Neutral Citation Number: [2023] EWHC 996 (Ch)

Case No: PT-2020-BRS-000094

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

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 3 May 2023

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

MARTYN JAMES	**Claimant**
- and -	
(1) LORRAINE ANNE SCUDAMORE	**Defendants**
(2) RAYMOND JAMES	
(3) EDWARD ERNEST FORD	
(4) ROBERT MARTYN LITTEN JAMES	
(5) REBECCA DIANE LITTEN JAMES	
(6) ELIZABETH RACHEL LITTEN JAMES	

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Amy Berry (instructed by **Coodes LLP**) for the **Claimant**
James Kirby (instructed by **Nalders LLP**) for the **First Defendant**
Matthew Mills (instructed by **Birkett Long LLP**) for the **Third Defendant**
The other defendants did not appear and were not represented

Hearing dates: 28 February 2023 to 2 March 2023

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Approved Judgment

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

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This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 am on 3 May 2023

HHJ Paul Matthews :

Introduction

1. This is my judgment on the trial of a probate claim, commenced by claim form issued on 29 September 2020. The claimant is one of the two sons by his first marriage of the deceased, Ivor Percy James, who died on 21 June 2010. His will dated 6 March 1998 and a codicil dated 26 December 2002 were proved by his second wife, Christine, on 28 July 2011. For convenience, but without intending any disrespect, I shall refer to the non-parties throughout by their given names. Ivor and Christine had no children together. She herself died on 24 February 2018.

2. The claimant accepts the validity of the will, but not the codicil. If valid, the codicil replaces the life interest given to Christine in the matrimonial home (with remainders over to the sons) with an absolute interest. The other son of Ivor, Raymond, is the second defendant to this claim, but has played no part in the proceedings. The claimant has three children by his former partner, Dianne James before they separated in 1998. They are the fourth to sixth defendants, and all of age, but likewise have played no part in the proceedings.

3. Christine's will appointed her niece Lorraine, the first defendant, as executrix, and she duly proved the will. By her will, Christine gave 70% of her residuary estate to her sister Diana, the first defendant's mother, and 30% to the claimant's children. Unfortunately, Diana died some six months after Christine, on 28 August 2018, appointing her husband, the third defendant, as her executor and making him her universal legatee. This means that the first defendant, by chain of representation, is now the personal representative of Ivor's estate, although Christine's position as beneficiary of that estate is now represented as to 70% by the third defendant and as to 30% by the fourth to sixth defendants.

4. The attesting witnesses of the 2002 codicil were Dawn Buckley and her husband Noel Buckley. He died in 2017. Dawn is the mother of Dianne, and thus the grandmother of the fourth to sixth defendants. She gave evidence before me. Noel (but not Dawn) had a son, Shaun, who also gave evidence before me. In 2002, Dianne was in a relationship with Martin Greenslade, whose mother Susan ("Susie") made a statement for these proceedings, but did not give oral evidence.

The parties' positions

5. The claim and particulars of claim seek the revocation of the probate granted to Christine in relation to both the will and the codicil, and the grant of a fresh probate of the will alone. The claimant says that the 2002 codicil is invalid for non-compliance with the Wills Act 1837 in a number of respects. These were that the witnesses signed the codicil before Ivor did, and that the witnesses signed it on a different date to that stated on its face. It is also said that Christine gave all the instructions for the preparation of the codicil, and herself completed the signature of Ivor, who was suffering from the after-effects of a stroke at the time of purported execution.

6. The defence of the first defendant complains of procedural irregularities, lack of compliance with the pre-action protocol and the relevant practice direction, and denies that the codicil was not properly executed. It also alleges that the claim is brought too late, by reason of laches. The third defendant says that he has no knowledge of the circumstances of the execution of the codicil, and therefore has no positive case to put forward, but nevertheless requires the claimant to prove the allegations of invalidity.

Procedure

7. Directions to trial were given by District Judge Wales on 20 July 2022. One important point to notice is that no permission was given for any expert evidence as to handwriting to be adduced. The claimant did not seek any such evidence, on the basis that the original codicil had been lost while in the possession of solicitors involved at an earlier stage. At the PTR before me on 9 January 2023 I gave permission for the claimant to rely at trial on supplementary witness statements of Dawn Buckley and Dianne James which had accompanied his application by notice dated 4 January 2023.

8. The trial itself was held before me at an attended hearing in Bristol, when Ms Amy Berry (instructed by Coodes LLP) appeared for the claimant, Mr James Kirby (instructed by Nalders LLP) appeared for the first defendant and Mr Matthew Mills (instructed by Birkett Long LLP) appeared for the third defendant. However, closing submissions were given in writing during the week of 6 March, and there was a remote hearing on Friday 17 March to deal with matters arising out of those. I subsequently invited, received and considered further submissions to deal with a discrete point of law, to which I shall refer later.

Procedural issues at trial

9. At the opening of the trial on 28 February 2023, I heard argument and gave rulings on two preliminary matters. One related to whether a small number of documents, for which legal professional privilege was claimed by the claimant, should nevertheless be inserted in the trial bundle. For reasons given at the time, I decided that those documents should indeed go in. The other was as to whether the court should give permission to the claimant to ask certain limited further questions of a witness (Dawn Buckley) in amplification of her written witness evidence, in light of the fact that there was to be no expert evidence in relation to handwriting at the trial. Again, for reasons given at the time, I decided to give that permission.

10. Issues also arose about the disclosure given by the claimant in this matter. These included very late disclosure (during the trial) of certain original documents not previously disclosed. Ms Melanie Grose, a partner in the claimant's solicitors, and head of its probate litigation department, made a witness statement about this, and was cross-examined on it. It is plain that there were severe failures in the preparation of this claim on the part of the claimant, in particular in relation to disclosure of documents. This led to some rather chaotic scenes at the trial as further documents were produced during the evidence itself. I accept that illness and other absences from work at the claimant's solicitors lay at the root of at

least some of these failures, but they demonstrate to me that the system in place there was very far from robust.

How judges decide cases

11. For the benefit of the lay parties in this case I will say something about how English judges decide civil cases like this one. I borrow the following words largely from other judgments of mine in which I have made similar comments. First of all, judges do not possess supernatural powers that enable them to divine when someone is mistaken, or not telling the truth. Instead, they take note of the witnesses giving live evidence before them, look carefully at all the material presented (witness statements and all the other documents), listen to the arguments made to them, and then make up their minds. But there are a number of important procedural rules which govern their decision-making, some of which I shall briefly mention here, because non-lawyer readers of this judgment may not be aware of them.

Burden of proof

12. The first is the question of the *burden* of proof. Where there is an issue in dispute between the parties in a civil case (like this one), one party or the other will bear the burden of proving it. In general, the person who asserts something bears the burden of proving it. But in a probate case the person propounding the will or codicil in contention must prove that it is valid. Here the claimant asserts that the 2002 codicil is invalid, and it is the first defendant who is in effect propounding it. So the legal burden of proving that the codicil is valid is borne by the first defendant. She is however assisted by certain presumptions of fact which operate in relation to wills and probate. I will deal with this in more detail later.

13. The importance of the burden of proof is that, if the person who bears that burden satisfies the court, after considering the material that has been placed before the court, that something happened, then, for the purposes of deciding the case, it *did* happen. But if that person does *not* so satisfy the court, then for those purposes it did *not* happen. The decision is binary. Either something happened, or it did not, and there is no room for 'maybe'. That may mean that, in some cases, the result depends on who has the burden of proof.

Standard of proof

14. Secondly, the *standard* of proof in a civil case is very different from that in a criminal case. In a civil case it is merely the balance of probabilities. This means that, if the judge considers that a thing is *more likely to have happened than not*, then for the purposes of the decision it *did* happen. If on the other hand the judge considers that the likelihood of a thing's having happened does not exceed 50%, then for the purposes of the decision it did *not* happen. It is not necessary for the court to go further than this. There is certainly no need for any *scientific* certainty, such as (say) medical experts might be used to. However, the more serious the allegation, the more cogent must be the evidence needed to persuade the court that a thing is more likely than not to have happened.

