrelevant documents or that some specific further document had been suppressed. He referred to the criticism of Ms Sharpe's

partner, Mr Monty at [43] of Stephen's Skeleton, pointing out that the Court of Appeal was well aware of the division of labour within Lovell White Durrant and submitting that this allegation was illustrative of someone who had become preoccupied over many years. In the event, in his oral submissions, Stephen withdrew any criticism of Mr Monty.

59. In relation to cause of action estoppel, Mr Patton KC submitted that the causes of action pleaded in the 1997 proceedings were deliberately broad. The main plea at [12] of the draft amended Particulars of Claim was that Alexander: "gave instructions to Marcus and/or the executors as to the provision to be made for Mrs Margulies and Stephen, alternatively Stephen and his family respectively by way of secret trust. In particular, [Alexander] gave instructions that Stephen, alternatively Stephen and his family, should share in the Collection and in the other assets of [Alexander] equally as always intended." This plea did not state when the instructions were given. As Nourse LJ observed at [5], the secret trust: "could have been imposed on Marcus at any time before the father's death in 1991".

60. Alternative cases were advanced in the draft amended pleading. At [13B] it was alleged that there was a secret discretionary trust or fiduciary power of appointment, either created by the 1987 letter or created prior to that letter and evidenced by it. At [17] it was alleged, in the alternative, that Alexander's estate was held upon the trust that would have been applicable on intestacy or "upon some other trusts preventing Marcus from unconscionably retaining the entire estate".

61. As Mr Patton KC pointed out and, as I have set out in detail above, at the Court of Appeal hearing, Mr Etherton QC on behalf of Stephen was permitted to put forward an unpleaded case that the rationale for the trust being secret was to facilitate tax evasion in respect of the monies in the UBS account and any other Swiss bank accounts. He also contended that the grant of the power of attorney over the account to Stella in 1988 was a further indication that Alexander intended the funds in the account to benefit Stephen, all allegations repeated by Stephen before this Court.

62. Mr Patton KC submitted that, taking those pleaded and unpleaded cases together, as the Court should do in determining what causes of action were advanced in the 1997 proceedings, really put it beyond doubt that the cause of action now advanced in these proceedings, that there was a trust of the Swiss moneys in the UBS account or other Swiss bank accounts in favour of Stephen or that he had some equitable entitlement to those moneys, was completely subsumed within the cause of action advanced in the 1997 proceedings. Whilst it was true that the cause of action advanced in the 1997 proceedings was wider, because it included the art collection as well, this was a case of the greater including the lesser.

63. He submitted that, whilst the critical point being made by Stephen in these proceedings was that it was now being alleged that the Swiss monies went to Marcus before Alexander died and so were not in his estate when he died, that did not assist Stephen, because the key point in his case is that during his lifetime, Alexander's assets included the Swiss monies and the trust was constituted by Marcus getting the monies at some stage, which was the same case as advanced before the Court of Appeal. There was no material distinction between the case now advanced that the moneys were transferred to Marcus in August 1990, as opposed to on Alexander's death in May 1991, which was only a timing point. Whilst it was true that a trust constituted on Alexander's death would be characterised as a secret trust, which is probably not how one would characterise an *inter*

vivos transfer, that was only a legal label, which was not what mattered. What mattered was the set of facts being relied upon, which was the same as in the 1997 proceedings.

64. Mr Patton KC accepted that his Skeleton Argument was not entirely accurate in saying at [41] that a secret trust is a form of express trust, since *Lewin on Trusts* (20th edition) [3-080] states that the difficult question whether fully and half-secret trusts are express or constructive remains unsettled. He submitted, however, that it was unnecessary to decide that question, as we were not concerned with the legal label but with the question of what set of facts was relied upon, which was in substance the same as the set of facts relied upon in the 1997 proceedings.

65. If, contrary to those submissions, the present proceedings are not barred by cause of action estoppel, Mr Patton KC submitted that they were clearly barred by issue estoppel. In the 1997 proceedings, the critical first step which Stephen had to establish was that Alexander had manifested an intention to create a trust for Stephen's benefit. The Court of Appeal held that Alexander had not manifested such an intention, so that the claim failed. Mr Patton KC submitted that the critical first step in the present proceedings was exactly the same. Unless Stephen could establish that Alexander had manifested an intention to create a trust, the claim was bound to fail. The issue was the same and the Court of Appeal's reasons for rejecting the claim in the 1997 proceedings were equally fatal to the present claim.

66. Mr Patton KC then dealt with Stephen's case that the doctrine of issue estoppel did not apply because he could rely upon the exception for special circumstances, on the basis that he had obtained new evidence that was not available at the time of the 1997 proceedings. Mr Patton KC submitted that two of the matters referred to in [12] of Stephen's Skeleton Argument, namely the Swiss monies and the power of attorney granted to Stella in 1988 were clearly known to Stephen at the time of the Court of Appeal hearing, as they were the subject of submissions by Mr Etherton QC, so that Stephen's assertion to the contrary was simply wrong.

