Neutral Citation number: [2024] EWHC 2086 (Ch)

IN THE HIGH COURT OF JUSTICE **Claim No. PT-2023-000541**
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
PROPERTY TRUSTS AND PROBATE LIST

MASTER MARSH (sitting in retirement)
Rolls Building
Fetter Lane
London EC4A 1NL

BETWEEN

JONATHAN EWAN MARCUS

Claimant

and

EDWARD QUINTIN MARCUS

Defendant

JUDGMENT

Thomas Braithwaite (instructed by **Maurice Turnor Gardner LLP**) appeared for the **Claimant**

Matthew Mills (instructed by **Ellisons Solicitors**) appeared for the **Defendant**

Trial 22, 23 and 24 July 2024

Judgment handed down by email at 10.00 on 16 August 2024

1. On 29 November 2003 Stuart Marcus created as settlor the SN Marcus Settlement ("the Settlement"), which is a discretionary trust in favour of a class of beneficiaries that includes "the children and remoter issue of the Settlor" and their spouses. The Settlement was a tax mitigation arrangement in what their advisers at the time described as a 'Son of Melville' scheme[1] using discretionary trusts to postpone the payment of CGT. Stuart Marcus' wife Patricia created a similar settlement, the PEJ Marcus Settlement, at the same time.

2. Stuart and Patricia Marcus were married on 29 September 1973. Edward Marcus (who is the defendant) was born on 11 March 1978 and Jonathan Marcus (who is the claimant) was born on 23 December 1981. Stuart Marcus died in 2020. Throughout the trial the parties and their parents were referred to using their given names and I will adopt the same approach in this judgment.

3. Edward and Jonathan were brought up by Stuart and Patricia as brothers and believing they were brothers. There is no doubt that they are both Patricia's children. However, Jonathan seeks to establish that Stuart was not Edward's father and, if he is right about that, he says, on a proper construction of the Settlement, Edward falls outside the class of beneficiaries who may benefit. The same point does not arise under the PEJ Marcus Settlement because Patricia is Edward's mother.

4. Patricia told Edward for the first time in March 2010, when he was aged 32, that his true father was Sydney Glossop who was a partner in a law firm in Norwich. Stuart never knew that his wife believed Sydney Glossop was Edward's father and he created the Settlement in 2003 believing that he was Edward's and Jonathan's father.
5. This claim was issued on 3 July 2023, some seven weeks after Jonathan found out about his mother's claim about Mr Glossop being Edward's father. In a prior claim brought by Edward in 2021, Edward sought Jonathan's removal as a trustee of the two settlements. Jonathan defended that claim and Patricia made two witness statements in the removal proceedings that were relied upon by Jonathan in which she referred to Edward and Jonathan as "our sons". She has now provided witness evidence in this claim saying that Edward was Mr Glossop's son.

6. On 10 March 2022, after a 1½ day hearing, Master Pester made an order that the trustees of the Settlement, Edward, Jonathan and Timothy Addinell who was a long-standing professional trustee, should resign in favour of independent trustees appointed in accordance with a process prescribed in the order. Although it is not directly relevant to this claim, Edward says that Jonathan has delayed the implementation of the order and the appointment has not yet been finalised. Indeed, it was at one time part of the relief sought in this claim that Edward should be removed as a trustee of the Settlement. Jonathan has also issued an application to set aside Master Pester's order. However, save as a matter of context, the 2021 removal proceedings now have only very limited bearing on the issues in this claim.

[1] Following *Melville v IRC* [2001] EWCA Civ 1247.

7. The issues for the court to resolve in this claim were reduced to eight at the outset of the trial. They have been defined by the parties in the following way:

   "1. Is the court satisfied on the balance of probabilities that Edward Marcus is not Stuart Marcus' biological son?

   2. If so satisfied, should the court make the declaration sought by Jonathan in paragraph 1 of the Prayer?

   3. Does the word 'children' in the Settlement include stepchildren?

   4. Was the 2004 Deed of Appointment executed on the basis that Edward was the son of Stuart Marcus, and has Jonathan derived benefits by reason of that Deed such that he is estopped by deed from challenging the truth of Edward's parentage?

   5. Was there a convention which 'crossed the line' between Edward and Jonathan that Edward was Jonathan's full brother, and did Edward act to his detriment in reliance upon that convention, such that Jonathan is estopped by convention from denying the validity of the 2004 Deed of Appointment and/or the 2016 Trustee Appointment Deed?

   6. Did Jonathan make the representations alleged in Edward's Amended Defence and did Edward rely on those representations to his detriment, such that Jonathan is estopped by representation from denying that Edward is a beneficiary of the Settlement?

   7. Was the effect of the Deed of Appointment dated 5 March 2004 to add Edward to the class of beneficiaries of the Settlement regardless of whether Stuart was his biological father, and if so for what purposes?

   8. If the effect of that Deed was not to add Edward to the beneficial class, then what was its effect? [Jonathan asserts its effect was to appoint the income to him alone; Edward asserts it was entirely void.]"

8. The issues cascade one from another and the core issues are issue 1 concerning Edward's parentage and issue 3 which is the issue of construction arising under the Settlement. If the court concludes that Jonathan's claim on issue 1 fails, the issue of construction does not need to be determined because Edward falls within the class of beneficiaries in the Settlement, and none of the other issues need to be decided. If, on the other hand, the court decides the issue of paternity in favour of Jonathan, the court has to determine the issue of construction. It is only if that issue is determined in favour of Jonathan that the remaining issues, or some of them, need to be dealt with. Issue 2, the question of whether the court should grant a declaration of non-paternity

is to be decided, if it arises, when the court deals with the relief to be granted after this judgment has been handed down.

9. Although issue 3 has not been redefined by the parties, it falls to be considered in light of a re-amendment to the defence agreed by the parties during the trial. The re-amendment was put forward because in the course of openings there was discussion with the court about the meaning of "stepchild", it being common ground that it is not a term with a standard legal meaning. Edward's case on construction is now put in three alternative ways. First, as originally pleaded, that 'children' includes stepchildren; secondly that 'children' includes children of the family and thirdly that 'children' refers to Edward and Jonathan.

10. Thomas Braithwaite appeared for Jonathan and Matthew Mills appeared for Edward. I am grateful to them both for the helpful and measured way in which the trial was conducted. This enabled the trial to proceed in a constructive manner despite the nature of the issues it involves and for the trial to be concluded well within the time estimate.

Background

11. In 1962 Stuart founded a family toy business originally named Kitfix Hobby's Limited. The company's primary business was manufacturing and selling toys. In the late 1980s, the company acquired the brand 'Sequin Art'. The company was re-named Kitfix Swallow Group Limited and at about the same time as Sequin Art was acquired the company also started to buy and lease investment properties in England.

12. The company's shares were structured into A and B shares with the A shares carrying voting rights but no dividends and the B shares carrying a right to dividends. However, there was never a practice of declaring dividends. The shares were largely held by members of the family with Stuart and Patricia holding between them 50.1% of the A shares and 68.7% of the B shares. Edward and Jonathan had significant holdings and in 2003 there was already in existence an Accumulation and Maintenance Settlement created in 1988 under which Edward and Jonathan were the beneficiaries. The trustees of that settlement held 150,000 A and 150,000 B shares. No details have been provided about that settlement, but it is not suggested that the drafting of the Accumulation and Maintenance Settlement gives rise to any difficulties.

