Neutral Citation Number: [2023] EWHC 1863 (Ch)

Case No: CH-2022-000163

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
ON APPEAL FROM DECISION OF RECORDER ROBERTSON
AT THE CENTRAL LONDON COUNTY COURT ON 26TH JULY 2022
LOWER COURT CLAIM NUMBER H10CL283

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

Date: 20/07/2023

Before :

SIR ANTHONY MANN

- -

Between :

(1) Ian Paul McLean **(2) Sean Andrew Frederick McLean** **(3) Lorraine Pomeroy**	**Claimants/ Appellants**
- and -	
Brett Reginald McLean	**Defendant/ Respondent**

- -
- -

Michael Horton KC and **Guy Holland** (instructed by **Taylor Rose MW**) for the **Claimants/Appellants**
Brett Reginald McLean in person as the **Respondent**

Hearing date: Tuesday, 16th May 2023

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Approved Judgment

This judgment was handed down remotely at 10.00am on Wednesday 20th July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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SIR ANTHONY MANN

Sir Anthony Mann :

Introduction

1. Where parties agree to leave true mutual wills, their agreement is capable of giving rise to trusts affecting their property which prevent the second to die from effectively resiling from the agreement, via the mechanism of the imposition of an implied trust (or perhaps a constructive trust). That that is capable of being the case has been established in law for some considerable time. Such a state of affairs was alleged in the present case, but Recorder Robertson held that the necessary agreement did not exist. That decision is challenged in this appeal. The present appeal also raises the question of whether the doctrine of mutual wills can be extended to a situation in which there is no clear mutual agreement like a contract but where there are circumstances capable of giving rise to a proprietary estoppel which has the same effect at the end of the day. At the trial of this action Recorder Robinson was minded to say that such an estoppel could not give rise to mutual will-type trusts as a matter of principle, and in any event he held the facts did not justify such a result in this case. Those aspects of his decision are also challenged on this appeal, all with permission given by Bacon J.

2. For obvious reasons of clarity, in this judgment I will refer to the various family members by their first names, without intending any disrespect.

The testamentary background

3. On 23rd June 2017 husband and wife Reginald and Maureen McLean executed mirror wills which left their respective estates to each other if surviving, and the residue to their four children in equal shares. On 16th March 2019 Reginald died and Maureen took his estate. On 16th August 2019 Maureen executed a new will leaving her entire estate to her son Brett, the defendant in this litigation, and died shortly afterwards on 27th August 2019. She thereby cut out the other three children (actually her step-children - they were children of Reginald by a former marriage). Those other three children (the claimants in this action) claim that the 2017 wills were mutual wills by which Maureen's estate came to be held in trust for all four children equally under the mutual wills doctrine. Brett contests that and seeks to take under the 2019 will. Whether there were effective mutual wills is the subject of this appeal.

4. At the trial Brett challenged Reginald's 2017 will on the grounds of lack of capacity, and both wills on the grounds of undue influence. Those two challenges failed on the facts before the judge below. There is a suggestion, but only a suggestion, that Brett seeks to challenge at least capacity in his respondent's notice, but it is not a clear and reasoned challenge and none was mounted when Brett addressed me. I should also

add that the findings in those areas are classic findings of primary fact which are normally unchallengeable and there is nothing in the case which suggests that Brett can mount the difficult challenge which would be necessary to sustain an appeal in this case. It is therefore unnecessary to deal further with those parts of the judgment below.

The facts as found by the judgment

5. The relevant facts are within a fairly small compass and can be set out as follows, extracted from the careful judgment below.

6. On 12th August 2013 Maureen and Reginald each established a discretionary family trust. The beneficiaries of Maureen's trust were Reginald and the four children. A memorandum of wishes of Maureen dated 11th September 2013, signed by Maureen, provided that the first priority should be the support of Reginald; that their house should be given to Brett unless it had been sold; and if it had been sold the proceeds should be split between the four children. The trustees were asked to treat her three children (the claimants in this action) "with broadly equal shares". No findings were made about Reginald's trust. On 30th October 2013 Reginald and Maureen each signed wills, which were mirror wills, leaving their respective estates to their respective family discretionary trusts.