67. The specific additional matters, of which Stephen asserted he had only become aware since the Court of Appeal hearing, were those set out at [31] of the Particulars of Claim and Mr Patton KC dealt with these in turn.

68. The first matter was that Stephen relies on his note of a telephone conversation on 9 September 1999 between himself and his cousin, HHJ Dennis Levy QC (now deceased), in which the latter purported to relay an offer from Marcus to settle the claim in the 1999 proceedings. However, Mr Patton KC submitted that this was all protected by without prejudice privilege that Marcus has never waived. He also submitted that, where there was no waiver, the only circumstances in which without prejudice privilege could be overridden were if the "unambiguous impropriety" exception applied. There was some suggestion in Stephen's Skeleton Argument that this exception applied because any proposed settlement would involve a fraud on the Inland Revenue.

69. The authorities on this exception were recently reviewed in detail by Males LJ in the Court of Appeal in *Motorola Solutions Inc v Hytera Communications Corpn Ltd* [2021] EWCA Civ 11; [2021] QB 744. At the end of that review he stated the principles at [57] as follows:

> "From this review of the cases I would conclude that the courts have consistently emphasised the importance of allowing parties to speak freely in the course of settlement negotiations, have jealously guarded any incursion into or erosion of the without prejudice rule, and have carefully scrutinised evidence which is asserted to justify an exception to the rule. Although the unambiguous impropriety exception has been recognised, cases in which it has been applied have been truly exceptional, and (leaving aside *Dora v Simper*) there has been no scope for dispute about what was said, either because the statement was recorded (the admission of a dishonest claim in *Hawick Jersey Ltd v Caplan*) or because it was in writing (the email threats in *Ferster v Ferster*). I would not wish to exclude the possibility that the evidence about what was said at an unrecorded meeting may be so clear that the court is able to reach a firm conclusion about it (nor would I wish to encourage the clandestine recording of settlement meetings), but such cases are likely to be rare. *Dora v Simper* itself is clearly an outlier which has been criticised in later cases and, until the decision of the judge in this case, has never been followed. In my judgment its approach of asking whether one party's disputed evidence, if true, demonstrates an unambiguous impropriety is contrary to the weight of authority, wrong in principle and should not be followed."

70. As Mr Patton KC submitted, relying on that passage, the instances where the exception has been held to apply are truly exceptional. At [58] to [65] Males LJ went on to reject the suggestion that it was sufficient that there was a good arguable case of unambiguous impropriety. At [66] he said the judge should have asked himself whether the evidence before him established unambiguous impropriety so that, as Mr Patton KC put it, it is an absolute test. He submitted that it was simply fanciful to suggest that that test could be satisfied here, not least because before one got to any question of alleged impropriety, there was ambiguity, since contemporaneously Marcus and his solicitors were saying Judge Levy had misinterpreted what Marcus said.

71. It is appropriate to deal with this issue of privileged material straight away. In his oral submissions, Stephen did not in fact seriously suggest that he could rely on the unambiguous impropriety exception and, even if he had done, any such argument would be hopeless for all the reasons Mr Patton KC gave. The suggestion that any settlement would have involved a fraud on the Revenue is not borne out by any of the material and is completely baseless and, in any event, would not justify the breaching of the privilege since, as Mr Patton KC correctly submitted, the unambiguous impropriety exception is not concerned with general wrongdoing but with some abuse of the privilege itself.

72. Stephen did try to suggest that the conversation with Judge Levy was not without prejudice but that contention is also hopeless. The conversation was clearly part of a continuum of settlement discussions, as the subsequent solicitors' correspondence demonstrates. Accordingly, this material is inadmissible and Stephen cannot rely upon it. Furthermore, I agree with Mr Patton KC that, even if it were admissible, the Court of Appeal could and should have been told about it. Stephen says that he felt constrained not to refer to it in Judge Levy's lifetime out of respect for his position as a member of

the judiciary, but that is not a good reason for not having referred to the material, if it had otherwise been admissible.

73. The second matter relied upon by Stephen as supporting his case that there were exceptional circumstances and therefore no issue estoppel was the conversation with Inge in February 2004 when she told Stephen that Alexander had told Marcus to deal fairly with Stephen and give him "his share". Mr Patton KC submitted that this was completely unspecific hearsay evidence, not identifying the date when Alexander was alleged to have said this. This was immaterial. The same point applied to the third matter, what Inge told Mr Wood of Herbert Smith on 29 March 2004 (as set out at [35] above). The alleged statement by Alexander was in precatory language, completely vague with no supporting documentation, as Mr Wood recorded. Mr Patton KC submitted that it was immaterial.