Role of judges

15. Thirdly, in our system, judges are not investigators. They do not go looking for evidence. Instead, they decide cases on the basis of the material and arguments put before them by the parties. So, it is the responsibility of each party to find and put before the court the evidence and other material which each wishes to adduce, and formulate their legal arguments, in order to convince the judge to find in that party's favour. There are a few limited exceptions to this, but I need not deal with those here.

The fallibility of memory

16. Fourthly, more is understood today than previously about the fallibility of memory. In commercial cases, at least, where there are many documents available, and witnesses give evidence as to what happened based on their memories, which may be faulty, civil judges nowadays often prefer to rely on the documents in the case, as being more objective: see *Gestmin SGPS SPA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), [22]. This is not a commercial dispute, but a probate dispute. Nevertheless, it concerns money and property, in the way that many commercial disputes do, and there are a number of useful documents available. This is important in particular where, as here, the relevant facts occurred many years ago, some witnesses are no longer available to give their evidence, and the memories of those who are available have been dimmed by the passage of time.

17. In deciding the facts of this case, I have therefore had regard to the more objective contents of the documents in the case. In addition to this, and as usual, in the present case I have heard witnesses (who made witness statements in advance) give oral evidence while they were subject to cross-examination and re-examination. This process enables the court to reach a decision on questions such as who is telling the truth, who is trying to tell the truth but is mistaken, and (in an appropriate case) who is not telling the truth. I will therefore give appropriate weight to both the documentary evidence and the witness evidence, both oral and written, bearing in mind both the fallibility of memory and the relative objectivity of the documentary evidence available.

Reasons for judgment

18. Fifthly, a court must give reasons for its decisions. That is what I am doing now. But judges are not obliged to deal in their judgments with every single point that is argued, or every piece of evidence tendered. They deal with the points which matter most. Moreover, it must be borne in mind that specific findings of fact by a judge are inherently an incomplete statement of the impression which was made upon that judge by the primary evidence. Expressed findings are always surrounded by a penumbra of imprecision which may still play an important part in the judge's overall evaluation. Put shortly, judgments do not explain all aspects of a judge's reasoning, although they should express the main points, and enable the parties to see how and why the judge reached the decision given.

Evidence

Witnesses

19. The following witnesses gave evidence before me: Dawn Buckley, the claimant, Dianne James, Shaun Buckley, the first defendant and the third defendant. Most of them had limited evidence to give. The exception was Dawn Buckley, the surviving attesting witness, and the only surviving person present at the putative execution of the codicil. I give below my impressions of the witnesses.

20. The claimant was an intelligent but somewhat reticent witness. He seemed to be suspicious of being trapped by cross-examination into giving any evidence that might assist the defendants. He also appeared slightly belligerent on occasion. He changed his evidence on a number of occasions. He evaded questions that he did not want to answer, often by asking other questions, and often by saying he could not remember, though his body language suggested strongly that he did. He certainly remembered things that were in his own favour. Overall I am afraid that I did not trust his evidence at all, and I put no weight on it unless independently corroborated.

21. Dianne James, the claimant's former partner and the mother of his children, was a very unsatisfactory witness. She constantly shifted her ground and changed her evidence, sometimes in the same answer. She seemed on occasion to be saying the first thing that came into her head. Many of her answers were of the "would have been" variety, meaning that she was not actually giving her recollection at all. Having observed her closely, I am afraid that in my opinion she was making much of it up as she went along. I cannot believe her evidence.

22. Dawn Buckley, Dianne's mother, was on the face of it a forthright witness, who knew her own mind, and took her time in answering questions. However, sometimes her answers were confused, and sometimes contradictory, even in the same answer. She accepted readily that she had forgotten things, and repeatedly said that it was all a long time ago. And yet she was very clear and very strong in saying she remembered even tiny details of what had happened over twenty years earlier. At the time I had no doubt that she and her daughter, and also the claimant, had discussed this matter over and over again, to the point where any original recollections were overlaid with the fruits of those discussions. As a result, I originally thought that she had convinced herself of certain things which coloured the whole of her evidence. In short, that she was telling me what she thought was right, rather than what she could actually remember.

23. However, because of the disclosure problems to which I have already referred, it was necessary for Dawn Buckley to be recalled to give further evidence. Prior to her giving evidence on this second occasion, she was kept out of court whilst other evidence was dealt with. When she gave evidence on the second occasion, I was surprised to see that she was far less forthright, and far less sure of herself. That could have been just the upset for an elderly lady of having to give evidence twice, of course. However, after hearing all the witnesses and considering the matter overall, and comparing with the documentary evidence, I came to the conclusion that she was instead telling me her part of a concocted story (which she was unfortunately also confused about). As a result I do not accept any of her evidence where not corroborated by an independent source.

24. Shaun Buckley, the son of Noel Buckley (the other attesting witness, now dead) and the stepson of Dawn, was a relatively straightforward witness. His evidence was marginal, but, with one exception, I accept that he was telling me what he believed to be the truth. The exception relates to whether he noticed his father go out on Boxing Day. Whether or not what he said about this was the strict truth, I do not accept that it was the *whole* truth.

25. The first defendant was an intelligent and transparently honest witness, who accepted correction where she was wrong, and stood her ground where she thought she was right. Cross-examination made no impression on her. I accept her evidence, although of course it had a limited scope.

26. The third defendant was an elderly and somewhat deaf, but nevertheless alert, witness. He was asked very little, but presented again as transparently honest. I accept his evidence, again limited in scope as it was.

Other evidence

27. In addition to the oral evidence of these witnesses, there was a witness statement from Susie Greenwood, the mother of Dianne James's partner (Martin Greenwood) in 2002, and a letter from Christine herself to Crowdy & Rose, dated 19 October 2013. I have taken both into account, bearing in mind the limitations on this kind of written evidence. The probative value is naturally less than in the case of a witness on oath, whose demeanour is visible to the court, and whose evidence can be tested in cross-examination. The documents in the agreed trial bundle are also evidence, pursuant to CPR PD 32 para 27.2.

Handwriting evidence

28. Because there was no expert handwriting evidence, I should make the following points of relevance to this case. I was referred to the decision of Chief Master Marsh in *44 Wellfit Street Ltd v GMR Services Ltd* [2017] EWHC 1841 (Ch), where the judge said this:

> "89. Witnesses may not generally, unless they are experts, compare specimen signatures with disputed signatures and express an opinion about the likeness or otherwise of the disputed signature to the true samples … However, evidence of identity of a person, or familiarity with a signature, is not regarded as expert opinion. A witness is entitled to say that is has seen a person's signature previously and the signature that is disputed is unlike the usual signature. Evidence of recognising a signature or, by parity of reasoning, not recognising a signature is admissible as the passage at para. 1-45 in Expert Evidence: Law and Practice 3rd ed. makes clear. At paragraph 1-046, the authors contrast the position concerning evidence of comparison, which they say is for an expert. In the case of recognition evidence, the weight to be given to it is a matter for the court."

29. The work referred to in that extract is *Hodgkinson on Expert Evidence*, now in its 5th edition by Mark James. The relevant paragraphs in the 5th edition are 1-40 and 1-41. The author and editor rely in para 1-40 on the decision of the Court

of Appeal in *Lucas v Williams* [1892] 2 QB 113, 116, where Lord Esher MR (with whom Fry and Lopes LJJ in substance agreed) said

> "Take the case of proof of a man's handwriting: a witness is called who says, 'I have seen AB write, and I know his handwriting. The document produced I declare is in his handwriting, because the writing in it is exactly like his.' That kind of evidence is given every day."