7. On 2nd June 2017 Maureen and Reginald attended the offices of Streeter Marshall, solicitors, and met Mr Alistair McKie, an solicitor experienced in dealing with wills and probate. There are no particular findings about any actual events leading up to that visit, but the firm was not one which was previously known to the McLeans though it was one used by Reginald's son Paul. That meeting ended up with both McLeans making the mirror wills referred to above. Mr Mckie's attendance note (recording a meeting of 48 minutes) is important both for what it does and what it does not contain, so like the judge below I will have to set out most of it (though I will set out a little more). It reads (so far as material) as follows:

> "Mr McLean is the uncle of Paul Robinson, a well-established client of mine.… [Age and parentage of children referred to]
>
> …
>
> Clients provided a copy of Mrs Mclean's current Will, which is a mirror of Mr Mclean's dated 30 October 2013. In the Will, Mrs Maclean has left her entire estate (except her personal belongings] to the [discretionary trust].… I explained to the client what this means and the ramifications. I drew the client's attention to the Memorandum of Wishes dated 11 September 2013, by which Mrs Mclean let her trustees know her wishes.

> Client said that her Memorandum of Wishes no longer reflects her wishes as she does not want her property at Beau Rivage to be given to Brett.
>
> Client explained that Brett does not get on particularly well with his half siblings. I explained that, as things currently stand, it is absolutely crucial that all the trustees get on well and agree. If there is any disagreement between the trustees, then the Trust cannot be run properly.
>
> It was clear to me that clients need to rewrite their wills. It is not enough for the clients to rewrite their Memoranda of Wishes, because clients do not trust the trustees to act together properly.
>
> Clients said that they would like to appoint each other as their sole executor and trustee and for the surviving spouse to receive everything on the first spouse's death.
>
> On the second spouse's death, clients would like the residuary estate to be divided equally between the 4 children.
>
> I raised the issue that if Mr McLean were to pass away first, then there was no guarantee that Mrs McLean would not change her will and leave her entire estate to Brett. Mr Mclean explained that he trusts his wife implicitly. They have been married for 45 years and there is no way that she would do this.
>
> …
>
> Clients confirmed that they would like a provision inserted providing for their grandchildren, should any of their children predecease. …"

8. Mirror wills incorporating those instructions were executed on 23rd June 2017 with Mr McKie as one of the witnesses.

9. The Recorder found that that attendance note was accurate so far as it went, but found that it omitted one or two matters which he nonetheless considered Mr McKie had

accurately recollected. One was that Maureen responded to her husband's remarks about her not changing her will. In a *Larke v Nugus* statement Mr McKie was asked whether Maureen responded to her husband's recorded remark about Maureen not changing her will, to which he responded:

> "Whilst I do not remember exactly what Mrs McLean said in response, I clearly recall that her response was similar to her husband's in that she would not change her Will and disinherit her stepchildren."

10. The Recorder seems to have approached this evidence with care, and the paragraphs immediately following his recitation of this statement by Mr McKie do not contain a finding that it happened, but it seems he accepted it because the last sentence of paragraph 110 (see below) would clearly indicate that he did.

11. In response to a question as to whether the making of mutual wills was discussed, Mr McKie in his *Larke v Nugus* statement, said:

> "I do not recall advising the clients specifically about making mutual Wills, but if I did, I do not generally recommend that clients make mutual Wills. In this case the clients had been married for 45 years and trusted each other implicitly.

12. The Recorder also had before him a "Joint Letter" written by Reginald and Maureen in April 2018 to the children (but not apparently received by Brett), which he found to be a genuine letter despite a challenge by Brett that it was a forgery. It said:

> "Dear Sean, Lorraine, Ian and Brett,
>
> Recognising that our health is inevitably deteriorating we needed to think through what happens next when one of us survives the other, and then when we both move into the next world what will happen to our collective belongings. You'll all be aware that Seaside Road is something of a desirable location these days.
>
> Therefore, we met with a professional legal firm almost a year ago and left a will that represents our wishes.