13. Stuart and Patricia consulted Mills & Reeve in Norwich in May 2003 about the creation of two new settlements. The surviving part of their file was produced just a few days before the trial commenced. I will come to the applicable rules of construction, but it is common ground between the parties that to the extent it provides relevant information about the context in which the Settlement was made, its contents are admissible. However, the contents of the file cannot be relied upon to provide indirect evidence of Stuart's subjective intention. Although this distinction is easy to state, it is less easy to apply because some of the information in the file is capable of fulfilling both functions.

The Settlement

14. The material provisions of the Settlement provide:
    (1) Clause 1(b) – The Trust Period is 80 years.

    (2) Clause 1(c) - 'The Beneficiaries' are defined as:

> "(subject to Clauses 5(b)(i) and (ii) below) the following persons whether now living or born hereafter during the Trust Period
>
> (i) the children and remoter issue of the Settlor now in being or born hereafter
>
> (ii) the spouses, widows and widowers of such children and remoter issue
>
> (iii) any charities"

    (3) Clause 1(e) – The Initial Period means the period ending 7 March 2004 (a period of 100 days). This is subject to the Remainderman's power to extend it.
    (4) Clause 2(b) – The Trustees were given a discretionary power to pay the income to or for the benefit of any one or more of the Beneficiaries.
    (5) Clause 5(b) gave powers to the Remainderman (i) "to add any person(s) or class of persons (excluding however the Settlor or his spouse) to the class of Beneficiaries", (ii) to exclude any person from the class of Beneficiaries and (iii) to extend the Initial Period.

15. On the same day as executing the Settlement, Stuart assigned to the Trustees (who were originally two partners in Mills & Reeve) 291,584 A shares and 399,500 B shares in Kitfix Swallow Group Limited.

16. On 4 March 2004, upon the expiry of the Initial Period, three events occurred. First, Stuart assigned the Remainder Interest in the Settlement to Patricia and thus made her the Remainderman under the Settlement. Secondly, Patricia as Remainderman extended the Initial Period to 1 March 2020. (It was later extended to 1 March 2040). Thirdly, she exercised by deed her power of appointment as Remainderman under clause 5c of the Settlement requiring the Trustees to pay the income to Edward and Jonathan in equal shares. Under issue 7 the court is required to decide whether the effect of the Deed of Appointment was to join Edward to the class of Beneficiaries, regardless of whether he was Stuart's child.

Subsequent changes to the company structures

17. In 2005, after graduating from university, Jonathan moved to Germany. He started a property renovation and lettings division in Berlin under the Kitfix Swallow Group Limited umbrella. Over the next 15 years, he received over £6 million in investment money from Kitfix Swallow Group Limited. In 2013, the German business was incorporated in Germany as Kitfix Immobilien Holding Gmbh & Co KG. It was a wholly owned subsidiary of Kitfix Swallow Group Limited.

18. In 2017, Kitfix Swallow Group Limited was renamed Kitfix Swallow Properties Limited and 'demerged' into two groups of companies. This was done for tax reasons and to enable Sequin Art to be sold. The first group of companies focussed on manufacturing and selling toys, and the second group of companies focussed on property letting. The two groups of companies are Kitfix Swallow Group Limited, which wholly owned Sequin Art Limited, and Kitfix Investments Limited, which wholly owned Kitfix Swallow Properties Limited (the renamed 1962 company). In turn, the renamed Kitfix Swallow Properties Limited owned two German companies: (1) Kitfix Immobilien Holding GmbH & Co KG, which is a German partnership which holds the German assets. (2) Kitfix Immobilien Holding GmbH, a German limited company which acts as the managing partner of Kitfix KG. Stuart and Jonathan were the original directors.

19. On 26th November 2019, all of the shares in Kitfix GmbH were sold to Jonathan. Edward did not find out about this until after it had happened. Following Stuart's death in February 2020, Jonathan has been the sole director and shareholder of Kitfix GmbH.

20. On 21st April 2023, the assets of Sequin Art Ltd were sold to a Polish limited company which is now called Kitfix Sp. z o.o. Jonathan is a director and shareholder of that company.

21. Currently, the assets in the Settlement are:

    1,094,536 A shares in Kitfix Investments Ltd (36.45% of the total A shares)

    1,499,623 B shares in Kitfix Investments Ltd (49.94% of the total B shares)

    1,338,972 shares in Kitfix Swallow Group Ltd (43.19% of the total shares)

22. The value of the shares held by the Settlement is estimated to be approximately £14.5 million.

The evidence

23. Edward and Jonathan have had poor relations for many years and there have been major disagreements between Edward and Stuart and Patricia at different times. Patricia has chosen to give evidence on behalf of Jonathan about matters that are highly personal to her. She is clear that Edward is not Stuart's biological son. The role of the court is to determine this issue on the evidence in a dispassionate way. Jonathan's motives for bringing this claim are irrelevant, as are the reasons for the breakdown of relations between Edward and Jonathan. The outcome will be adverse for one party but, as Mr Braithwaite observed, the decision is a binary one. The court must decide whether on the balance of probabilities either that Stuart was Edward's father, or that he was not.

24. It is helpful to start by recognising two uncontroversial propositions of law. First, there is a presumption that a child born during a marriage is the child of the husband.

The presumption is rebuttable. Secondly, the fact that Stuart is named as Edward's father on his birth certificate provides prima facie evidence of his paternity. However, it is not determinative. Both these propositions derive from the extensive summary of the law relating to declarations of parentage in the judgment of Macdonald J in *MS v RS and others* [2020] EWFC 30 at respectively [49] and [68]. There is a discussion in the same judgment about the burden of proof although it was provided in the context of section 26 of the Family Law Reform Act 1969. He also refers to the well-known remarks made by Lord Hoffmann in *In Re B* [2009] AC 11 at [2] about the binary nature of judicial decision making.

25. As to the evidence that is needed to rebut the presumption of parentage, Macdonald J at [57] says:

    "… a declaration of parentage is significant and should not be based on potentially unreliable evidence."

26. Mr Mills relied upon this observation but if I may say so, it is not revelatory. In the same way with all civil claims, the evidence must in aggregate be sufficient to discharge the burden of proof. If it is not of sufficient weight, the claim will fail. Elements of the evidence may be of greater or lesser strength. What matters is the tally from the totality of the evidence and if after considering it the court is not satisfied on the balance of probabilities, the finding will follow accordingly.

Expert evidence

27. The evidence that Jonthan relies upon first and foremost is provided by Orchid Cellmark Limited (trading as Cellmark) in a DNA sampling report dated 23 January 2024. It is convenient to deal with this evidence before the witness evidence. An issue has been taken about the form of Cellmark's report and the absence of a certificate in the form required by CPR rule 35.10 and paragraph 3 of Practice Direction 35. Although the report is signed by Mr D Gostick, who describes himself as a "Reporting Scientist", the report does not include a statement of truth in the form specified in paragraph 3.3 of PD 35. The statements required by paragraph 3.2(9) of the Practice Direction are also absent. However, it is of note that Cellmark is accredited by the United Kingdom Accreditation Service (UKAS) and Mr Gostick says he is employed by Cellmark to oversee DNA relationship testing.