74. The fourth point was what Baron J was reported to have said at the hearing in November 2005. Mr Patton KC submitted that, even assuming it is an accurate report of what the judge said, judges ask questions for all sorts of reasons and it was not evidence of anything and utterly immaterial.

75. The fifth point was the conversation with Willy Margulies in November 2012 (as set out at [43] above). Given that Willy Margulies had since died, as Mr Patton KC put it, the note of the conversation was as good as it would get from Stephen's point of view. It was second-hand hearsay and speculation, material that Willy was not prepared to stand by in his lifetime and, as he made very clear, unsupported by any documentation. Mr Patton KC submitted that it was simply not material and certainly not something which would enable Stephen to say that it was unjust that he should be estopped by the Court of Appeal decision.

76. In addition to those matters, there was the extensive pleading in relation to Dulwich Inc. Mr Patton KC submitted that this has nothing to do with the claim which Stephen is seeking to bring now, the case set out in the June 2020 draft pleading (set out at [46(2)] above having not been pursued. He submitted that none of that extensive material (and indeed none of the other matters relied upon, with the exception of the conversation with Willy Margulies) had anything to do with the Swiss bank accounts, which is what Stephen alleges distinguishes this claim from the previous one. Mr Patton KC asked the Court to note that Willy Margulies, when asked by Stephen whether he knew who had power of attorney over Alexander's Swiss accounts, claimed to know nothing about such accounts, although Stephen's note says this is untrue.

77. Mr Patton KC pointed out that Stephen's Skeleton Argument relies on another alleged new point, which is the reprimand of Mr Paisner by the Law Society in 2005, which was not known to Carnwath J and the Court of Appeal and therefore is said to make all the difference as to whether the present claim should be allowed to proceed. Mr Patton KC submitted that the decision of the Adjudication Panel (which I have referred to in detail at [38] to [41] above) gave effect to the criticisms of Mr Paisner by Rattee J and Johnson J in 1993 and 1994, of which Carnwath J and the Court of Appeal were well aware. Accordingly, this is not adding any new material either, but simply reflecting, as a disciplinary decision, the criticisms made by those judges earlier.

78. Accordingly, Mr Patton KC submitted that there were no special circumstances which would render unjust the present claim being barred by issue estoppel and it was so barred.

79. If he was wrong about cause of action estoppel and issue estoppel, then Mr Patton KC put his strike out case on the basis of *Henderson v Henderson* abuse of process. He submitted that Stephen could and should have brought the present claim in 1999 at the time of the Court of Appeal hearing. If one looked at his witness statement in support of his application for further information in August 1999, that is still really the sum total of what he is able to say in support of this claim. He has not obtained any new material about the Swiss accounts or the power of attorney that he could not have put forward at the time of the Court of Appeal hearing. The material about Dulwich was new, but Mr Patton KC submitted that was all irrelevant. If, as Stephen contends, those then advising him did not consider there was sufficient to amend the claim, the position is no different today than in 1999. If the claim was to be brought at all, it should have been brought then or, if not then, never.

80. Mr Patton KC then turned to his alternative application, which was for summary judgment on the basis that the claim has no realistic prospect of success on the evidence. He relied on the well-established principles summarised by Lewison J (as he then was) in *Easyair Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15]. He submitted that the question for the Court was whether there was some new material that creates a realistic prospect of success, when the Court of Appeal concluded there was not. The answer was no; if anything rather the opposite because the current pleading ignores the contemporaneous documents such as the 1984, 1986 and 1987 letters. There is not even a plea of a declaration of trust which makes the pleading demurrable. Mr Patton KC noted that, in his witness statement, Stephen accepts that he has no documents that provide positive proof as to Alexander's intentions with regard to the UBS account. He claims a "share" of the monies in the account and "share" is defined in the pleading as "a substantial part of the monies in the Swiss account or accounts", which is even more uncertain than the original plea in the 1997 proceedings which was at least for one third of the estate. Overall, Mr Patton KC submitted that the claim had no realistic prospect of success so that Marcus was entitled to summary judgment.

81. Stephen began his oral submissions with an impassioned criticism of Marcus for concealing the truth as to Alexander's intentions and misleading the Court of Appeal. This is obviously something of which he has convinced himself over the years, no doubt because he cannot accept that his father cut him out of his will. However, it is a serious allegation of fraud, which is not supported by evidence and would have been improper if advanced by a legal professional. I do not propose to set out, even in summary form, in a public judgment all the outrageous unsubstantiated allegations made by Stephen in his submissions about Marcus and Mr Paisner.