> With our health as it is now we wouldn't feel confident to change anything but equally feel very happy with what we have done.
>
> We are very proud of you all and your families and hope that we have been able to do will give each of you and your children, and grandchildren, something to enjoy."

13. The letter to Sean had additional handwritten piece of text at the end:

> "The will you signed is now obsolete – another has been done to replace the other one by another solicitor".

14. Having previously held (in paragraph 82 of his judgment) that for the doctrine of mutual wills to apply there has to be "what amounts to a contract between the two testators that both wills will be irrevocable and remain unaltered" the Recorder made the following findings of fact from Mr McKie's evidence:

> " 106. From Mr McKie's evidence, I make the following findings of fact:
>
> (a) at the meeting on 2 June 2017, Mr Mckie told Reginald that there was no guarantee, even if he and his wife were making mirror Wills, that Maureen would not change her will and leave the entire estate to Brett. Reginald explained that he trusted his wife implicitly and there was no way she would do this.
>
> (b) Maureen said words to the effect that she would not change her will or disinherit her step-children, and that she trusted her husband implicitly.
>
> (c) The specific issue of mutual wills was not discussed, and Mr Mckie did not advise as to what they were or what that effect was.

> (d) Neither Reginald nor Maureen contemplated a situation where either would change the 2017 Wills, because they trusted each other.
>
> (e) Reginald and Maureen both made the 2017 Wills on the basis of their trust in one another, and, as Mr McKie's evidence showed, they did not contemplate a situation where either would wish to change them."

15. Having referred to the Joint Letter the Recorder reached his conclusions in the following terms:

> "109. In my judgment, the evidence does not clearly and satisfactorily demonstrate that there was a legally binding agreement, akin to that of a contract, between Maureen and Reginald that neither of them would revoke the 2017 Wills without the consent of the other. The evidence does not demonstrate that Reginald made any such promise: on the contrary, he specifically stated that he trusted his wife implicitly, on the strength of their 45 year marriage, which in my judgment means that he did not think there was any need to make an agreement. He was willing to rely on trust alone. That, it seems to me, placed only a moral obligation on Maureen, and not a legally binding obligation. There was no discussion about whether, if Maureen died first, Reginald would revoke his will. That finding is fatal to the Claimants' case: without a reciprocal agreement amounting to a contract between the two testator is that both wheels will be irrevocable and remain unaltered, the doctrine of mutual wills does not apply (*Charles v Fraser* at [59]). Even if Maureen could be said to have made a legally binding promise, that is not sufficient without a reciprocal promise from Reginald.
>
> 110. … The fact that Maureen and Reginald had a common intention to provide for all four children on 2 June 2017 does not mean that they promised not to revoke the 2017 Wills. As I have set out above, the authorities are clear that a common intention, expectation or desire is not enough. That, in my judgment, was all that Reginald and Maureen were expressing. Maureen's comment that she would not change her will or disinherit her step-children, and that she and her husband trusted each other implicitly, was consistent with that."

> 111. The Joint Letter does not assist the Claimants in demonstrating that there was an agreement…. The Joint Letter is consistent with the common understanding as to their current intentions that they expressed at the 2 June 2017 meeting …
>
> 112. It is a separate question whether what Maureen said on 2 June 2017 was sufficient to found a proprietary estoppel. As I have ruled, the authorities do not, in my judgment, support the engagement of the doctrine of mutual wills based on a proprietary estoppel. I may of course be wrong about that. I was not addressed on the requirements of a proprietary estoppel beyond what is set out in *Legg v Burton* . However, it seems to me that at least the element of reliance is missing: on the factual matrix that I have found, changing the world was not in the contemplation of either Reginald or Maureen on 2 June 2017. But that does not mean that either was legally bound not to change their will. The evidence does not support a finding that Reginald made his 2017 Will on the basis of Maureen's assurance, and I am not therefore persuaded that the Claimants have shown that a proprietary estoppel has arisen in any event. The 2017 Wills were made on the basis of both parties' trust of each other, which is no more than a moral obligation."