I respectfully agree. Moreover, it is evidence of fact, and not of opinion. It is *comparison*, as opposed to *recognition*, which is reserved to experts. Of course, the *weight* to be given to evidence of recognition is a matter for the court.

30. On the other hand, I was also referred to *R v O'Sullivan* [1969] 1 WLR 497, a decision of the Court of Appeal, Criminal Division. That court was concerned with the conviction of a defendant accused of stealing a bank wallet, having signed for it on a register. The jury was given a copy of the register and also genuine signatures from the defendant. No handwriting expert gave evidence. The Court dismissed the defendant's appeal, making the following comments on the question of handwriting evidence (at 503B-D):

> "It seems to the court that in the instant case the matter was properly dealt with. The fact remains that there is a very real danger where the jury make such comparisons, but as a matter of practical reality all that can be done is to ask them not to make the comparisons themselves and to have vividly in mind the fact that they are not qualified to make comparisons. It is terribly risky for jurors to attempt comparisons of writing unless they have very special training in this particular science. All possible was done, this court thinks, with great care and very fairly by the court in the instant case. It may well be that, despite it, the jury did try to make comparisons. That is really unavoidable and it should be accepted these days that *Reg. v. Tilley* [1961] 1 W.L.R. 1309 cannot always be in its literal meaning exactly applied; nevertheless every possible step and regard should be had to what was said by the court in that case, inasmuch as never should it be deliberately a matter of invitation or exhortation to a jury to look at disputed handwriting. There should be a warning of the dangers; further than that, as a matter of practical reality, it cannot be expected that the court will go."

Since in this case I am to find the facts, and thus fulfil the jury function as well as that of judge of law, I bear these words very much in mind.

Facts found

31. In the light of the evidence, I find the following facts, in addition to the non-contentious matters to which I have already referred in the opening paragraphs of this judgment, dealing with relationships between the parties, and certain key dates.

Ivor and his family

32. Ivor was born on 20 November 1926. He started with nothing, but became a successful businessman, based in the Swindon area. He had two sons by his first

marriage, the claimant and Raymond. Both sons had partners and children. The claimant had a relationship with Dianne (but separated in 1998) and Raymond married Cheryl. Christine was Ivor's second wife, and he was her second husband. They bought a house together in Steventon, near Abingdon. Christine had no children by either of her marriages. But she treated the claimant's children as her own grandchildren, sending them birthday and Christmas cards describing herself as their grandmother.

33. Raymond became estranged from Ivor, and there was no contact between them, or between Ivor and Raymond's children thereafter. Provision was made for Raymond in both Ivor's will and the disputed codicil, but none for his children. Despite the claimant's evidence, which I do not accept, I find that the relationship between the claimant and Ivor was poor. The claimant was in contact with Ivor only from time to time, and usually to ask for something. However, Ivor had a good relationship with the claimant's partner Dianne and their children, his grandchildren.

The 1998 wills

34. Ivor and his wife made wills in 1998, using a firm of solicitors called Pryce Collard Chamberlain in Abingdon, near where they lived. The solicitor concerned was called Stuart Capel. There is a copy of Ivor's 1998 will in the bundle, but not of Christine's. The terms of Ivor's and Christine's codicils do however suggest that Christine's 1998 will was at least similar in structure to that of Ivor, though her assets would obviously have been different. Ivor's 1998 will is dated 6 March 1998. It appointed Christine and an accountant, Keith Middleton of Wenn Townsend in Oxford, as executors and trustees. It divided his estate into five categories: (1) a Property Fund, consisting of the matrimonial home at the time of death, (2) a Share Fund, consisting of the shares in a company called ER Miller (Wantage) Ltd, (3) a Land Fund, consisting of various parcels of commercial property, (4) all his personal chattels, and (5) the residue of his estate. Categories (4) and (5) were in the events that happened given to Christine absolutely.

35. The first three categories, however, were given to the trustees on trust for Christine for her life (or, in the case of the Share Fund, during her widowhood) and then in the events that happened on trust for his two sons, the claimant and Raymond, in equal shares absolutely. It appears from the invoice from Pryce Collard and Chamberlain dated 20 January 2002 that the matrimonial home was in fact owned by Ivor and Christine as beneficial joint tenants, so that, unless there were a severance, on Ivor's death Christine would take the house absolutely by survivorship, and there would be nothing to pass to the trustees of the Property Fund. Hence, if Ivor and Christine had not instructed the solicitors to make the amendments to their wills by way of codicil, and at the same time also obtained the advice about severing the joint tenancy, when Ivor died in 2010, the house would have passed to Christine absolutely, and the problem raised in this claim would not have arisen.

Moves to Cornwall

36. After her separation from the claimant in 1998, Dianne moved with their three children to Truro in Cornwall to be near her mother (Dawn Buckley) and stepfather (Noel Buckley). The claimant however stayed in the Swindon area. In 2001, Ivor retired from business, and in December he and Christine also moved to Truro, to be near the grandchildren. In fact, they bought a house (called 'Cranmere') in the same street as Dianne and her children, just a few doors away.

Ivor's health

37. In October 2001 Ivor's mobility, which had been declining slowly, took "a sharp turn for the worse", and he was referred by his Abingdon GP to a consultant neurologist in Oxford. The referral letter said that there was "no evidence of any cognitive impairment". He was admitted to hospital on 4 December 2001 for tests, but discharged the same day after having them. The discharge letter related that a CT scan had shown enlarged lateral brain ventricles, and suggested a lumbar puncture test to delineate pressure, but that Ivor was not keen to undertake it as this stage. Accordingly, the GP was asked to continue to keep him under observation, and, if there was a deterioration in gait or incontinence, then Ivor should be referred back to the neurologist. From a later medical email, it appears that he was diagnosed at this time with normal pressure hydrocephalus. As a former coroner, I know that hydrocephalus is a medical term, meaning a build-up of cerebrospinal fluid ("CSF") on the brain.

38. By June 2002, Ivor and Christine had moved to Truro. He was seen by a physiotherapist in June 2002, who referred him to the staff physician at Redruth Community Hospital, saying that "His mobility at present [is] appalling" and that she was "not convinced that he will respond to rehabilitation because he has memory and cognitive problems". In July 2002 the consultant rehabilitation physician reviewed him and found that "His balance and memory [were] now deteriorating although he remains continent".

39. By August 2002 Ivor had decided that he would now like to consider the implantation of a shunt, previously suggested to and rejected by him. (Again, as a former coroner, I know that in the medical context a shunt is a special tube inserted to divert excess CSF from the brain to elsewhere in the body.) He was seen by the consultant physician again in November 2002, who asked the consultant neurologist at the Derriford Hospital in Plymouth to review a CT brain scan of Ivor. She told the neurologist that his wife had been "most concerned about his short term memory, his intermittent urinary incontinence and his unsteadiness while trying to walk", and asked him whether he would consider Ivor as a candidate for a shunt.

40. Ivor was admitted to the Planned Investigation Unit at Derriford Hospital on 19 December 2002, with a history of "declining mobility and poor balance, episodes of infrequent urinary incontinence and his wife has more recently been concerned about short term memory problems". The report says that "On the day that he was seen … he was alert and orientated, he could remember events from the previous day without any difficulty. A CT scan of his brain had shown large ventricles and no obstructive lesion. Hydrocephalus was seen." Ivor was discharged home the same evening, on the basis that "there was no indication

to perform a CSF diversionary procedure". In other words, a shunt was not needed.

The codicils

41. As appears from the invoice of Pryce Collard Chamberlain dated 29 January 2003, on 11 November 2002 Ivor and Christine gave instructions to that firm to prepare codicils to their wills to make amendments, but also to advise them on severing the joint tenancy in their matrimonial home. This invoice shows that notices of severance were indeed prepared, signed by the clients and appropriate restrictions registered at the Land Registry. It also states that engrossments of the codicils were sent to Ivor and Christine. This is confirmed by the solicitors' letter from Stuart Capel dated 18 December 2002, enclosing those engrossments, and stating that each of them now had a half share in the house to leave to the other (so using up part of the nil-rate band for inheritance tax purposes).