28. In some circumstances the failure to comply with CPR rule 35.10 might lead to the court disregarding the evidence altogether. However, Mr Mills did not take his submissions that far and merely invited the court to have regard to the failures when deciding what weight to attribute to the evidence. That was a realistic position to take. The order made by Master Pester on 3 November 2023 gave Jonathan permission to rely upon the report of an expert on the question of whether Edward and Jonathan share two parents or one, identified Cellmark (not a named person or a recognised class of expert) as the expert, required the report to be served by 4pm on 9 February 2024 and permitted Edward to put written questions to Cellmark by 4pm on 23 February 2024. Edward neither sought permission to rely upon similar expert evidence nor took objection to Cellmark being identified as the expert in the order rather than an individual.

29. The report was served in accordance with the order. However, Edward did not ask questions by the deadline specified in the order. Well beyond that deadline, Ellisons, who act Edward, wrote on 8 April 2024 to Maurice Turnor Gardner, who act for Jonathan, asking whether Jonathan would oppose an application for permission either to challenge the report at trial without cross-examination, or permission to cross-examine someone from Cellmark or permission to submit questions out of time. After some correspondence, a compromise was reached that avoided the need for a contested application being heard. It was agreed that Edward could submit the nine questions to Cellmark specified in Ellisons' letter dated 22 April 2024 and that no application that would permit further challenge to the evidence would be made. The agreed questions were submitted on 26 April 2024 and answered on 29 April 2024.

30. The deficiencies in the Cellmark report must be viewed therefore in light of (a) permission being sought by and given only to Jonathan to rely upon expert evidence, (b) the failure by Edward to engage with the report in accordance with the order, (c) there being no challenge to the conclusions in the report beyond the questions asked and (d) crucially, that no objection to the form of the report was taken over a period of six months. The point was taken for the first time in Mr Mills' skeleton argument. I remark in passing (without intending criticism of Mr Mills) that this is poor practice. If a point about the evidence is to be taken at a trial, due warning should be given to the other party well in advance of the trial, rather than being raised for the first time in a skeleton argument.

31. Furthermore, there is nothing in Cellmark's report to suggest in any way that their analysis of the DNA samples with which they were provided was partisan or would have been different had they been jointly instructed by both parties, or that a report from another provider would have reached a different conclusion. The balanced nature of the report can be seen from a caveat it contains:

    "Please note that due to the nature of inheritance this analysis can only give an indication of the relationship and that sibling analysis is not as conclusive as testing both parents against their alleged children. Addition of an untested parent may alter the conclusion obtained."

32. In their letter answering the defendant's questions (the letter was signed by Miss Rosamund Andrews an 'Interpretation Assistant Manager') they take the caveat further and say as an introduction to their answers:

    "DNA relationship testing, such as sibling analysis, is not as conclusive as parentage testing. This is due to the nature of the inheritance of the DNA markers. On average full siblings will share considerably more DNA markers than unrelated individuals however it is possible for two individuals to have the same parents and only share a small number of DNA markers. If this is the case then full siblings may be detected as half siblings or even possibly unrelated in a DNA test. A relationship such as half siblings is more distant than the relationship between full siblings and the evidential strength of any DNA testing will usually be weaker. It is not always possible to detect a half sibling relationship in a DNA test. For this reason DNA sibling analysis is not conclusive and can only give an indication of the relationship."

33. This caveat is repeated when answering question 5.

34. The report fails to comply with the requirements of CPR rule 35.10 and rule 3 of the Practice Direction in a number of respects including:
    (1) It is not made by a person, or if it is the person does not provide their qualifications.
    (2) It does not say who carried out the tests and provide their qualifications.
    (3) The absence of information about the database against which the DNA tests are measured. It is short on statistical analysis.
    (4) The absence of a statement that the expert understands and has complied with their duty to the court.
    (5) The absence of a statement of truth.

35. On the other hand, the order giving permission specifies that the expert evidence is to be provided by "Cellmark" rather than a named expert or an expert with particular qualifications. DNA testing by a laboratory is now very common and a test that is provided widely both for legal proceedings and for other purposes. There is no challenge to the methodology used by Cellmark or any criticism about the manner in which their conclusions are provided.

36. In my judgment, the Cellmark report broadly demonstrates the approach that is expected from a report that complies with PD35 and the Guidance. It complies in spirit if not in form. It contains an explanation of the process of DNA testing, provides clear conclusions (to which I will come) but also makes clear the limitations that apply to those conclusions. Had the report provided an unequivocal opinion I would approach its conclusions cautiously (regardless of issues of form) but that is not the case. It would be artificial to reduce the weight that is to be given to the report due to failures of form in the circumstances I have described. In this regard I have in mind in particular the terms in which the court gave permission and the absence of timely challenge to the form of the report. I will give due weight to the report and the answers to question without subtraction due to a lack of form.

37. The report provides the following conclusion:

    "The DNA results are consistent with [Jonathan] being related to [Edward] as a half sibling ie having one parent in common.

    It is 57 times more likely that [Jonathan] and [Edward] are related as half siblings than if they are unrelated. <u>It is 25 times more likely that [Jonathan] and [Edward] are related as half siblings than if they are related as full siblings</u>." [my emphasis]

38. These conclusions are followed by four paragraphs under the heading analysis and the DNA profile results are set out in the table.

39. I need only refer in addition to the answer to question 3:

    "3. As above, the DNA results support a half sibling relationship. Whilst a full sibling relationship cannot be excluded based on these results, the result at test DYS391 is significant. This is a test on the Y chromosome which indicated male lineage and is not used in the calculation of the likelihood ratio as standard; however, if two individuals share the same father then we would expect their DNA result at this test to

match. The DNA at this test does not match between [Jonathan] and [Edward] which could indicate that they do not share the same biological father. However, a full Y-STR DNA test would need to be carried out to confirm this."

40. This further test was not commissioned by either party.

41. The language used in the report is cautious. Cellmark are at pains to make clear there are no certainties to be derived from the DNA testing where the samples come only from the putative siblings. However, even paying close heed to their caveats, they express an opinion that it is 25 times more likely than not that Edward and Jonathan do not share the same biological father, that they are half siblings. Mr Mills relies upon Cellmark's statement that DNA testing for siblings is not conclusive and can only give an indication of the relationship. However, the indication here is a powerful one. 25 times more likely than not is a long way from the tipping point of the balance of probabilities. I accept the evidence provided by Cellmark and being cogent and reliable and find that Edward and Jonathan do not share a biological father.

42. It is still necessary, however, to consider the evidence that may indicate which of them is not Stuart's biological son.

Witness evidence

43. Jonathan, Edward and Patricia have each provided witness statements and all three witnesses have been cross-examined. The evidence has unfolded in a way that is not standard for a Part 7 claim because the claim was issued as a Part 8 claim and a witness statement was provided by Jonathan at the time the claim was issued and, shortly afterwards, Patricia made her first statement.

44. Jonathan's first statement is dated 3 July 2023. He says he was told by Patricia just seven weeks earlier on 15 May 2023 that Edward's father was Mr Glossop, that she had told Edward about this in 2010 and she and Edward had visited Mr Glossop in March 2010. He also says that Stuart died not knowing that Edward was not his son.