16. Then at paragraph 113 the Recorder found that telephone calls which the parents had with Sean and with Lorraine did not demonstrate that there was any agreement as to non-revocation either. He expressed final conclusion at paragraph 114:

> "114. In my judgment, therefore, there was no legally binding agreement between Maureen and Reginald that they would not revoke or change the 2017 Wills without the consent of the other. Maureen may have been morally bound, but she was not legally bound. Maureen was therefore legally entitled to change her will and make the 2019 Will giving her estate to Brett."

17. Thus the mutual wills case failed on both what I can call the traditional approach (based on agreement) and the more novel approach (proprietary estoppel). Mr Horton sought to challenge the conclusions in both those areas. In considering his appeal I will consider the traditional approach first, and then, so far as necessary, turn to the estoppel approach.

The law of mutual wills

18. The background to the appeal under both major heads is, of course, the law of mutual wills.

19. The basic underlying principle can most conveniently be taken from *In re Dale, decd* [1994] Ch 31 at p37D:

> "The doctrine of mutual wills is to the effect that where two individuals have agreed as to the disposal of their property and have executed mutual wills in pursuance of the agreement, on the death of the first ("the first testator") the property of the survivor ("the second testator"), the subject matter of the agreement, is held on an implied trust for the beneficiary named in the wills. The survivor may thereafter alter his will, because a will is inherently revocable, but if he does his personal representatives will take the property subject to the trust."

20. The important factor for present purposes is the level and nature of the "agreement" required for the invocation of the effect. There is no doubt that it is a high level of agreement which amounts to, or perhaps is akin to, a contract. There are cases which seem clearly to state that a binding agreement is required which is contractual - see most clearly *In re Goodchild, decd* [1997] 1 WLR 1216. This is to be distinguished from something which is merely an "honourable engagement", which is not sufficient:

> "There, as in this case, the principal difficulty is always whether was a legally binding obligation or merely what Lord Loughborough LJ in *Lord Walpole v Lord Orford* (177) 3 Vew Jun 402, 419, described as an honourable engagement." (p1223H)

21. In *Goodchild* Leggatt LJ expressed himself clearly in terms of the requirement of a contract, or at least clear evidence of a mutual intention that the wills should not be altered:

> "I am satisfied that for the doctrine to apply there must be a contract at law: see Morritt J in *In re Dale* [p1224G] ...

> "Even if a binding agreement were not required, it would still have to be proved that both testators intended not merely that Gary should be the ultimate beneficiary but that the survivor should not prevent that happening, if he or she thought fit. [p1225E]

> Two wills may be in the same form as each other. Each testator may leave his or her estate to the other with a view to the survivor leaving both estates to their heir. But there is no presumption that a present plan will be immutable in future. A key feature of the concept of mutual wills is the irrevocability of the mutual intentions. Not only must they be binding when made, but the testators must have undertaken, and so must be bound, not to change their intentions after the death of the first testator. The test must always be, suppose that during the lifetime of the surviving testator the intended beneficiary did something which the survivor regarded as unpardonable, would he or she be free not to leave the combined estate to him? The answer must be that the survivor is so entitled unless the testators agreed otherwise when they executed their wills. Hence the need for a clear agreement. (p1225E-G).
>
> …
>
> …A mutual desire that Gary should inherit could not of itself prevent the survivor from resiling from the arrangement. What is required is a mutual intention that both wills should remain unaltered and that the survivor should be bound to leave the combined estates to the son. That is what is missing here." [p1225H-1226A]

22. The evidence of this agreement must be "certain and unequivocal" (*Re Oldham* [1925] Ch 75 at p87) or "clear and satisfactory" (*Re Cleaver* at 948A). This is because the situation involves the intentions of those who have died, which leaves greater scope for uncertainty about those who can no longer give evidence, and, in my view, because the doctrine of mutual wills is "anomalous" (see per Morritt LJ in *Goodchild* at p1239C-E). That justifies a stringent test for the existence of the relevant requirements, and also care in assessing the evidence. Having said that, the civil standard of proof applies, that is to say the balance of probabilities.

23. The key distinction is therefore between something which amounts to a contract, or which demonstrates a level of agreement akin to a contract on the one hand, and matters binding in honour only.