42. The letter appears to have been sent by post, and so cannot have arrived at their home before 19 December (when Ivor was in hospital for tests). But, given that that was less than a week before Christmas, and that the postal service at that time of year is frequently delayed, it is perfectly possible that the letter did not arrive before 20 December, or even later. In 2002, 19 December (and 26 December) fell on a Thursday. The Thursdays in January 2003 were 2, 9, 16, 23 and 30.

43. The letter of 18 December 2002 from Mr Capel of Pryce Collard Chamberlain, giving detailed instructions of how the Codicil was to be signed, relevantly said this:

> "Accordingly would you both please sign the Codicil's [sic] in accordance with the enclosed instructions.
>
> Basically you must first of all obtain two witnesses who should not be persons that benefit under the terms of your Will or Codicil. When you have those two persons together with you, you can then date the Codicil in words and then sign the same where indicated. It is best that you use all your names or initials. The witnesses then must sign by giving their signature, name address and occupation as indicated. Would you then please return the Codicils to me so that I can check that this has all been carried out correctly. I will then supply you with copies for your records and placed the originals in my firm strongroom for safekeeping."

It will be noted that the execution procedure as described sets out the following order for actions, once the witnesses are with the testator: (1) date in words is inserted, (2) testator signs, preferably using *all* names or initials, (3) witnesses sign *etc*.

44. There is another letter in the bundle from Mr Capel of Pryce Collard Chamberlain, dated 20 January 2003. This relevantly says:

> "Thank you for returning your Codicil's [sic] duly signed. These appear to be in order. I confirm that I have placed the original Codicils in my firm's vault along with your Wills for safekeeping. For your records I enclose copies of the Codicils herewith".

It is to be noted that Mr Capel did not consider that there was anything unusual about the signed codicils. They appeared "to be in order". But copies of both codicils were in the bundle, and so we could see for ourselves.

45. Each of the two codicils contained an attestation clause. That for Ivor was in the following form (and that for Christine was the same, *mutatis mutandis*):

> "SIGNED by the said IVOR PERCY JAMES as a Codicil to his Will which bears date the Sixth day of March One thousand nine hundred and ninety eight in the presence of us present at the same time who at his request and in his presence and in the presence of each other have hereunto subscribed our names as witnesses".

This is a standard form of attestation. It does not, for example, refer to any party acknowledging an *existing* signature. That is of course understandable, because the lawyer drafting the codicils will have assumed that execution takes place in the normal way, without any need for acknowledgments.

46. Both codicils were signed. It is common ground that both Dawn and Noel Buckley came to Ivor's and Christine's house, and signed each codicil as attesting witnesses, opposite the attestation clause. It is also common ground that Christine signed her codicil opposite the attestation clause, but *above* the space for the signatures of the attesting witnesses. The main area of contention relates to whether Ivor signed his.

47. There is certainly a signature there, opposite the attestation clause, and above the signatures of the attesting witnesses. On any view the first few letters written are shaky, and it is not obvious what they say. But they are clearly followed by "Percy" and "James" in handwriting. There are subsidiary issues about the order of signing and the date of signing. Both codicils are dated in complete words, "this *Twenty Six* day of *December* Two Thousand and two", where the words "Twenty-Six" and "December" are handwritten and the other words are printed. I am satisfied on the evidence that the written words in the date are in the handwriting of Christine.

Events in 2013

48. In 2013 the claimant consulted solicitors, Crowdy & Rose, about the possible invalidity of Ivor's codicil. They wrote to members of the family to ask about what had happened at the time of execution. Dawn wrote a letter to the solicitors dated 2 July 2013. As a result the solicitors prepared a draft witness statement which, with small alterations, Dawn signed and dated 6 August 2013. This draft statement makes the following points, amongst others:

1. Dawn was approached by Christine to go to her home to witness a document.

2. Dawn arranged to go there after going to see Dianne her daughter.

3. It was a working day afternoon when with her husband Noel she met Dianne and then all three went to Ivor's and Christine's house.

4. On arrival, an undated and unsigned document was on the table and Ivor was seated at the other end.

5. They did not see Ivor sign the document in their presence.

6. Dawn would not have signed on Boxing Day "due to family celebrations that happen every year".

49. The draft statement does not however say (as she said at trial) that Dawn and Noel met Christine at Dianne's house and went with her (and Dianne) to Christine's house. Nor does it mention that Ivor at least tried to sign (or that there was any "kerfuffle"). Nor does it say (as she did at trial) that Noel was ill all Boxing Day and stayed in bed. Instead it says that "family celebrations that happen every year" would have prevented attendance. But there were no celebrations that year on Boxing Day. They were on Christmas Day. What happened was that Noel drank too much that Christmas Day, and was apparently ill the next. And we know that that did not happen every year, because Dawn and other witnesses relied on the fact of Noel's illness as a reason for identifying 2002 as the year when he was not available on Boxing Day.

50. As a result of the response from Dawn, Crowdy & Rose wrote to Christine by letter dated 14 October 2013. Presumably, she received it next day, on 15 October 2013. The letter said that Dawn Buckley's evidence led them to conclude that the codicil was formally invalid, and invited her own recollection of the circumstances in which the codicil was executed. Christine did not take long to reply. She wrote back to Crowdy & Rose by letter dated 19 October 2013. The material parts of this letter amounted to her account of the signing process.

51. These read as follows:

> "Further to your letter of 14th October 2013, I enclose copies of 2 letters written to Ivor and I by Stuart Capel of Pryce Collard Chamberlain, solicitors.
>
> The first was dated 18th December 2002 enclosing the Codicil to Ivor's Will and giving detailed instructions of how the Codicil was to be signed. This included the comment (line 4 of the 3rd paragraph) that 'It is best that you use all your names or initials'. As a result, Ivor included his middle name 'Percy' in his signature, thinking that this was required. Please note that Ivor's handwriting had been shaky after he had had his first stroke, before we arrived in Cornwall.
>
> The second letter was dated 20th January 2003, acknowledging receipt of the Codicil duly signed and enclosing a copy, together with a fee note (also enclosed).

> Accordingly, the Codicil was signed at some point between 19th December 2002 and 17th January 2003, allowing for the post.
>
> I have a very vivid recollection of Ivor sitting at the head of the table on Boxing Day 2002. Dawn and Noel (Diane's stepdad) walked up from Diane's house, 2 doors down. Ivor signed the Codicil with Dawn and Noel standing beside him on Ivor's right hand side, and they then signed as witnesses. Stuart Capel's instructions were very clear about the signing procedure and I think that it is very unlikely that someone would sign to say that they had witnessed a signature if they had not. Also, there is absolutely no reason why the Codicil would have been dated on Boxing Day if it had not actually been signed on that day.
>
> For the absence of any doubt, Ivor was diagnosed with dementia by Dr May in Truro on 11th March 2008, some five years after the Codicil was signed and returned to Stuart Capel."

52. It will be noted that Christine's account of what happened follows the instructions given by Mr Capel in his letter of 18 December 2002. I do bear in mind that Christine, having died in 2018, was not on oath in writing this letter in 2013. Nor could she be cross-examined at the trial on the statements made in it, and neither could her demeanour be observed whilst giving such evidence. On the other hand, I also bear in mind that she was being asked important questions by a firm of solicitors instructed by the claimant about what had happened, and which might possibly lead to litigation. It was a serious matter, being given serious attention. Whilst it is not as strong as evidence tested in court and not found wanting, I can and do give it appropriate weight in deciding what actually happened on that day.