45. Patricia's first statement is dated 27 July 2023. She sets out in paragraphs 3 to 11 a summary of her conversation in 2010 with Edward, she says a visit was made with Edward in 2010 to see Mr Glossop and says she is certain that Mr Glossop was Edward's father and gives the reasons why she reached that conclusion. She said that a blood or DNA test would show that Edward and Jonathan are half-brothers, that Stuart died not knowing about Edward's parentage and that she had only told Jonathan about Mr Glossop being Edward's biological father on 15 May 2023. She exhibits an exchange of emails between her and Edward in March 2010 immediately after their visit to Mr Glossop.

46. Patricia's first statement was served on Edward before he filed an acknowledgement of service and provided evidence in response to the claim. He objected to the use of Part 8 and later the order dated 3 November 2023 converted the claim to Part 7, gave directions for pleadings and subsequent exchange of trial statements. However, it is notable that in Edward's first statement dated 21 September 2023 (after having seen

Patricia's first statement) at a time when he was acting in person he does not engage with his mother's evidence. He merely says:

"Whilst I do not accept that my father is not my biological father, this is irrelevant as I am a named beneficiary and also was a named beneficiary pursuant to a deed of appointment made by [Patricia] which has appointed income to me. The allegation surrounding the identity of my biological father is therefore irrelevant and is the recent of several attempts to frustrate the implementation of Master Pester's order in claim PT-2021-000232…. [passage omitted]".

47. He then goes on to suggest that the issue of construction under the Settlement should be dealt with first and that his birth certificate records his father as being Stuart.

48. Jonathan and Patricia's first statements deal only with the issue of paternity. Both of the statements confidently state the position about Edward's paternity and refer to the possibility of DNA testing being undertaken. Cellmark's report was served in late January 2024 so that by the time the trial witness statements (Jonathan's and Patricia's are dated 18 June 2024 and Edward's is dated 19 June 2024) were exchanged, Cellmark's conclusions were known. Edward has therefore had the advantage when preparing his trial witness statement of knowing what evidence Jonathan and Patricia would rely upon and knowing that if Cellmark's opinion is accepted it is 25 times more likely than not that he and Jonathan do not share a father. That of course leaves open the question of which of them is Stuart's biological son.

49. Edward's defence raised a wide range of issues, including issues that are fact sensitive. They cover family relations and involvement in the family business over an extended period from about 2010 to 2020 as well as the paternity issue. For reasons that will become clear, it is not necessary for me to determine issues 4 to 8 (issues 4, 5 and 6 are issues of estoppel). I will approach the evidence of the three witnesses concentrating upon their evidence that relates to Edward's paternity and I will not make findings of fact that relate to issues I do not have to decide. However, when assessing the quality of the evidence provided by each of the witnesses, their reliability and credibility, I have had regard to the totality of their evidence both in written and oral form.

50. The issue of construction gives rise to no disputed issues of fact of any significance.

51. There is a very helpful discussion in Chapter 45 of *Phipson on Evidence* 20th Ed. about fact finding and the assessment of evidence. It refers amongst other authorities to the well-known observations by Leggatt J in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [15-21] and his later observations in *Blue v Ashley* [2017] EWHC 1928 (Comm) at [68-69]. Human memory is unreliable. Patricia's evidence about the circumstances of Edward's conception concerns events of nearly 50 years ago. There is no writing contemporaneous with those events that assists her recollection. It is right that her recollections about those events should be viewed cautiously.

52. Patricia's evidence is that the first time she spoke to Edward about his parentage was in 2010 when she revealed to Edward that his father, according to her evidence, was

not Stuart but Mr Glossop. She was married to Stuart from 1973 to 2020 but kept her relationship with Mr Glossop from him. Although there are significant differences between Patricia's and Edward's recollections of events in 2010, there is also strong similarity in their recollections. They agree that Patricia spoke to Edward about Mr Glossop, she said he was Edward's father and they went to see Mr Glossop together. Helpfully, there is an exchange of emails between them in March 2010 about that visit. It is the only contemporaneous document. The main differences between them concern what Edward says he was told by his mother about her marriage, about her affair with Mr Glossop, and how long it lasted, and recollections Edward has from about the age of 5 about visits to the family home by a "white-haired old man".

53. Edward's evidence deals in some detail with events he can recall when he was very young about Mr Glossop continuing to see Patricia until after Jonathan's birth. He raises the possibility that Mr Glossop may be Jonathan's father which, if right and if Cellmark's report is accepted make it very likely that Edward is Stuart's son. Just as Patricia's evidence may be unreliable due to the passing of time, Edward's evidence provided from a period when he was aged 4 or 5 in the early 1980's may also be unreliable.

54. Sadly, relations between Patricia and Edward are very poor; she and Edward are on opposite sides of this litigation, with her giving evidence for Jonathan. A desire to help Jonathan may have created an additional overlay that could have affected her recall of events. She made two witness statements in support of Jonathan in the previous trustee replacement proceedings in which she described Edward and Jonathan as her sons which could be seen as being inconsistent with her more recent evidence.

55. The principal witness in relation to paternity is of course Patricia. She is now aged 81. Her evidence concerns events that took place covering the period from 1977, when Edward was conceived, to 2010 when she talked to Edward for the first time about Sydney Glossop. (In her evidence Patricia was adamant that she spoke to Edward when he was 30 in 2008 but this unrefreshed memory is incorrect because there is an email which she exhibits from March 2010 that pinpoints the date accurately).

56. The two statements she has made in this claim deal with the crucial events. In her first statement dated 27 July 2023 she says:

"3. Edward had reached the age of 30 and I felt it was time that I told him who his real father was. At the time I told Edward he was residing in Gladstone Street, Norwich. I called on Edward at Gladstone Street and informed him his father was not Stuart Marcus but was Sydney Glossop who was a retired Partner in the firm of Russell Steward Stevens & Hipwell, Solicitors, Norwich.

4. Edward questioned me about his father and I explained the type of person he was and his profession.

5. I then asked Edward if he would care to meet his father and he answered in the affirmative. I told Edward I would find out where he was living. Upon searching the

internet for Sydney Glossop, I found a newspaper article in the Birmingham Mail which mentioned Sydney Glossop was in a care home.

6. In March 2010 Edward and I drove in his car to the care home in Birmingham. We found Sydney in his bedroom sitting up in his bed. I said 'Hello Sydney I would like you to meet Edward your son'. After spending approximately two hours with Sydney we left the care home and returned to Norwich.

7. I have no doubt that Edward's father is Sydney Glossop, as I had not tried for a baby with my Husband Stuart Marcus three to four weeks prior to Edward being conceived. After I found out I was pregnant with Edward, the relationship with Sydney Glossop ceased. Thereafter I had an exclusive relationship with my husband, Stuart Marcus.

8. Jonathan is the son of Stuart Marcus, as at this time in 1981 I had only a relationship with my Husband Stuart Marcus. Both a blood or a DNA test will show that Jonathan and Edward are only half-brothers.

9. My Husband Stuart Marcus passed away on 20th February 2020, he died not knowing that Edward was not his biological son.