The appeal in relation to mutual wills by agreement

24. There was no real dispute as to the law applied by the Recorder in this part of the case. His citation of the leading authorities (including *Legg v Burton* [2017] EWHC 2088(Ch)) demonstrates that he was aware of the need to establish agreement in some binding way as opposed to one binding in honour only. At paragraph 110 he said:

> "As I have set out above, the authorities are clear that a common expectation, expectation or desire is not enough."

25. That is an accurate summary of the law. On that basis he concluded, for the reasons I have set out, that there was no binding agreement in this case. It is that conclusion that Mr Horton challenges.

26. In doing so Mr Horton acknowledges that such primary findings of fact that the Recorder made are not susceptible of attack in this appeal on normal principles. That covers sub-paragraphs (a) to (c) of paragraph 106 of his judgment (set out above). However, he says that the other two sub-paragraphs of paragraph 106 are inferences drawn, which an appeal court is as able to draw as the first instance judge, and which are more amenable to appeal - see *Assicurazioni Generali SpA v Arab Insurance* [2003] 11 WLR 577 at paragraphs 14-15. That is true, so far as it goes. The Recorder's conclusion as to there being no agreement was one which resulted from an interpretation of the facts as he found them, which was an evaluative judgment in relation to primary facts. However, that does not mean that the appellate court has an entirely free hand in relation to those findings so as to be able to consider the matter de novo and without regard to the findings below. There are still constraints. As Clarke LJ said in *Assicurazioni* at paragraph 17:

> "16. Some conclusions of fact are, however, not conclusions of primary fact of the kind to which I have just referred. They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way.
>
> 17. In *Todd's* case [2002] 2 Lloyd's Rep 293, where the question was whether a contract of service existed, Mance LJ drew a distinction between challenges to conclusions of primary fact or inferences from those facts and an evaluation of those facts, as follows, at pp 319-320, para 129:
>
> '… In the present case, therefore, I consider that (a) it is for us if necessary to make up our own mind about the correctness or otherwise of any findings of primary fact or inferences from primary fact that the judge made or drew and the claimants challenge, while (b) reminding ourselves that, so far as the appeal raises issues of judgment on unchallenged

> primary findings and inferences, this court ought not to interfere unless it is satisfied that the judge's conclusion lay outside the bounds within which reasonable disagreement is possible.'"

27. As Lewison LJ said in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5:

> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them."

I bear in mind that approach.

28. Mr Horton's criticism of the judge's findings centred on paragraph 109 of the judgment, which I have set out above. The essence of Mr Horton's challenge is that the judge failed to give proper effect to the trust that each of the will-makers expressed in the other. He submits that the "trust" referred to was not something that they were manifesting and which demonstrated that their transaction was something less than an agreement (an "honourable engagement"). Rather, it was an expression which arose specifically in the context of Maureen revoking her will, and when Reginald expressed his trust that she would not, she confirmed that should would not. Mr Horton said that she was "expressly stating that she will indeed not revoke her will if he predeceases her". The context was said to be relevant - they were revoking earlier wills, getting rid of discretionary trusts and making new matching wills. The trust was trust that the spouses would abide by the agreement they have made. This conclusion is said to be supported by the Joint Letter, which was a polite way of letting the children know that they were not going to change their wills again.

29. Mr Horton also relied on what he said was an error of law manifested in the following sentences of paragraph 109:

> "There was no discussion about whether, if Maureen died first, Reginald would revoke his will. That finding is fatal to the Claimants' case: without a reciprocal agreement [etc] …"

Mr Horton's point is that that finding pre-supposes that an express agreement is necessary, whereas the authorities demonstrate that an implied agreement suffices.

30. I do not consider that this challenge to the judgment below succeeds. The decision of the Recorder was one which he was entitled to reach on the basis of the evidence he had and, applying the above authorities on appeals from evaluative decisions, it should be allowed to stand. Subject to one minor oddity, he betrayed no error of logic in reaching his conclusion, and his findings of primary fact are not (and cannot be) impeached. The route he took was therefore a proper route, and the destination (conclusion) at which he arrived was one which he was manifestly entitled to arrive at. Indeed, for reasons that I shall come to, I think it was the correct decision and one which I would have arrived at myself.