82. He made detailed submissions about the 1986 and 1987 letters and how Alexander changed his will in 1982 because of Cesare's ingratitude, not because of anything Stephen had done. He sought to interpret all these documents and events as not meaning that his father intended to cut him out of his share of the estate. However, those are all matters on which Mr Etherton QC made submissions on his behalf and with which Nourse LJ dealt at length. There is nothing new. Stephen also advanced a thesis that the 1980 letter was somehow drafted by a Swiss bank in a form required by them which had to be handwritten and this was to do with disentitling Judith and Cesare from the Swiss account, but he produced no evidence to support that somewhat wild allegation. In any event, the 1980 letter was before the Court of Appeal and Mr Etherton QC had the opportunity, which he took, to make submissions about it.

83. In support of his case that his father cannot have intended to cut him out of his share of the estate and had given instructions to Marcus in relation to Stephen, Stephen relied upon the evidence which Marcus gave before Rattee J at the probate trial in 1993. However, that evidence was cited and analysed by Nourse LJ at [39] to [41] of his judgment.

84. Stephen submitted that Mr Paisner was lying when he said he did not know about the Swiss accounts. He showed the court entries in Marcus's diary for Sunday 2 and Monday 3 May 1982 and a train timetable, which he said showed that Mr Paisner and Marcus were at his parents' house at 4 Sidmouth Road London NW2 on the afternoon of 2 May and then in Switzerland, with Marcus catching a train from Bienne, where the bank was, to Geneva at 15.28 and Mr Paisner returning to London. As Mr Patton KC pointed out in his reply submissions, none of that was foreshadowed in the evidence for this application, so neither Marcus nor Mr Paisner had had any opportunity to deal with this and in any event, as Mr Patton KC also pointed out, in his witness statement Mr Paisner did not deny knowing about Swiss bank accounts. At [8], he simply confirmed that to the best of his knowledge and belief, Alexander never gave him or Marcus instructions or expressions of wishes in favour of Stephen regarding assets held in Swiss bank accounts nor did he know of any documents recording such instructions or which otherwise supported Stephen's case.

85. Stephen referred to another entry in Marcus's diary for 25 March 1988: "PT 3.30 re A/c". He said that "PT" was Paicolex Trust, a trust management company in Switzerland of which Paisner & Co were shareholders. He then simply asserted that Marcus had taken documents to Paicolex about Dulwich Inc, which is not supported, even inferentially, by the diary entry and for which there is no evidence. Marcus may well have been seeing Paicolex (who were trustees of his father's 1959 settlement) for any number of reasons, so none of this even begins to advance Stephen's case.

86. At a number of points in his submissions Stephen admitted that he did not have any direct evidence that Alexander intended that he should receive his share of the Swiss account(s) and was reliant on inferences. He submitted that he should not be penalised for this because Marcus and Mr Paisner, who were wrongdoers, held all the documents. He asked rhetorically whether they would give disclosure of material which could be used by him as a stick to beat them with.

87. He submitted that there were five pieces of circumstantial evidence which he relied on, but which he accepted were open to interpretation. The first was what Marcus had said to HHJ Levy which he sought to argue was not subject to without prejudice privilege. However, as I have already found, he is wrong about that. The conversation was part of without prejudice settlement discussions and is inadmissible in evidence. The second and third matters were the conversations with Inge in 2004 and 2005 to which I have already referred. The fourth matter was the alleged comment by Baron J, also reported by Inge. Stephen referred to the fact that Mr Tooth had said he could not give Stephen any information as he was a data controller. He submitted that Mr Tooth could have said that what was reported wasn't true and said that perhaps Mr Tooth had the documentation.

88. The fifth matter was the evidence relating to Dulwich Inc. Stephen submitted that it was relevant because Alexander had an interest in it and again repeated his allegations about the dishonesty of Marcus and Mr Paisner, doubting their statements in their witness statements that they knew nothing about Dulwich Inc. He submitted that, if the Court

accepted that it was a Margulies company established at the request of Alexander, that gave rise to questions as to who suggested registering a company in the BVI, why and for what reason, why he accepted the advice and for whose benefit the company was set up. He pointed out that in 1988 when the company was incorporated, Alexander was 86 and Stella was in a vegetative state. Stephen said that the company could have been incorporated for a reason other than tax planning and submitted that it was arguable that it was to give Alexander leeway to hold assets for him until he got married and had children. He submitted that he should have the right to ask Marcus in these proceedings why Dulwich Inc was established. He asserted that it was arguable that the BVI company was set up because Paicolex did not want to hold the relevant assets any more as they were having trouble with his solicitors, Herbert Smith, who were asking which assets were his. However when I asked him what evidence he had to support this, there was nothing he could point to and given that the company was incorporated in 1988 before his parents' death, the time frame seems wrong for any involvement of Herbert Smith.