10. On 15th May 2023 Jonathan was visiting the UK and I decided it was time to tell him that Edward was his half-brother and that Sydney Glossop was Edward's biological father."

57. Her statement exhibits an e-mail exchange with Edward in 2010. The title to the emails is "John Le Mesurier" because Edward remarked that the photograph he had found on the internet of Mr Glossop suggested he was "the spitting image of John Le Mesurier". The exchange is significant because Patricia replies: "I cannot stop thinking of him".

58. The exchange suggests that by 15 March 2010 they had both been to see Mr Glossop following which Edward wrote to Patricia:

> "Thanks for introducing me to him. Its all been a bit of a shock. [sic] You will have to let me know when we can make another trip over. I have spent hours on the internet looking into this and it is amazing how many people are in the same position. I suppose it must be difficult for you as well."

59. Patricia replied the same day saying:

> "Had a conversation today – it was wonderful. Thank you for being so kind and understanding. I still have butterflies even now after all these years. We will make arrangements to go again. He is so happy."

60. It appears that Patricia had spoken to Mr Glossop after the visit and her message suggests that Patricia was still strongly affected by Mr Glossop. "He is so happy" could refer to Mr Glossop's pleasure at being in contact with Edward or to pleasure at re-connecting with Patricia, or both.

61. Patricia's second statement is dated 18 June 2024. When she made it she had not seen Edward's statement dated 19 June 2024 in which he deals with parentage in detail. Patricia provides more information about her relationship with Mr Glossop and her announcement to Edward in 2010.

62. Patricia says in her statement:

> “8. Prior to my marriage I had had a relationship with Sydney Glossop, who was a solicitor in Norwich. I met Sydney in the 1960s when I was working in a solicitor's office. I was a legal secretary from the age of 17. We used to visit the same cafe in London Street Norwich, which was close to our respective offices where we worked, and became friends first before we started arranging to meet up and a physical relationship began. Sydney was 54 and married when I met him, and I was in my 20s.
>
> EDWARD'S PATERNITY
>
> 9. After my marriage Sydney made a nuisance of himself and rang me up constantly. Stuart was always on the road as a sales representative. In 1977 he went away for 3 weeks, as mentioned in my previous statement. Sydney rang me during this period, and I agreed to meet him. It was at this meeting that Edward was conceived - I know this because as Stuart had been away, he could not have been the father. Other than this one-off encounter, I did not see Sydney again after this meeting. Sydney continued to try and contact me, however I stopped this.
>
> 10. Other than that encounter, I had absolutely no relationship with any man other than my husband. Accordingly, I am absolutely certain that Jonathan is Stuart's son.
>
> [passage omitted]
>
> 11. I told Stuart that I was pregnant when I got the pregnancy test results. I eventually told Sydney but not for a long time afterwards. Sydney had no reaction to the news and was not interested in having any further relationship with the child (Edward).
>
> 12. I registered Edward's birth on 3 April 1978 in Norwich. I cannot remember if Stuart was with me or not. However he was present at Edward's birth. There was nothing I could do but put Stuart as Edward's father on the birth certificate. I knew that Stuart absolutely adored me, and I could not hurt him in that way. I also knew that Sydney was married and did not want any relationship with Edward.”

63. Her statement goes on to describe again the occasion in 2010 when she told Edward about Mr Glossop and their visit to him. She concludes by saying:

> “19. After the meeting with Sydney, he asked me not to meet him again. I think he was frightened that Edward was going to get involved with his Will when he died. Neither Edward nor I ever saw Sydney again.
>
> 20. Edward and I only spoke about Sydney twice after the meeting, once in a brief email exchange where Edward said that Sydney looked like John Le Mesurier and once when I told Edward that he had a bad temper 'just like Sydney'.”

64. Patricia’s written evidence is not entirely consistent about the extent to which she was in contact with Mr Glossop after the occasion she identifies as the date of Edward’s conception. She says she did not see Mr Glossop from that point onwards although he made efforts to stay in contact with her and she told Mr Glossop “a long time afterwards” that Edward was his son. She is vague about how she told Mr Glossop about Edward.

65. Her oral evidence about the extent to which she maintained contact with Mr Glossop after 1977 was also muddled. She accepted that there was some contact and that Mr Glossop visited the house in Taverham after Jonathan was born. Her recollection about detailed points relating to the trusts and the dates of some events was unimpressive. On occasions she would

not accept a point that was obviously correct, such as refusing to accept Jonathan had sent an email from her account and at one point maintaining she did not treat Edward and Jonathan equally.

66. She was however adamant and consistent that she did not have sex with Mr Glossop after the one occasion she describes in her written evidence and that Mr Glossop is Edward's father.

67. Edward's second statement, which is responsive to Patricia's first statement, provides a lengthy summary of his recollection of his mother's revelation in 2010 about her relationship with Mr Glossop. He recalls her telling him a good deal about the state of her marriage with Stuart, that from her point of view it was an unhappy marriage and that Mr Glossop was her true love. Critically he says she told him that she was still seeing Mr Glossop in 1982 after the family moved to Norwich and after Jonathan was born. He also recalls her saying that she did not want Stuart to have any doubts about being Edward's father so she was always careful to ensure that she maintained a sexual relationship with both Stuart and Mr Glossop.

68. His recollection of the visit to Mr Glossop records that he did not acknowledge Edward as his son and instead Mr Glossop was very happy to see Patricia. They behaved in a way that Edward says was "sickening", that Patricia hugged Mr Glossop and said to Edward that "this is what true love is".

69. There are two further important elements that arise from Edward's evidence. First, he says that his mother told him during a conversation in the car park of Waitrose in Swaffham later in 2010 that it was a mistake telling Edward about her affair with Mr Glossop and that Stuart is his biological father. He describes her as being very certain about the position and said if Edward told Stuart about Mr Glossop she would deny the relationship. Secondly, Edward says he was told by Patricia that the relationship with Mr Glossop continued until after Jonathan was born, that Mr Glossop was able to visit her more discreetly before the move from Yewtree Farm to 2 Tusser Road in Taverham. Edward could recall as a child an old man with white hair coming to the house in Taverham. He provides other detail from his recollection of that time about visits by this man and that he was the same man who visited when Stuart was away. He says Patricia explained the visit as a visit by "Casey" who sold insurance. Eventually he says Patricia told this man to stop visiting. He says that in 2010 Patricia accepted that "Casey" was in fact Mr Glossop.

70. There appears to be no dispute that the family lived at Yewtree Farm in Foulden up to 1982 or 1983. Jonathan was born on 23 December 1981. The family moved from Yewtree Farm to 2 Tusser Road Taverham. Edward's evidence is that Patricia told him her relationship with Mr Glossop continued until after the move to Taverham and he claims to have a recollection (aged about 4 or 5) of an old man with white hair coming to the house in Taverham and this was the same man who visited the house at Foulden when Stuart was away. This would have been when Edward was aged about 4. Edward says:

> "I remember him visiting on a summer afternoon and that he played with our dog, Charcoal, a black labrador cross breed. Our mother told me his name was Casey and that he sold insurance. Our mother didn't want to draw attention from the neighbours, so she told Mr Glossop to stop visiting us. She told me that if I ever saw him to tell her so that she could report him to the police. She told me not to speak to him. This all happened after Jonathan was born."