31. The one error of law relied on by Mr Horton was, in my view, no such thing. The main sentence of paragraph 109 relied on is said to betray an understanding on the part of the Recorder that an agreement had to be express for the invocation of the doctrine of mutual wills, and that that is wrong in law. I would agree that if that is what the Recorder was saying then it would be an error, because an agreement could be implied, though bearing in mind the stringency of the agreement requirement it may be hard to establish one in the absence of an express agreement. However, the Recorder was not saying an express agreement was required. What he was making was an evidential point. He was pointing out that the one-sided references to revocation, with nothing said about Mr McLean's side, meant that there was no material on which to find a mutual (reciprocal) agreement. One side of it was missing.

32. The one potentially slight oddity about his findings in paragraph 109 occurs earlier in the paragraph, when the Recorder says:

> "The evidence does not demonstrate that Reginald made any such promise: on the contrary, he specifically stated that he trusted his wife implicitly, on the strength of their 45 year marriage, which in my judgment means that he did not think there was any need to make an agreement. He was willing to rely on trust alone. That, it seems to me, placed only a moral obligation on Maureen, and not a legally binding obligation."

33. This is a slightly odd analysis. The trust placed in his wife was not the opposite of a promise made by him, which the judgment might be thought to say it was. However, a fair consideration of the passage does not reveal that to be some sort of serious mistake of logic which requires an appellate court to revisit the conclusion. There was thus no error of law.

34. Thus the Recorder's conclusion was one that was open to him on the facts as found. In addition, if it mattered, it was also, in my view, the correct decision. What is required

to establish mutual wills is a clear agreement, whether strictly contractual or not. Expectation, or trust, is not enough. The evidence in this case established only trust. If any agreement arose, it appears that it must have arisen at the meeting with Mr McKie. There is no suggestion that the spouses went to the meeting knowing what they wanted to do and had agreed mutual wills before they got there. The terms of their wills would seem to have evolved from a discussion with Mr McKie as to what they should do in the light of the fact that they did not want their then existing wills to stand. It is not clear how the idea of the mirror wills evolved, but evolve it did once it became apparent that re-writing would be necessary (see the sequence of events in the attendance note and in particular the remark about the clients' needing to re-write their wills). In those circumstances one wonders how the clear agreement required for mutual wills can have come about. It can only have come about when Mr McKie raised the one-sided question of what should happen if Reginald were to die first. The response was not an agreement by Maureen, matched by a complementary agreement from Reginald, that the wills would not be revoked. Instead, Reginald indicated that he trusted his wife not to do that - words of expectation, not agreement. Maureen apparently said something which justified the trust (the point not recorded in the attendance note but found by the Recorder) and said that she trusted her husband, but the matter did not go further than that. I would agree with the Recorder that that is not enough to move the transaction out of the realms of trust and into the realms of binding agreement.

35. It also seems to me that it would be informative to consider a different version of the critical question posed by Leggatt LJ in *Goodchild* and set out above. What if it were to turn out that one of the four children had a serious change of circumstances (such as an accident or serious illness) which a surviving parent might well think justified increased provision for that child, and which it might be right to suppose that the pre-deceasing spouse would also have thought would be right. Were the spouses really agreeing that the will of the surviving spouse could not be changed to accommodate that? That, or Leggatt LJ's actual question, were not considered in the judgment, but there is nothing in the facts as found which would suggest that in those extreme circumstances the second will should not be changed to accommodate the new and unforeseen circumstances. It is much more likely that the "trust" which the spouses had in each other was the sort of trust in the ability of the surviving spouse to exercise his/her judgment as to what it was right to do in all the circumstances. If that is right then that conclusion is fatal to the mutual wills argument because there was no binding agreement (or an arrangement treated as binding) not to revoke.

36. Accordingly, the appeal in relation to the Recorder's decision on mutual wills arising out of agreement fails.

The proprietary estoppel-based claim

37. As already pointed out, the Recorder found against the proposition that an estoppel could suffice in place of an agreement in the creation of mutual wills, and that in any event an estoppel argument failed on the facts.