89. In addition to those matters, Stephen relied upon a Daily Telegraph article from October 2013, "The Business: Marcus Margulies" in which Marcus is reported as saying:

> "My greatest mentor was my father. I always knew I wanted to follow him into the watch business. Having said that, I didn't have much choice. My father wasn't a violent man but he probably would have beaten me up if I had wanted to go into another industry. There was always conflict because he always thought he knew better. When he was older, I would agree with everything he said and then do whatever I wanted, which made for a very good relationship."

Stephen made rather hyperbolic submissions about that passage to the effect that it was an admission by Marcus that he had been dishonest to his father. He translated this into Marcus saying yes to his father when Alexander gave him instructions about giving Stephen his share and then keeping the money when his father died.

90. Stephen submitted that, on the basis of the inferences he asked the Court to draw, he had an arguable case which had a realistic prospect of success and which should be allowed to go to trial. He placed particular reliance on the judgment of Lord Hamblen JSC in *Okpabi v Royal Dutch Shell plc* [2021] UKSC 3; [2021] 1 WLR 1294 at [126]-[127] and [131]:

> "126. Conducting a mini-trial also led to the court making inappropriate determinations in relation to the documentary evidence. Since the court was making a decision on the evidence, it effectively had to conclude that the prospect of there being further relevant evidence on disclosure could and should be discounted.
>
> 127. Simon LJ appears to have dismissed the relevance of future disclosure on the basis that a good arguable case has to be demonstrated on the basis of the material currently available. At para 82 he stated that:

> "… the prospect of further evidence relevant to the existence of the duty of care does not assist on the present appeal in relation to jurisdiction, which must be decided on the material available and in accordance with the relevant test."
>
> To similar effect at para 122 he stated that:
>
> "Although, the claimants make a further point that it is illustrative of what may emerge on disclosure, the difficulty is that jurisdiction is founded on a properly arguable cause of action and not on what may (or may not) become a properly arguable cause of action."
>
> This is an erroneous approach. The resolution of the jurisdictional challenge depended upon whether the appellants' claim satisfied the summary judgment test of real prospect of success. As Lord Briggs stated at para 45 of his judgment in *Vedanta*:
>
> "… the court cannot ignore reasonable grounds which may be disclosed at the summary judgment stage for believing that a fuller investigation of the facts may add to or alter the evidence relevant to the issue."
>
> 131. At para 45 of his judgment in *Vedanta* Lord Briggs cited with approval the following passage from the judgment of Asplin J in *Tesco Stores Ltd v Mastercard Inc* [2015] EWHC 1145 (Ch) at [73] :
>
> "… account must be taken of all relevant factors relating to economic, organizational and legal links which tie the parent and the subsidiary on a case by case basis …[I]t seems to me that this is a matter which turns on a wide range of factors which should be decided at trial with the benefit of full disclosure, including possibly third party disclosure and oral evidence."”

91. Stephen submitted, in essence, that his pleading disclosed a case which had a real prospect of success and the Court should not conduct a mini trial at this interlocutory stage, but should let the case go forward to trial with disclosure and evidence, on the basis that the fuller investigation which would then be made might well disclose material which would make out Stephen’s case. He referred to the fact that UBS had undertaken to preserve any documentation for the last twenty years, submitting that the fact that they had done so demonstrated that the Bank must know the documents are important and showed the dishonesty of Marcus. He submitted that for the Court to shut him out now and strike out the claim would be a “crook’s charter”.

92. In relation to cause of action estoppel, Stephen argued that the claim he was now making was not the same cause of action as in the 1997 proceedings. In those proceedings, he had pleaded a trust which took effect on his father’s death which he accepted would be liable to be struck for cause of action estoppel if repeated now. However it was not, because what he was now pleading was a different case of an *inter vivos* trust or fiduciary

obligation. He contended that what the Court of Appeal had been addressing was whether he had an arguable case for a one third share of his father's estate, but what he was now claiming was not a share of his father's estate because the Swiss monies were not in the estate on his father's death. He submitted that was also the answer to issue estoppel.

Discussion

93. The case advanced by Stephen in the 1997 proceedings was, as Mr Patton KC submitted, deliberately broad and the pleading referred to a secret trust or a fiduciary power. The case was not just the pleaded one summarised at [59] and [60] above, but included the unpleaded allegations which Mr Etherton QC was permitted to advance about the secret trust encompassing the Swiss bank accounts and the need for secrecy because of tax evasion or avoidance. Stephen did not commit to the trust having been created at any particular time. As Nourse LJ said: "the secret trust could have been imposed on Marcus at any time before the father's death in 1991".