71. He goes on to say that Patricia confirmed to him in 2010 that the man he could recall coming to the house was Mr Glossop:

> "She referred to a particular visit which I remembered when Mr Glossop came to the window of the house. Jonathan and I ran and jumped on the sofa by the window and our mother remembered me saying to Mr Glossop "who are you?" she said she found this funny as I was quite rude in the way that I said it."

72. It was put to Patricia that Edward could recall another occasion when Mr Glossop visited. Stuart returned to the house and Mr Glossop had to clamber out the window to escape. She said this did not happen.

73. Jonathan's evidence on the issue of paternity is much less central than that of Patricia and Edward. Jonathan has made three statements. In his first statement, made at the time the claim was issued he says that he was only told on 15 May 2023 by Patricia that Stuart was not Edward's father. It follows that although Patricia provided two witness statements in the trustee removal proceedings, she had not told Jonathan about Edward's parentage until after that claim was concluded. It is of note that in his first statement, and this was repeated in his second statement, he expressed a willingness to provide a DNA sample for testing. It is clear that he was convinced by what his mother told him because this claim is based upon the premise that he is Stuart's biological son and he does not share a biological father with Edward.

74. Jonathan's third statement provides more detail about the occasion when Patricia told him about Sydney Glossop. Jonathan gave evidence in a helpful and clear way. There is simply no basis to doubt his evidence that he found out about Sydney Glossop in May 2023. Had he known that Edward is or may not be a full sibling he had every incentive to raise the issues in the claim at a much earlier stage. I therefore accept his evidence.

75. Jonathan's evidence about May 2023 was challenged on the basis that Patricia did not speak to him about Edward's parentage but rather Jonathan discovered the position himself because he has access to Patricia's computer and her email address. This assertion was part of Edward's case that Jonathan exercises "sinister control" over his mother. There is however no evidence of substance to show that Jonathan was able to access his mother's computer at will or that had he done so he would have been able to discover information about Edward's paternity. The only email exchange on the subject dates from March 2010 under the heading "John le Mesurier" and it is fanciful to think that Jonathan scrolling through his mother's email account could have (a) alighted on this email exchange and (b) realised its significance without being given its context and an explanation for the heading.

76. Mr Mills submitted that the court should not place reliance upon Patricia's evidence. He points to the number of occasions she said she could not recall instead of answering a question and to obvious errors. He relies upon the fact that Patricia was not truthful about her relationship with Mr Glossop over decades and submitted that this degree of deception corrupts memories. Furthermore, that her recollection of events in 1977 and beyond is unsupported by any documents. She accepted the relationship with Mr Glossop was a passionate one and it was suggested to her that her recollection of 1977 is false because it is affected by wish fulfilment. She wants Edward to be Mr Glossop's son.

77. I accept that Patricia was an imperfect witness and that she was wrong about some matters. There is ambiguity in her second statement about contact with Mr Glossop after what she describes as a one-off liaison with him in 1977. She says she did not see Mr Glossop after this occasion but shortly afterwards (paragraph 11) she did not tell Mr Glossop about her being pregnant (or possibly having had his child) "for a long time afterwards". She is unspecific about how they were in contact.

78. However, I was left with no doubt that Patricia was an honest witness giving evidence about very personal and vexing issues concerning her family life. It is unsurprising that she could not recall matters of detail about peripheral issues given her age. The central factual issue concerns whether it is possible that Stuart is Edward's father. Is Patricia's evidence reliable in saying that she had sexual intercourse with Mr Glossop in 1977 at a time she was not having intercourse with Stuart and did not have sexual intercourse with Mr Glossop after the one occasion in 1977? If her evidence is accepted on these two points, Mr Glossop was not Jonathan's father. Did Patricia maintain that she had no further sexual relations with Mr Glossop after 1977 because it is true or because she has convinced herself that it is true?

79. There are helpful pointers in the evidence including that:

> (1) Patricia's first statement was made prior to the DNA testing. She said unequivocally that DNA testing would show that Edward and Jonathan are half-brothers. The report since obtained provides powerful evidence to confirm that she is correct.
>
> (2) Patricia is the only person with first-hand knowledge about her relationship with Mr Glossop. Only she would know about her sexual activity with Stuart, his absences on business, her sexual activity with Mr Glossop. Her evidence about Stuart's absence for a period in mid-1977 was not capable of being challenged. Even accepting the possibility that she has convinced herself of a set of facts, as to the date of conception and her sexual partner at that time, I consider it is more likely than not her recollection about the core facts is correct. Her core evidence about an extra-marital affair leading to conception the birth of a child who was treated as the child of her husband is far more likely to be remembered accurately than other events, due to its significance for her and for her marriage. It is wholly plausible that the sexual liaison in 1977 was not continued after Patricia realised that she was pregnant and, as she put it, she later had "no choice" but to put Stuart down as Edward's father on the birth certificate because she wished to preserve her marriage, which then endured until Stuart's death.
> (3) If a sexual relationship with Mr Glossop had continued up to the time of Jonathan's conception, and therefore there being doubt about his parentage, it is very unlikely that she would have acted as she did in breaking the news of his biological father being Mr Glossop only to Edward. It is news that can fairly be described as monumental. Indeed, it is difficult to think of many things more fundamental to a parental relationship than a woman informing her child that the person who has acted as a father for over 30 years is not the child's biological father. It would have been utterly irresponsible of Patricia to tell Edward about the identity of his true father had she not been certain about the facts. She gave no impression at all in court that such a degree of irresponsibility was possible.
> (4) The email exchange between Edward and his mother in 2010 indicates strongly that both believed at the time that Mr Glossop was Edward's father. There is doubt about the extent to which, if at all, Mr Glossop acknowledged Edward as his child at the visit, but I do not consider that his reaction weighs heavily. Patricia says that he was concerned about his principal family's rights of inheritance which is plausible.
> (5) Edward's recollection of the conversation with Patricia in the Waitrose car park later in 2010 is convenient to enable him to explain why he did not mention in the Trustee removal proceedings that Stuart may not be his father. Patricia says she does not recall it. A conversation along the lines of if you tell your father I will

deny it would not have been surprising. Patricia may have chosen to tell Edward not to discuss the subject any further out of a concern for Stuart finding out about the affair and Edward's parentage. Such a conversation is not inconsistent with Mr Glossop being Edward's father.

(6) Edward's witness statement was provided after seeing Cellmark's report. He has every reason to cast doubt on Patricia's evidence and produce a version of events that suggests uncertainty about Jonathan's parentage. Edward's evidence contained elements that were exaggerated including the absurd suggestion about the white-haired man having to jump out of a window to avoid detection by Stuart. This was a clear indication of a willingness to gild the recollection of a child.

(7) Edward's evidence about continuing contact between Mr Glossop and Patricia is not evidence of a continuing sexual liaison. If there had been a continuing sexual relationship it is unlikely that Mr Glossop's visits would have been at times when the two young children were at the house. There is no evidence of covert meetings. Taken at its highest Edward's evidence suggests there was continuing contact between Mr Glossop and Patricia. She is adamant that there was no sexual relationship beyond 1977 and I accept her evidence on that point.

80. The evidence contains a number of suggestions about bodily, health and behavioural similarities and dissimilarities between Stuart and the parties to this claim. I do not consider they are reliable indicators of any substance.