53. Having received Christine's response, Crowdy & Rose wrote again to Dawn, asking her for more details to support her version of events. Dawn responded with a letter dated 9 December 2013, which I reproduce here as written:

> "I stand by what I have said in my first statement to you.
>
> Firstley it was <u>not</u> on Boxing Day 2002 we had a Boxing Day at home due to Noel not being well after Christmas Day, he spent the whole day in bed, very sick.
>
> Also we did <u>not</u> stand by Ivor as he signed the will. He was at the top end of a very long dining table. We signed it first, the [sic] Christine walked around the table to Ivor where he looked at it and then must have tried to sign.
>
> I only first saw his writing when you sent me the copy of the will. I was sadley surprised at how he had signed, and knew Christine's handwriting immediatley.
>
> Dianne has an entry in her 2002 diary that a lady who then lived in London called Suzy Greenslade stayed at her home that Christmas. We all had a very long Christmas Day there leaving at around midnight. Also Shaun our

> eldest son is checking his work computer to confirm he and his then partner were staying with us that year. Very vivid in our memories as Noel was very drunk and gave us a lot to rember. Also my brother came for New Year and remember's the story's that were told. When Noel read what Christine had stated he said (BOLLOKS) to standing by Ivor at the table. I could write a statment for Noel, he is declining in health, and is extremely deaf."

54. It will be seen that Dawn has changed her story. The first letter referred to the signing not having taken place on Boxing Day, because of celebrations that happened every year. In the second letter, however, it is not Boxing Day 2002 because Noel was ill that year. I add also that, in cross-examination, Sean said that Dawn was wrong to say that he had been checking his work computer. He did not put personal matters on his work computer. And, indeed, he did not maintain a diary.

Dawn's evidence at trial

55. I must also compare Christine's letter of 19 October 2013 with the evidence of Dawn, as the sole surviving attesting witness. In her evidence for trial, Dawn Buckley said that she used to visit Dianne every Tuesday and Thursday. Christine approached her, saying that she wanted her and her husband Noel to witness a document. She could not remember when exactly they visited Christine and Ivor, except that it was a weekday afternoon after work, and the grandchildren were at school. It could not have been Boxing Day, 26 December 2002, she said, because Noel had drunk too much at a house party at Dianne's on Christmas Day, and was unwell on Boxing Day and so spent all that day in bed.

56. Whatever day it was, Dawn's evidence at trial was that she and Noel went to Dianne's house and met Christine there. (In contrast, Dianne's evidence however was that Christine and Ivor met them only when they reached the door of Christine's and Ivor's house.) They all (including Dianne) walked to Ivor's and Christine's house, a few doors away. Dianne went into the kitchen to make tea. The others went into the dining room, where Ivor was already sitting at one end of the "large" dining table, and the document (single) was at the other end, where they were. Christine indicated where they were to sign, and they did so. Then Christine took the document to the other end of the table. In her first witness statement, she said that she did not see Ivor sign the document, but then they all had a cup of tea together before leaving.

57. In cross examination she agreed that there were in fact two codicils on the table, and that she had forgotten this, as "it is a long time ago". She also said that Christine had signed her codicil first and then she and Noel had signed. Then she changed her mind and said that she and Noel had signed first. When it was suggested that she had just changed her evidence, she said she did not remember. A few minutes later, however, she insisted that they had signed Ivor's codicil before Christine's, and then indeed said that she did not think Christine's codicil was there at all. Later on in cross-examination she said she could not remember whether they had signed Christine's codicil before Ivor's, or vice versa.

58. In her second witness statement, for which I gave permission at the PTR, Dawn said that she had previously omitted evidence that she now realised (following a telephone conversation with the claimant's solicitor and counsel) was relevant to the claim. She said the dining table was "long" and "seated about 4 people on each side". (In cross-examination she said it was a "long, pine table".) She said that Christine took the document they had signed up to Ivor, who did appear to try to sign it, but she (Dawn) was too far away to see how far he signed it. She said that Christine pulled the document away from Ivor, and that they "obviously disagreed", though in cross-examination she accepted that this was speculation on her part. Ivor tried to get hold of the document and Christine was pulling it away from him. She described it as a "kerfuffle". Dawn said it was awkward and she looked away. However, she went on to say that she never saw Christine hold the pen or sign the document, and no indication from Ivor that he wanted Christine to sign it.

59. Her second witness statement goes on to say that, when she saw the codicil again, after the death of Ivor (so about 8 years later), she was

> "saddened to see what appeared to be Ivor's first 2 or 3 letters of his name, followed by Christine's handwriting completing the 'Percy James' … I recognised Christine's handwriting straightaway as I have received many cards over the years from her."

As to the last point, Dawn was taken to copies of a number of birthday and Christmas cards in the bundle which she said were written by Christine. She described her handwriting as very neat. It became clear that she thought the handwriting on Ivor's codicil was Christine's because it was so neat.

60. Dawn's husband Noel unfortunately died in 2017, so we did not have the benefit of his direct evidence. However, a document disclosed by the claimant for the first time only at the trial was said by Dawn on being recalled to the witness box to be Noel's account of the events on the same occasion. This was however written by her (and so was in her handwriting). She said in evidence first that she "probably" wrote it for him, and then in answer to a question whether he had any input into it, answered "No, I wrote it for him". It is dated 14 January 2014. It is short and unsigned, and reads as follows:

> "Dear Mr Noyce
>
> I rember [sic] Christine Ivors wife asking me and Dawn if we would sign the will.
>
> We went to his house and he was sitting at the top of the table from us. All we had to do was to sign this will which we did."

61. It will be seen that the letter does not mention any "kerfuffle", does not say who signed first, does not say anything about the length of the table, and does not mention Christine's codicil. Dawn's first witness statement said that Christine approached her, but not Noel (as the letter says). Dawn confirmed this, and said she did not know why the letter said something different. She agreed that she was not very good at recognising handwriting, except her own. As to the dining

room table, the evidence of the first defendant before me was that the dining room table which Christine and Ivor owned was an ordinary oval mahogany dining table seating six in total, two on each side and one at each end. I prefer the evidence of the first defendant. I did not, however, have any evidence as to the dimensions of the dining room.

62. Dawn also agreed that she wrote a letter to Crowdy & Rose for Dianne, which Dianne signed. She did not remember writing it, but it was in her own handwriting. She accepted that she had seen Christine's letter, but denied that she wrote Dianne's letter so as to bolster the claimant's case. She further accepted that she could not actually remember events except from what she had written down.

63. If the grandchildren were at school on the day of the signing, it must have been after the New Year, because the codicils could not have arrived before 19 December 2002, and Ivor and Christine were at the hospital on that day. The codicils were received back by the solicitors before 20 January 2003, so the only Thursdays possible in January 2003 were 2, 9, and 16. But the schools would not have been back on 2 January, which means that it could only have been 9 or 16 January. So not only the *date* would be wrong on the codicils, but also the *year*. And Christine and Ivor would have waited either three or four weeks since receiving the codicils before signing. In the circumstances, that seems unlikely to me. They would have wanted to get the codicils signed as soon as they reasonably could.

64. Dawn's clear evidence is that Ivor's codicil was not dated when she and Noel signed. If that is right, Christine could not have dated the codicil in advance of an expected appointment which for some reason did not then take place. But, on the other hand, if it was dated *after* it was signed, there was no reason for it to bear the date 26 December 2002 *unless that was indeed the date it was signed*. Christine had no reason to lie about the date of execution, and the claimant and his witnesses did not suggest any. After all, it made no difference to Christine or Ivor on what day it was signed. And the claimant and his witnesses accept that the attesting witnesses *did* attend at Ivor's and Christine's house and sign it.

65. Dawn accepts that Christine approached her to bring Noel and sign the codicils. Moreover, it is clear that the approach to her was before the date it happened, and not on the day itself. If Boxing Day had been fixed for the purpose, but in the event Noel was too ill to attend, there would have been some communication with Christine and Ivor to postpone the appointment. But there is no mention of this anywhere. If, on the other hand, there was such an appointment made in advance for Boxing Day and Noel had a hangover and spent much of the day in bed, the appointment for such an important purpose might well have caused him to get up anyway, ill or not. I note in passing that Noel's handwriting on both codicils was very poor, which is at least consistent with not feeling well.