94. Although Stephen seeks to argue that the case which he now advances in the present proceedings is founded on a different cause of action to the ones advanced in the 1997 proceedings, because he now says that it is to be inferred that the Swiss monies passed to Marcus before Alexander's death, so that they were not part of his estate on his death, I agree with Mr Patton KC that that is no more than a timing point. I also agree with Mr Patton KC that the set of facts now relied upon, including as to the Swiss bank account(s) is essentially the same as in the 1997 proceedings. This is demonstrated by the striking extent, noted at [19] to [26] above, to which the allegations now made by Stephen replicate the submissions made by Mr Etherton QC on his behalf to the Court of Appeal in relation to the cause(s) of action then relied upon.

95. It is no answer to say that the case now put forward is not strictly one of a secret trust, because what is alleged is an *inter vivos* transfer, since that is to focus on what Mr Patton KC correctly described as a legal label. What matters is not the legal label but the facts relied upon, which as I have said are essentially the same as in the 1997 proceedings. It is of no consequence that the case now advanced is in a narrower compass than in the 1997 proceedings because it is limited to the Swiss bank account(s) rather than one third of the entire estate including the art collection. The cause of action now advanced is, as Mr Patton KC accurately put it, entirely subsumed within the cause of action in the 1997 proceedings which failed. The cause of action having failed in those proceedings, Stephen is estopped from raising it in the present proceedings, which should be struck out.

96. Even if there were not a cause of action estoppel, the claim in the present proceedings is clearly barred by issue estoppel. The issue in question is whether, at some point in his lifetime, Alexander manifested an intention to create a trust over some or all of his assets. As Mr Patton KC said, that was a critical first step which Stephen had to establish in the 1997 proceedings, on which he failed: see [94] to [99] of Nourse LJ's judgment, cited at [31] above. Although Stephen's current pleading is strictly speaking defective, because it does not plead that Alexander manifested an intention to create a trust at some point before his death, that remains a critical first step in the present proceedings, a necessary fact which Stephen would need to prove, so that the issue is exactly the same. Unless Stephen could establish that Alexander manifested such an intention, the present claim would be bound to fail. Accordingly, that issue is exactly the same as was decided against him by the Court of Appeal.

97. As already stated in the section of this judgment dealing with the law on res judicata, issue estoppel will bar the new claim unless the claimant can show that there are special circumstances such that the estoppel would cause injustice. However, that exception should be kept within narrow limits, as the editors of *Spencer Bower and Handley: Res Judicata* correctly state. In my judgment, the matters relied upon by Stephen come nowhere near justifying the application of that exception.

98. The conversation with Judge Levy in September 1999 is part of a continuum of without prejudice privileged correspondence which is inadmissible in evidence for the reasons I have already given at [69] to [72] above. Even if it were admissible, the matter was one which could and should have been raised with the Court of Appeal.

99. The conversations with Inge in February and March 2004 on which Stephen relied are, at best, unsubstantiated hearsay evidence from someone who clearly had no personal knowledge of Alexander's intentions or of his estate or wills. As Mr Wood of Herbert Smith recorded about the second conversation, even eighteen years ago, Inge was not very precise and had no documentary evidence to back up what she was saying. Furthermore, she did not put a date on when Alexander is alleged to have said anything. Also, I agree with Mr Patton KC that, in any event, what Alexander is alleged to have said was in precatory language and thus no more indicative of an intention to create a trust than the correspondence considered in detail by the Court of Appeal. The conversations are simply not material.

100. The same is the case in relation to the alleged comment by Baron J at a hearing in November 2005, also reported by Inge. A Mr Patton KC said, judges ask questions about all sorts of things and Inge was not able to explain the context at the time. The judge died in December 2013 so nothing further could emerge about why she made the comment. What she may have been alluding to is lost in the mists of time. This is a straw in the wind which does not begin to support a case that Alexander manifested an intention to create a trust.

101. As for the conversation with Stephen's cousin Willy Margulies in 2012, he has since died so nothing further can be added to what he said. It was second-hand hearsay and speculative, unsupported by any documentation. It is not material, again going nowhere near supporting a case that Alexander manifested an intention to create a trust. Whether true or not, Willy also denied knowing anything about the Swiss bank accounts, so none of this assists Stephen in relation to his allegations in the present proceedings. Furthermore, if Willy had anything of significance to say, he could have been approached in 1999 before the Court of Appeal hearing.

102. To those points can be added the extensive material and pleading in relation to Dulwich Inc, about which Stephen appears to have become extremely preoccupied over the years. However, I agree with Mr Patton KC that none of that extensive material is of any relevance to the claim which Stephen now seeks to put forward. Even if Alexander was the beneficial owner of that BVI company (which is only supported by vague oral evidence, not by any documentation, despite the extensive documentation put before the Court) that does not begin to establish that he manifested an intention to create a trust in Stephen's favour or that assets held in Swiss bank accounts were somehow intended to be for his benefit. His submissions about what might emerge if the case went to trial were pure speculation unsupported by any evidence. An example is the submission about

Dulwich Inc and Paicolex on the basis of the entry in Marcus's diary referred to in [85] above.