81. I find that Stuart was not Edward's biological father.

Issue 3 - the issue of construction

82. What is the proper construction of the words "the children and remoter issue of the Settlor now in being or born hereafter" and in particular the meaning of "children" as it is used in the Settlement?

83. The principles the court should apply were summarised by Carr LJ (as she then was) in *ABC Electrification Ltd v Network Rail Infrastructure Ltd* [2020] EWCA Civ 1645 at [17-19]:

> "17. The well-known general principles of contractual construction are to be found in a series of recent cases, including *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900; *Arnold v Britton and others* [2015] UKSC 36; [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173.
>
> 18. A simple distillation, so far as material for present purposes, can be set out uncontroversially as follows:
>
> i) When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. It does so by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions;

ii) The reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision;

iii) When it comes to considering the centrally relevant words to be interpreted, the clearer the natural meaning, the more difficult it is to justify departing from it. The less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning;

iv) Commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made;

v) While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party;

vi) When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time the contract was made, and which were known or reasonably available to both parties.

19. Thus the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise; the court must consider the contract as a whole and, depending on the nature, formality, and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated."

84. The Settlement is a unilateral document which involved no negotiation between parties. Nevertheless, it is clear from Lord Neuberger's judgment in *Marley v Rawlings* [2014] UKSC

2 at [17-23] that a document such as a will has to be construed applying the same principles as those summarised in *ABC Electrification Ltd v Network Rail Infrastructure Ltd*. The same approach should be applied when construing a settlement. However, Lord Neuberger pointed out at [21], having emphasised in paragraph [20] the importance of context, that the unilateral nature of a will is one of the contextual circumstances which has to be borne in mind when interpreting the document. The test to be applied by the court is essentially the same as for a bilateral document with one difference namely that "settlor" is substituted for "parties" so that the court is required to consider what a reasonable person, having all the background knowledge which would have been available to the settlor at the date of execution, would have understood the words used by the settlor to mean.

85. Lord Neuberger referred with approval at [23] to the test derived from *Boyes v Cook* (1880) 14 Ch D 53 at 56 that when interpreting a will the court should place itself in the "testator's armchair", that test being consistent with the approach to interpretation by reference to the factual context. The armchair approach does not provide a different test to that derived from the authorities summarised in *ABC Electrification Ltd v Network Rail Infrastructure Ltd* but it provides a useful reminder that in the case of a unilateral document, such as a settlement, the focus is upon one person's intentions, objectively ascertained.

86. Mr Braithwaite places particular reliance on the principles that are set out in paragraphs 18 (ii), (iii) and (iv) of Carr LJ's judgment. He emphasizes the language that is used in the Settlement and the principle that the clearer the natural meaning the more difficult it is to justify departing from it. The Settlement does not name Edward and/or Jonathan as beneficiaries, although it could have done. The court must start with the language used by the settlor. Drafting by a class of beneficiaries, rather than by naming them, is a common approach. It reserves the possibility that there may be other persons who fall into the class who were not known about when the settlement was created.

87. Mr Braithwaite also emphasises the fact that a contract has worked out badly is not a reason to depart from the natural meaning of the language used. At risk of stating the obvious here, it is not possible to have regard to the conclusion I have reached about Edward's parentage because it was not a fact or circumstance known to Stuart in 2003. The relevant context points clearly to Stuart believing in 2003 that both Edward and Jonathan were his biological children.

88. Mr Braithwaite submits that 'children' is a term of art and does not include what can loosely be called stepchildren such as children who have been treated as being one of the settlor's children but are not in fact his biological children.

89. Terms of art are discussed in Section 8 of Chapter 5 in Sir Kim Lewison's *Interpretation of Contracts* 8th ed. The principle is stated in the following way:

> "Where a document contains a legal term of art the court should give it its technical meaning in law, unless there is something in the context to displace the presumption that it was intended to carry its technical meaning."

90. In *Sydall v Castings Ltd* [1967] 1 QB 302 the Court of Appeal was required to consider the meaning of "descendant" in a company's group life assurance scheme. Diplock LJ sets out in his judgment an explanation for the benefits provided by legal terms of art, including the promotion of certainty in judicial decision making. He went to say at page 314F to 315A:

> "The lexicon of terms of art is to be found in the decided cases and in the textbooks consulted by legal practitioners. This does not entail (I use the verb in its popular

sense and not as a term of art) that the meaning of words and phrases which have become terms of art is incapable of evolution if the word or phrase is used in relation to circumstances of a kind which did not exist when its meaning as a term of art first became fixed. But the evolution of the meaning of a term of art is less rapid and less frequent than any changes in the meaning of words and phrases in popular speech, for the legal draftsman, knowing the previous meaning of the " term of art," can, if he wishes, extend or restrict that meaning by adding to it other qualifying words and phrases."

91. Later in his judgment he addressed examples of terms of art in wills and settlements and said at page 316D to 317A

> "Among the commonest forms of documents which are drafted and construed by professional lawyers are wills and settlements which create in favour of persons indicated by the document rights and liabilities in respect of property passing upon the death of a deceased; and among the commonest classes of persons in favour of whom such rights are created are those who bore some family relationship to the deceased. "Descendant" is but one of a number of nouns which have been used in countless legal documents for a century or more to identify persons between whom and the deceased a particular family relationship existed. Like "son," "daughter," "children," "issue," "father" and " ancestor," it is one of those nouns denoting family relationship which have become terms of art. In the case of many of these other nouns, it has been laid down in well-known decisions of the courts that, unless there is something in the context of the document or in the surrounding circumstances to indicate the contrary, their meaning does not include persons whose only claim to the described relationship to or through a male is based upon birth outside the bonds of wedlock. This rule of construction has been so uniformly applied to different nouns denoting family relationships that it has in my view become a general rule of construction applicable to all nouns within that class which have become terms of art. It has for many years been so treated by successive authors of the standard textbooks used by professional lawyers." [my emphasis]

92. Mr Mills submitted that 'children' is not a term of art or if historically it has been treated as such the time has come to look afresh at the term. He is right to point out that the authorities on the construction of contracts referred to in *ABC Electrification Ltd v Network Rail Infrastructure Ltd* do not refer to presumptions; neither does Carr LJ's summary of the principles of construction. Mr Mills may well be right that the identification of a word or phrase as a term of art in the context of wills and settlements is a less useful approach than it was at one time.

93. The authors of *Lewin on Trusts* 20th ed. paragraph 7-20 say:

> "… at common law in a disposition of property the expression "children" is construed *prima facie* as meaning legitimate children. And a child at common law child is legitimate if:
>
> (1) the child is born or conceived in wedlock;
>
> (2) the child, if not born or conceived in wedlock, is legitimate by the law of the domicile of each of his parents at the time of his birth; or

(3) the child's parents marry after the birth of the child and under the law of the father's domicile at the time of his birth and at the time of the subsequent marriage of his parents, the child is legitimated by that marriage.

This common principle of construction applied in relation to all expressions denoting family relationships. In order to displace the common-law rule, it was, in general, necessary to show either that it was apparent from the language used by the settlor or testator that a gift in favour of children was not intended to be for, or to be confined to, legitimate children, or alternatively that it was impossible from the surrounding circumstances for a legitimate child to take."