66. In her letter to Crowdy & Rose of 9 December 2013, Dawn said "Dianne has an entry in her 2002 diary that a lady who then lived in London called Suzy Greenslade stayed at her home that Christmas." Ms Greenslade's witness statement indeed so confirms. But she refused to attend court for cross-

examination, apparently from a desire to protect her son (who in 2002 was in a relationship with Dianne) and I am unable to test her evidence.

67. Her short witness statement says (amongst other things) (i) that she, Dianne, the claimant and the children briefly visited Christine and Ivor at their house "later on Boxing Day", something which neither Dianne nor the claimant mentions in their witness statements, and (ii) that nobody mentioned anything regarding witnessing the signature to a will or codicil. I find the first point strange, and in light of the unsatisfactory refusal of Ms Greenslade to attend for cross-examination, I put no weight on it. I may say that Dianne's 2002 diary, though it survived unscathed at least to 2013, "could not be located" when the first defendant's solicitors asked to see it in preparing this litigation.

68. Having seen the claimant's witnesses in the witness box, and the poor impression made by them (discussed earlier), I am satisfied that they are not telling the truth about the date, and that Dawn, Noel and Dianne indeed attended at Christine's and Ivor's house on Boxing Day. That in turn means that I find that they have all agreed on a story to tell the court. I do not know why they have done this. Perhaps they thought that, if the date of a testamentary document was incorrectly stated, the document would be invalid. But it does not matter. Shaun has chosen to turn a blind eye to what happened on that day, saying only that he did not notice his father going out. In cross-examination he accepted that he was not watching his father all day, but thought it "unlikely" that he went out. The further question which I shall have to decide is whether the concocted story includes other elements beyond misstating the date of attestation.

69. Dawn said in court that she did not take any of her letters in to Coodes, the claimant's solicitors. Yet a letter from Coodes to Nalders (the first defendant's solicitors) dated 10 November 2022 referred to Dawn bringing a letter into them. But, in answer to questions in court, Dawn could not remember doing this, although on points that favoured the claimant's case she was sure she could remember detailed events over 20 years ago.

What happened on execution

70. On the evidence, I find that what happened at Christine's and Ivor's house on Boxing Day 2002 was this. Ivor, Christine, Dawn and Noel were in the dining room, whilst Dianne was in the kitchen. Of those in the dining room, only Dawn is now still alive. For the avoidance of doubt, I made it clear that nobody's evidence (including the letter of instructions and Christine's letter in 2013) refers to any *acknowledgments* of signatures. This case is about signing and witnessing signatures, not acknowledging them.

71. Mr Capel's letter accompanying the codicils gave instructions as to the execution of them, which Christine followed. The attestation clause in the codicil is regular on the face of it, and there is a signature apparently of the testator on the codicil in the correct place. The letter from Christine in 2013 to Crowdy & Rose says that Ivor signed before the witnesses did, and in their presence, as stated in the solicitor's letter and the attestation clause. The letter written by Dawn on behalf of Noel to Crowdy & Rose does not say anything different.

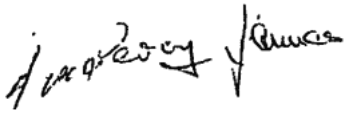
72. The only evidence that Ivor had not signed the codicil by the time that the witnesses signed is that of Dawn herself. As I said earlier, I am unwilling generally to accept her evidence unless corroborated from an independent source. I have already disbelieved her evidence on the date of execution, which I found that she concocted with her daughter and the claimant. I equally do not believe the story of the "kerfuffle", according to which Christine pulled the document away from Ivor as he was trying to sign it. In my opinion, this is a recent invention, again with her daughter. My conclusion is that she has equally made up the story that she and Noel signed before Ivor. I find that Ivor signed first, in the presence of the witnesses, who then signed in his and each other's.

73. According to Dawn's first trial witness statement, Ivor said as he signed "It is for the children". In cross-examination, she said that Ivor said this "about three times". This is not mentioned or supported anywhere else in the evidence. The codicil changed (a) the gift of the house on life interest trusts for Christine with remainders over to the claimant and Raymond into (b) an absolute gift for Christine. The claimant makes no case of lack of capacity on the part of Ivor, or of want of knowledge and approval by him. In the circumstances, it is difficult to understand why Ivor should have said what he is alleged to have said. It would simply not be true. It is also implausible that Ivor would keep repeating it. I find that Ivor did not say this.

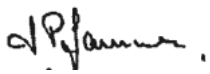
74. There is however a point raised by the claimant as to Ivor's apparent signature on his codicil. Dawn says in her evidence that when she saw the codicil for the first time with the signature on it, in 2013, she immediately recognised Christine's handwriting. First of all, I have found that Dawn and Noel signed after Ivor, so I do not accept that Dawn saw the signed codicil for the first time only in 2013. But, more importantly, I have found that Dawn's recognition of Christine's handwriting was based on its neatness compared to her own. The first few characters of the signature are an untidy scrawl, and Dawn said that that was Ivor. She said that Christine signed "Percy James", and that she recognised the handwriting immediately. As discussed earlier in this judgment (at [29]), evidence is admissible from a witness that she knows another person's handwriting and that the document produced is in that other's handwriting.

75. At the outset of Dawn's oral evidence, I had given permission to her counsel to take her to examples of Ivor's and Christine's handwriting to see whether she recognised them. She did not recognise any of the examples of Ivor's handwritten signature to which he was taken (all in the form "IP James"), but she recognised nearly all of the examples of Christine's handwriting and signature. In order to test Dawn's evidence of recognition I set out below some examples of handwriting in the bundle before me. I emphasise that this is done simply to test Dawn's evidence, and not for me as a non-expert to express any view on the identity of the authors of the handwriting.

76. This is the signature on Ivor's codicil, which Dawn recognised "immediately" as being in Christine's hand, except for the first few letters:

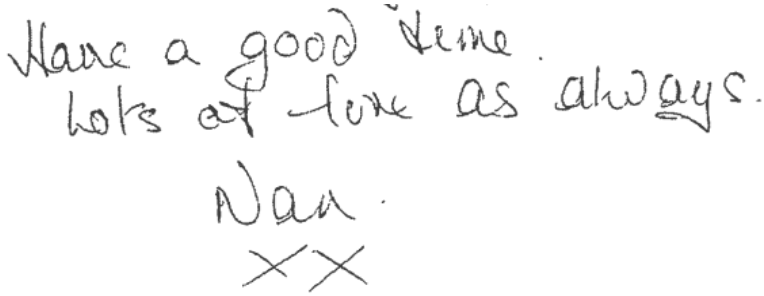


77. This is a signature of the testator from a 1961 company document (which Dawn did not recognise on its being shown to her):