103. In relation to the other diary entries from May 1982 referred to at [84] above, none of that is material. It does not support a case that Alexander intended to create a trust in Stephen's favour. The highest it could be put is that it may show that Marcus and Mr Paisner were at a bank in Switzerland discussing an account which may or may not have been held by Alexander. It does not support the contention that Mr Paisner had somehow lied about knowing about the Swiss bank accounts. As Mr Patton KC pointed out, Mr Paisner had not denied knowing about those bank accounts. He had simply said that, to the best of his knowledge and belief Alexander had never given him or Marcus instructions or expressions of wishes in favour of Stephen in relation to the Swiss accounts. The material about the diary entries does not begin to gainsay what Mr Paisner said in his witness statement.

104. Stephen also sought to rely on the manuscript letter of 18 July 1980 addressed by Alexander to his children, the text of which I set out at [7] above. He contended that this was a letter in terms required by a Swiss bank, which also had to be handwritten by the testator in order to change the inheritance regime in Switzerland. No evidence was put forward by Stephen to support that proposition and, in any event, as Mr Patton KC submitted, the letter is of no assistance in establishing an intention to create a trust in Stephen's favour. It is the clearest possible evidence to the contrary. Furthermore, both Mr Etherton QC and Mr Vos QC made submissions about the 1980 letter before the Court of Appeal. Mr Etherton QC disavowed the suggestion by Mr Vos QC that the letter might act as a will under Swiss law. As Mr Patton KC said, the letter was considered carefully by the Court of Appeal and there is no basis for reopening now the issue as to its meaning.

105. In criticising Mr Paisner, Stephen sought to make much of the severe reprimand administered to him by the Adjudication Panel of the Law Society the detail of which I have set out at [38] to [41] above. It is important to have in mind that the three matters (i) to (iii) at [39] were to do with the circumstances surrounding Stella's 1978 will and the power of attorney given to her when she clearly did not have capacity, and the criticisms levelled against Mr Paisner by the two High Court judges in respect of those matters, all of which was before the Court of Appeal and referred to at [61] of Nourse LJ's judgment. The suggestion made by Stephen that if, in addition to what Nourse LJ described as the serious criticisms made by the two judges, Mr Paisner had already received the severe reprimand and the Court of Appeal had known about that, it would have made a difference to their decision, is completely fanciful.

106. Of far more significance is that Adjudication Panel concluded that it was not satisfied there was even prima facie evidence of the allegation at (iv), which was the possibility that Mr Paisner had misled the Inland Revenue about the extent of Alexander's assets in preparing the probate papers, with particular reference to Swiss and other overseas funds. That allegation has resurfaced to an extent in some of the more outrageous criticisms of the conduct of Mr Paisner and Marcus made by Stephen, but it is no more supported by evidence than it was before the Adjudication Panel seventeen years ago. Overall, the decision of the Adjudication Panel goes nowhere near establishing that Alexander manifested an intention to create a trust in Stephen's favour and is simply not material. If anything it militates against the case Stephen now seeks to make.

107. Stephen relied upon the correspondence with UBS over the years since the Court of Appeal decision and, in particular, their repeated assurances that they would preserve any documents, to assert that this showed that the Bank knew that these documents were important and also showed that the Bank knew about the dishonesty of Marcus. This extravagant assertion demonstrated the extent of Stephen's obsession with this matter over a long period of time, but also betrayed a misunderstanding as to how Swiss banking laws operate. As UBS explained to him in the 2019 letter referred to at [43] above, the strict Swiss banking secrecy laws mean that the Bank cannot disclose information to him in circumstances where they have no proof as to his entitlement to that information. They will not even disclose whether there is any documentation. The fact that they are prepared to undertake to preserve documentation, if any, tells one nothing about their assessment of its significance, even if there is such documentation. The suggestion that it shows that Marcus was dishonest is completely unwarranted.

108. The assertion in relation to the Daily Telegraph article referred to at [89] above that it was somehow an admission of dishonesty by Marcus is equally extravagant. In my judgment, all it shows is how Marcus dealt with a strong willed father, which was in a way which would no doubt be familiar to many who found themselves in a similar situation. The suggestion that it supports Stephen's case that Alexander gave Marcus instructions in imperative form that Stephen was to have the benefit of the monies in the Swiss account(s), which instructions Marcus then disregarded, is frankly ridiculous.

109. Although repeated allegations were made by Stephen in his Skeleton Argument and his oral submissions about Marcus and Mr Paisner misleading the Court of Appeal and lying, no application has ever been made to set aside the judgment of the Court of Appeal for fraud. Those outrageous allegations, which are unsupported by any evidence, could not begin to satisfy the strict test in *Highland Financial* set out at [57] above. The judgment of the Court of Appeal clearly stands.