94. This passage was cited with approval by Chief Master Shuman in *Goodrich v AB* [2022] EWHC 81 (Ch) although that case involved multiple issues of construction arising from an Employee Benefit Trust. The construction of the word "children" as part of a class of beneficiaries in an EBT, which necessarily would need to be capable of application to a wide range of persons who were unascertained when the EBT came into being, and to be applied over the lifetime of the EBT, may not be on all fours with the same word used in a family settlement under which there is a single source for children, namely the settlor.

95. There is another helpful passage in *Lewin* at paragraph 7-023:

"*Relatives who are not children strictly so called*

The expression "children" in a trust for the children of a given person does not at common law include that person's grandchildren or stepchildren or any persons under a wider understanding of children found in family law (such as a "child of the family"), in the absence of an express provision to that effect or an extended meaning arising from the context. This principle has not been affected by statute in relation to the interpretation of trusts for children."

96. The authority cited in *Lewin* for the proposition that 'children' does not include stepchildren is *Re Lewis's Will Trusts, Phillips v Bowkett* [1937] 1 All ER 556. I merely observe that for a proposition of such importance it is a decision of limited weight given the lack of reasoning in the judgment. Clauson J was required to construe a will trust under which the trustees were required to divide the fund in equal shares "between the children of the said Evan Jones and Margaret Jones." Evan Jones had a child by an earlier marriage. The judge construed the clause as meaning people who were able to say 'Evan Jones and Margaret Jones were or are our parents and it would be an unnatural use of language to construe the words used as meaning the child of one of them. The child by the previous marriage was therefore excluded because it was a child of only one of them.

97. It seems to me that a debate about whether 'children' is a term of art and, if so, should it remain one is of very limited assistance to this court. The starting point now is to apply the natural and ordinary meaning of the words used and the clearer the words used the more difficult it is to justify departure from the natural meaning. 'Child' and 'children' are terms which are commonly used and will normally have the meaning ascribed to them in the passage from *Lewin* at 7-023 set out above. 'Children' does not include stepchildren unless the context indicates otherwise because it has a natural meaning. It would not naturally include someone who is not biologically related to a settlor. If an extended meaning was intended, it would have been possible to provide additional words to make that clear.

98. I am not convinced that the concept of legal terms of art has a useful place in the current approach to construction, unless a term of art is synonymous with "natural meaning", but I am convinced that this judgment is not the occasion, based upon the authorities cited to me by Mr Mills, to declare that children no longer has the standard meaning given to it in *Lewin* and elsewhere.

99. I will turn now to consider whether the context provided by the Settlement should displace the natural meaning of 'children'.

100. Relevant background information that is admissible includes the following:

> (1) Edward and Jonathan were both raised as Stuart and Patricia's children. Both children were born within their marriage.
> (2) Edward's birth certificate describes Stuart as Edward's father.
> (3) Stuart believed Edward was his biological child.
> (4) There is no indication that Stuart believed he had any other biological children in addition to Edward and Jonathan.
> (5) In 2003 Stuart was aged 66 and Patricia was aged 60. Patricia accepted in giving evidence that in 2003 she was past an age at which she could produce any more children. The likelihood of Stuart having further children was very small.
> (6) Stuart had no reason in 2003 to treat Edward and Jonathan differently. Jonathan tried to suggest otherwise when he gave evidence and said he did not agree with the suggestion that Stuart would not have given everything to him. However, he had immediately before that said that "he was fortunate to have kind and loving parents who were fair to both of us." The evidence is overwhelming that the rifts that emerged later were not present in 2003.
> (7) Patricia executed a Settlement in materially identical terms and the effect of using the term "children" in her settlement is that both Edward and Jonathan benefit under her settlement.

101. The words and phrases used in the Settlement are of limited assistance. There are three contextual points that can be made:

> (1) The Settlement uses the plural children rather than child.
> (2) The class of Beneficiaries is wide and includes children living or born in the trust period and remoter issue, spouses, widows etc.
> (3) There is power under clause 5(b)(i) to add <u>any</u> person as a beneficiary.

102. Mr Braithwaite submitted that it is not open to the court to adopt a wide construction and include a non-biological child within "children" and that such a construction is based upon knowledge of the outcome if the definition was applied using its normal meaning. Adopting a wider meaning, he submits, takes account of a mis-prediction about the effect of the clause in light of subsequent knowledge. It is not relevant to construction to apply knowledge he did not have.

103. I accept this proposition as far as it goes. It is not permissible to ask what Stuart might have thought had he known that Edward was not his child. The test for the court is to take the natural meaning of children and to consider what a reasonable person in possession of the facts and circumstances known or assumed by the parties at the time that the document was executed, and appreciating the overall purpose of the clause and the contract would understand Stuart to have meant by the word. Put another way are the facts and circumstances sufficient to lead the court to move away from the natural meaning of children?

104. The reasonable person who is undertaking this exercise knows about the family context and the purposes of creating the Settlement. It is known that Stuart was unlikely to have any further children. He had created a successful business that he had founded. He had a family with two sons who had reached their early twenties. There was no reason why Stuart should have wanted to have treated differently or to have benefitted any child or children other than Edward and Jonathan.

105. The re-amended defence puts three alternatives before the court – "stepchild", "child of the family" and "Edward and Jonathan". The role of the court applying an objective test is not to re-draft the Settlement, as might be the case with rectification, but to establish the meaning the words used. Stepchild is not a term of art and has no settled common law meaning and "child of the family" is a concept derived from statute. I do not find it is helpful when looking for the meaning of 'children' to settle upon a synonym with uncertain meaning as a substitute.

106. I consider that the surrounding circumstances point overwhelmingly in favour of a wider meaning than biological child being adopted. A reasonable person in knowledge of the relevant facts would readily conclude that when using "children" Stuart intended this word to be understood as meaning Edward and Jonathan; and not "Edward and Jonathan provided they are in fact my biological sons." The surrounding circumstances that resonate powerfully when looking at the Settlement through objective eyes are Stuart and Patricia's age, the apparent stability of their marriage, which had lasted for thirty years, and the family unit, the way in which Edward and Jonathan were treated within the family unit and the purpose for which the Settlement was created. Crucially there was no reason to consider that Stuart might have intended to treat Edward and Jonathan unequally. The inequality that would arise between the two settlements by applying the natural meaning of children is stark. It is right, of course, that in time honoured fashion the person who drafted the settlement provided for a class that left room for expansion rather than using the more direct choice of naming Edward and Jonathan. That drafting decision cannot be ignored. However, it is displaced by the context for the reasons I have given.

107. In reaching this conclusion I have not relied upon contextual matters that can be found in the Mills & Reeve file such as the references to "your sons", "your two sons", "the boys" which were clear references to both Edward and Jonathan. I was invited by Mr Mills to take them into account as matters of context. However, it seems to me that they are better seen as a record of Stuart's subjective intentions and as such they are inadmissible.

Issues 4 to 8

108. In light of my decision about issue 3 it is unnecessary for me to consider issues 4 to 8.

Conclusion

109. Upon the handing down of the judgment I will consider the form of order that should result from the finding about Edward's paternity and the proper construction of the Settlement.