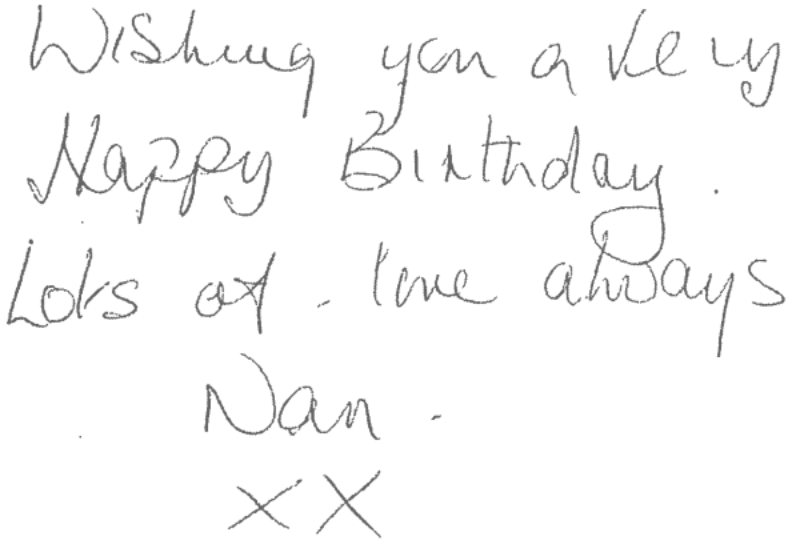


78. This is the signature on Christine's codicil:

79. This is from a birthday card from Christine to one of her "grandchildren":



80. This is from a birthday card from Christine to another of her "grandchildren":



81. Looking at the "James" part of the signature on the codicil, I cannot see how Dawn can have recognised Christine's hand in that, especially when she did not recognise Ivor's admitted signature on the company document. Christine's own version of "James" is shown on the third example, and is quite different. As for the intermediate word "Percy", I can see that the letter Y at the end resembles the letter Y in the first of the grandchildren's cards, but the letter Y occurs four times on the second of the grandchildren's cards, and is written in a different way on three of them. I am afraid that I simply do not accept Dawn's evidence that she recognised Christine's handwriting in the greater part of this signature.

82. Dawn's evidence was that Ivor hated his middle name "Percy" and never used it, instead signing "IP James". She was therefore suspicious of the fact that here

he had apparently signed his name in full. But this point was dealt with by Christine in her letter in 2013, when she pointed out that the solicitor's letter giving instructions on how the codicil is to be signed included the words "it is best that you use all your names or initials". Consequently, said Christine, "Ivor included his middle name 'Percy' in his signature, thinking that this was required". I accept this explanation. I also take full account of Ivor's various infirmities at this time. He may have paused between each part of his name, for example.

Post-execution events

83. Paragraph 10 of the particulars of claim states in part that

> "The claimants [sic] awaited the death of Christine on the premise that
>
> […]
>
> 10.4 Christine would have left the equivalent of the 50% life interest of the Deceased's estate … she has inherited absolutely pursuant to the alleged Codicil to the Claimant and the Second Defendant (or their children) in her will. In the event Christine left only 30% of the residue of her estate … to the First Claimant's [sic] children."

This statement of case is supported by a statement of truth signed by the claimant's solicitor on his behalf.

84. The claimant was cross-examined about this part of his statement of case. He said that Christine had assured him, even before Ivor's death, but also at Ivor's funeral, that the house would pass to the grandchildren. He was asked whether after the correspondence between Crowdy & Rose on the one hand and Christine on the other, Christine's intentions about the property were unclear to him. He said they were not, because Christine had told him that the property was going to the children. He was then referred to his Reply (again supported by a statement truth signed by a litigation executive on the claimant's behalf), where in paragraph 6 it is stated:

> "Christine's own testamentary intentions were unclear during her lifetime…"

85. It is clear on the evidence that Christine cared greatly for the claimant's children, and treated them as her grandchildren. I have no doubt that she intended to benefit them in her own will, and she may have made no secret of that intention to others, including the claimant. However, I do not accept the claimant's evidence that Christine promised, either before Ivor's death, or afterwards, that the whole house or its value would pass to the claimant's children. I bear in mind that, even under the original will *without* the codicil, but after severance of the joint tenancy, the claimant and his brother had a remainder interest in only half the house's value, and the grandchildren took nothing.

86. After Ivor's death, and notwithstanding the claimant's denials, I find that the claimant did not wait for the reading of the will, but immediately told Christine

to leave their home, as he thought it now belonged to him, and told the employees at his father's garage business that he was the new boss. Of course, the terms of the will and codicil meant that the claimant had no interest in the house at all, and only an interest in remainder (shared with his brother) in relation to the garage business. Nonetheless, Christine began to feel threatened and vulnerable, and so moved away to another part of Cornwall. She obtained probate to Ivor's estate. The original firm of solicitors that drafted the will had been taken over by another firm, and the original will and codicil could not be found. Probate was accordingly granted in relation to *copies*, limited, in accordance with the usual practice, until the originals should be found.

87. In 2014 Christine sold the house in Truro, Cranmere, for £395,000 and acquired the house in Redruth, Trethorns, for £270,000. If the codicil had been invalid, half of the purchase proceeds would have been hers (as beneficial tenant in common) and she would have been life tenant of the other half. In November 2014 she made a new will, by which she provided for 70% of her residuary estate to go to her sister Diana, and 30% to go to the claimant's children. I have not seen any calculations to show whether 30% of her residuary estate was more or less than the capital sum of £197,500 which would have comprised the Property Fund. The net value of her estate for probate purposes was £526,513, but on the one hand such values are often on the low side, and on the other there may have been tax and legacies to pay, and I have seen no accounts to show the value of her residuary estate. However, 30% of £526,513 would be £157,953.90.

88. Christine died on 24 February 2018. Her sister Diana did not survive her very long, dying a few months later, in August 2018. The third defendant, Diana's widower, is executor and sole beneficiary of her estate. The first defendant (Diana's daughter) obtained probate of Christine's estate as her executrix on 11 April 2019. This claim was first intimated to the first defendant and the other beneficiaries by letters from the claimant's solicitors in April 2019, and the claim was issued in September 2020.

The law

Will formalities

89. Section 1 of the Wills Act 1837 provides that, for the purposes of the Act, the term "will" includes "codicil". Section 9 of that Act, as amended in 1982, provides as follows:

> "No will shall be valid unless—
>
> (a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and
>
> (b) it appears that the testator intended by his signature to give effect to the will; and
>
> (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and

> (d) each witness either—
>
> (i) attests and signs the will; or
>
> (ii) acknowledges his signature,
>
> in the presence of the testator (but not necessarily in the presence of any other witness),
>
> but no form of attestation shall be necessary."

90. It will be noted that the Act does not impose a requirement that a valid will bear a date, let alone the correct date of execution. In *Corbett v Newey* [1998] Ch 57, Waite LJ (with whom Butler-Sloss and Morritt LJJ agreed) said (at 54D):

> "Before coming to the arguments, I should state that it is common ground between all parties that there is no requirement in law that a will should be dated. Lack of a date or the inclusion of the wrong date cannot invalidate a will."

91. Nor does the Act expressly prescribe the order in which the testator and the witnesses should sign. In its original form, section 9 of the Act provided that the testator's

> "signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

92. It will be seen that the main difference from the current version is that it was not clear in the original that the two attesting witnesses did not have to attest and sign in each other's presence. Now it is. But some commentators say that that the old wording contained a stronger temporal connection between the testator's signature and the witness's attestation, created by a combination of placing them in physical proximity and using the word "shall" (twice). Thus, in *Griffiths v Griffiths* (1871) LR 2 P&D 300, Lord Penzance said (at 303):

> "The statute says that the witness shall *attest*, and shall subscribe the will; which must mean that he shall put his name to the will as attesting to the fact that he saw the testator sign it; that is, he must put his name as witness".

93. Nearer our own time, in *Re Gibson* [1949] P 434, Pearce J decided that a blind man could not attest a will, because he could not see the signature being written by the testator:

> "There is no direct authority on the capacity of a blind man to witness a will. The normal meaning of 'attesting' is testifying or bearing witness to something, and the normal meaning of 'witness' is one who is a spectator of an incident or one who is present at an incident. Is mere presence, without the faculty of sight, enough to constitute a witness for the purposes of s. 9 of the Wills Act, 1837? Is an act which the witness cannot see done in his presence? The object of the Act is clear. One witness is not enough. The

> presence of two witnesses is made necessary in order to give certainty and to avoid fraud. In the light of common sense, and without any authority, I should be inclined to hold that for the purposes of the Act, a 'witness' means, in regard to things audible, one who has the faculty of hearing, and in regard to things visible, one who has the faculty of seeing. The signing of a will is a visible matter. Therefore, I think that a will is not signed 'in the presence of' a blind person, nor is a blind person a witness for the purposes of the section" (at 436-37).