38. I shall start a consideration of this point by considering how the estoppel is pleaded. The Particulars of Claim plead the point as follows:

> "7) At a meeting on 2 June 2017 with Mr Alistair McKie, solicitor, who drafted the mutual wills, Mr McKie raised the possibility that if Reginald died first there was no guarantee that the Deceased would not vary her will to disinherit her stepchildren and leave everything to her son the Defendant. Reginald and Maureen responded in terms that they had been married for 45 years and there was no way she would do that. The Deceased confirmed that this was correct.…
>
> 8) In reliance upon the assurance made by the Deceased asset out above and the agreement between themselves that neither party would revoke or alter their will without first informing the other, Reginald acted to his detriment and executed his will on 23 June 2017 and did not alter or vary it before his death."

39. That is the estoppel point which has to be considered. I put on one side for the moment the legal question of whether an estoppel (as opposed to an agreement) is sufficient to give rise to mutual wills, and assume for the moment that it might be. In my view the claimants' argument fails at the factual stage and the judge below was right about that.

40. If the estoppel claim is to work, it must be established that there was an appropriate representation by Maureen, intended to be binding and received as such, that she would not revoke her will. The facts which are fatal to establishing mutual wills by agreement are equally fatal to the estoppel argument. There was no agreement because it was not established that the parties intended to bind themselves beyond the realms of trust. If that is right then anything said by Maureen was neither said nor received on the footing that it was intended to be binding. There was therefore neither the necessary representation intended to be relied on, nor reliance on any such representation. That is a short answer to the estoppel point. It is not quite the same reasoning as that adopted by the Recorder but it seems to me to follow inevitably from a proper analysis of the facts in relation to the alleged agreement.

41. That makes it unnecessary for me to consider whether, as a matter of law, some form of estoppel, proprietary or otherwise, would be sufficient for the purposes of

establishing mutual wills. The point has a significant degree of plausibility, and it appealed to HHJ Matthews, sitting as a judge of the High Court, in *Legg v Burton* [2017] EWHC 2088 (Ch). He considered that the availability of an estoppel might be a way out of difficulties arguably posed by a situation in which the subject matter of mutual wills was real property, the agreement said to give rise to mutual wills was oral and the effect of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 was to provide that there could be no contract because the agreement was not in writing. In *Healey v Brown* [2002] EWHC 1405 (Ch) Mr David Donaldson QC, sitting as a deputy judge of the High Court, seems to have adopted that line of reasoning; in *Olins v Walters* [2007] EWHC 3060 (Ch) Norris J avoided the difficulty by saying that the problem did not arise where the relevant gift was of residue and not of real property even if the residue contained real property. HHJ Matthews seems to have suggested that proprietary estoppel might be another way of avoiding the consequences of section 2 (that seems to have been the significance of his proposal), though he did not need to decide or rely on the point because he was able to rely on *Olins* on the facts of his case.

42. As acknowledged by Judge Matthews, there are strong remarks in *Goodchild* which would, if taken at face value, strongly point to the requirement of an agreement in mutual wills in terms which would preclude the operation of an estoppel falling short of an agreement. I have cited some of them above, and Morritt LJ also expressed himself clearly in agreement or contractual terms which would not admit of the operation of an estoppel in lieu. There are other authorities which express themselves similarly. However, I share the view of Judge Matthews that, at least as a matter of principle, it is not easy to see why an estoppel should not operate in the realms of mutual wills if the evidence were clear enough (though in practice there may not be many cases where it would be likely to operate). Mutual wills operates in the realms of equity in order to prevent injustice, and that is what estoppels do as well. It might be said that the Court of Appeal in *Goodchild* did not have estoppels in mind when the Lords Justices made their pronouncements, and that the focus was on the firmness of the agreement which was required rather than on laying a clear boundary in principle.

43. However, having said that, I do not have to decide the point because of my decision on the facts of the matter, and since it is, or might be, an important one it is right that it should be decided in a case in which it is capable of mattering on the facts. I therefore say no more about it.

Conclusion

44. I therefore conclude that this appeal should be dismissed.