110. Whether taken individually or cumulatively, the matters on which Stephen relies, which he contends have emerged since the Court of Appeal decision, do not come anywhere near establishing special circumstances which would render it unjust for the claim Stephen now seeks to advance to be barred by issue estoppel. I am very firmly of the view that the claim is so barred and should be struck out.

111. My conclusions about the claim being barred by cause of action estoppel and/or issue estoppel mean that it is not strictly necessary to consider whether, in the alternative, the claim would be an abuse of process, but I will deal with that alternative case briefly. In my judgment, given that none of the material now relied upon by Stephen comes anywhere near establishing that Alexander intended to establish a trust in Stephen's favour and that that issue was determined against Stephen by the Court of Appeal, I consider that the claim now sought to be pursued would be an abuse of process. Both the private and public interests identified by Simon LJ at [48(1)] of *Michael Wilson & Partners* set out at [54] above are engaged. Marcus would be vexed by Stephen being permitted to pursue against him the same claim as was struck out by the Court of Appeal and the public interest of the state is that the same issues should not be relitigated having previously been struck out. In my judgment the present proceedings should be struck out as an abuse of process.

112. My decision on res judicata and abuse of process also makes it strictly unnecessary to consider Marcus's alternative application for summary judgment on the whole of the

claim, but since it was fully argued, I will consider it, albeit briefly. I agree with Mr Patton KC that the question for the Court is whether there is some new material before the Court which shows that the claim has a realistic prospect of success, when the Court of Appeal has decided that the claim then before it was bound to fail. In my judgment, the answer to that question is clearly no. If anything, as Mr Patton KC submitted, the present claim is weaker than that advanced in the 1997 proceedings. It does not rely upon the contemporaneous documents such as the 1984, 1986 and 1987 letters. The pleading does not even plead a declaration of trust, making it demurrable. The matters on which Stephen now relies which I have addressed in detail at [98] to [109] above are not material for the reasons I gave there. None of those matters supports a case that Alexander manifested an intention to create a trust in Stephen's favour over assets in Swiss bank accounts or over anything else.

113. On the basis of the material before the Court, the claim Stephen now seeks to advance has no greater chance of success than the claim which the Court of Appeal held was bound to fail and struck out. In reaching that conclusion, I am not conducting a mini trial as Stephen sought to suggest. I am simply deciding that the claim he now pleads, on the material before the Court, has no realistic prospect of success. It is no answer for Stephen to say that, although he cannot at present put more before the Court, if the Court lets the matter go to trial something may turn up on disclosure or in evidence which will support his case. That is pure "Micawberism".

114. Stephen's reliance on the decision of the Supreme Court in *Okpabi* in this context was misplaced. That was a jurisdiction challenge where the defendant who was being served out of the jurisdiction was challenging the jurisdiction, on the basis that the claim against the "anchor" defendant in the jurisdiction, Royal Dutch Shell ("RDS"), had no realistic prospect of success. The Supreme Court concluded that the claim against RDS did have a realistic prospect of success on the pleaded case and the material before the Court and that the Court of Appeal had erred in law in conducting a mini trial on the material before it and concluding the claim had no realistic prospect of success, rather than recognising that it should go the trial, which would have been the correct approach, as points (iii) and (v) of [15] of Lewison J's judgment in *Easyair* demonstrate.

115. However, nothing in *Okpabi* was intended to subvert the well-established principle that if, on the material before the Court, the claim does not have a realistic prospect of success, summary judgment cannot be resisted by suggesting that, if the claim is allowed to go to trial, something will turn up which helps the claimant. This is clear when the second and third sentences of [45] of the judgment of Lord Briggs JSC in *Lunggowe v Vedanta Resources plc* [2019] UKSC 20; [2020] AC 1045 are considered:

> "This poses a familiar dilemma for judges dealing with applications for summary judgment. <u>On the one hand, the claimant cannot simply say, like Mr Micawber, that some gaping hole in its case may be remedied by something which may turn up on disclosure. The claimant must demonstrate that it has a case which is unsuitable to be determined adversely to it without a trial.</u> On the other, the court cannot ignore reasonable grounds which may be disclosed at the summary judgment stage for believing that a fuller investigation of the facts may add to or alter the evidence relevant to the issue: see *Tesco Stores Ltd v*

> *Mastercard Inc* [2015] EWHC 1145, per Asplin J at [73].” (my emphasis)

116. No amount of protestation by Stephen that he has an arguable case which should be allowed to go to trial could give his case a realistic prospect of success. It follows that, even if the claim now made were not barred by res judicata or otherwise to be struck out as an abuse of process, it is bound to fail and Marcus would be entitled to summary judgment.

Conclusion

117. In all the circumstances, the application is allowed. The claim is struck out.