That decision similarly proceeds on the basis that the testator's signature must be on the page before the witness can attest.

94. Shortly afterwards, there was the decision in *Re Davies* [1951] 1 All ER 920. A testatrix made her mark on her will in the presence of the first witness, and, whilst the first witness was herself signing, the second witness entered the room. The testatrix acknowledged her mark to the second witness, who then signed the will. Morris J held that the will was invalid. He said (at 922B-D):

> "In *Moore v King* Sir Herbert Jenner Fust said (3 Curt 253):
>
> > 'I am inclined to think that the Act is not complied with, unless both witnesses shall attest and subscribe after the testator's signature shall have been made and acknowledged to them when both are actually present at the same time.'
>
> (See also *Wyatt v Berry* [[1893] P 5], per Gorell Barnes J). It seems to me to follow from those decisions, and also from *Hindmarsh v Charlton* [(1861) 8 HLC 160], that, on that facts of the present case, the attestation of the will of 9 February 1949, was not in the form required by the Wills Act, 1837, s 9, as the testatrix should have acknowledged her signature in the presence of both of the attesting witnesses before either of them signed."

95. The question is how far the law may now be different. As I have already said, it is now clear that the attesting witnesses do not have to be present at the same time when each is attesting and signing (or acknowledging). But what about the *order* in which the signatures are put on the testamentary paper? In *Sangha v Sangha's Estate* [2022] EWHC 2157 (Ch), Mr Simon Gleeson, sitting as a deputy High Court judge, on an appeal from a decision of the master, considered this point again in light of the amendments made to section 9 in 1982. He said:

> "46. The position for which Mr East argues was clearly the case prior to the amendments of s.9 made by the Administration of Justice Act 1982. The position under the previous legislation was that there was clear authority that where either or both witnesses signed before the testator had signed or acknowledged the will, the will was invalid (see Williams, Mortimer & Sunnucks at 9-24). However, the basis for this conclusion was that the old wording of the act was that the testator's signature 'shall be made or acknowledged… in the presence of two or more witnesses… and such witnesses shall attest and shall subscribe the will….' The word 'shall' in this context was held to denote a time sequence, so that it was read as 'shall then' (*Re Allen* (1839) 2 Curt 331). The amendments made to s.9 in 1982

> removed the word 'shall' from this section and reworded it. The editors of Mortimer, Williams and Sunnucks (at 9-25) express the view that this rewording removed the concept of time sequencing. The express intention seems to have been that three things are required – the testator must sign or acknowledge his signature in the presence of two witnesses, and each witness must either sign or attest to the testator. If that is correct, the fact that Mr Balraj Singh signed the will before the testator acknowledged the will before two witnesses does not invalidate the will, and the fact that he did not reacknowledge his own signature after that event is neither here nor there. This is exactly the conclusion which the Deputy Master came to in paras 119-121 of his judgement, and I have nothing to say about his conclusion beyond the fact that I agree with it."

96. The passage in Williams, Mortimer & Sunnucks at 9-24 referred to by the deputy judge reads as follows:

> "In the case of deaths on or after 1 January 1983, s.9(d) as substituted provides that a will made in any of the circumstances listed above will now be valid, provided each of the witnesses acknowledges his signature to the testator after the testator has made or acknowledged his signature."

For myself, I would not have said it was obvious that the learned editors there "express the view that this rewording removed the concept of time sequencing". I agree that it says that the witnesses can acknowledge their signatures to the testator *after* the testator has made or acknowledged his/her signature to them. So, in theory, what might happen is that the witnesses sign first, then the testator signs, and then the witnesses acknowledge their signatures to the testator. But the act of attestation in this case would lie in the acknowledgment, which *follows* the making of the testator's signature on the paper. You still cannot attest the testator's signature (or acknowledgment of the signature) unless and until the signature is on the page.

97. Accordingly, I do have difficulty with the deputy judge's statement that:

> "the fact that Mr Balraj Singh signed the will before the testator acknowledged the will before two witnesses does not invalidate the will, and the fact that he did not reacknowledge his own signature after that event is neither here nor there."

As it seems to me, the acknowledgement by Mr Balraj *after* the testator acknowledged his own signature is precisely what the amended section required, but in that case it did not happen.

98. Moreover, it does not appear that the deputy judge was referred to the intervening decision of the Court of Appeal in *Barrett v Bem* [2012] Ch 573. There the testator had attempted to sign the will, but his hand shook too much to be able to do so. His sister (who was in fact the sole beneficiary of the will) then took the pen and signed for him, the testator acquiescing, although he had not asked her to do so. There were two trials, because after the first one the second attesting witness (who had not been traced at the time of the first) had been found and had provided a statement. At the second trial the judge held that

the will was validly executed, as the sister had signed on behalf of the testator. The Court of Appeal however held that the will was invalid, as there was no evidence of any active step taken by the testator in the nature of an instruction to the sister to sign for him. His mere acquiescence in the act was not enough.

99. It is important to note that in that case there was no issue as to the order in which the signatures were placed on the will. The only reference to this which I have found was in relation to the first trial, referred to by Lewison LJ (with whom Maurice Kay and Hughes LJJ agreed), when he said:

> "2. … He then signed the will and his signature was witnessed by two nurses …"

Given that the judgment in the first trial was set aside and a retrial ordered, that is of course by no means conclusive. But, so far as I can see, it is all there is on the point.

100. However, later in his judgment Lewison LJ went on to say this:

> "18. I begin with some general observations. First, as Mr Warwick appearing for Michael pointed out, all four of the conditions in section 9 must be satisfied before a will can be said to have been validly executed. Second, there is no discretion on the part of the court to override compliance with these conditions in order to give effect to the putative testator's intentions or wishes. *Third, the conditions set out what is in effect the temporal sequence for their fulfilment.* Fourth, since the validity of a will necessarily arises after the principal actor is dead, there are powerful policy reasons for insisting on their fulfilment. Fifth, the starting point for understanding the requirements of section 9 must be the words of the section itself" (emphasis supplied).

101. The emphasised third point in that extract makes clear that the event referred to in section 9(d) (whether (i) or (ii)) *follows* that in section 9(c). That is not inconsistent with what Williams Mortimer and Sunnucks say at 9-25, but it *is* inconsistent with the decision in *Sangha*. What Lewison LJ says in *Barrett v Bem* is of course *obiter*, because the question of temporal sequence did not arise on the facts of that case. But it remains nevertheless a considered dictum of a unanimous constitution of the Court of Appeal. Even if I am strictly not bound by it, I should pay it great respect, and not least because of the identity of its author.

102. It is clear that the witnesses must be both present when the testator signs or acknowledges his or her signature, and the testator must be present when each of the witnesses signs or acknowledges his or her signature. Of course, where there is an attestation clause, that may state the order in which events are said to have occurred. But, as the section itself expressly says, no form of attestation is actually *necessary*.

103. The meaning of the word "attest" (and its cognate "attests") in this statutory context is clear from the earlier authorities, and in my judgment the amendments of 1982 have not changed that. You attest to some perceptible event, in the sense

that you say you have perceived (usually, but not always, *seen*) its occurrence. In my judgment the event to be attested is *either* the testator's signature of the will, *or* his/her acknowledgment of that signature. What the witness must do in the current form of the section is found in the words "attests and signs the will; or … acknowledges his signature", as distinct from the original version, "shall attest and shall subscribe the will".

104. There are thus *either* two separate actions, *or* alternatively just one, involved for the witness. The first alternative consists of, first, attesting, or bearing witness to, either (a) the act of signature itself or (b) the acknowledgment of the existing signature that is witnessed. The second part of the first alternative involves the act of signature by the witness, as a formal acknowledgment of the attestation that has just taken place. The second alternative consists of the acknowledgement by the witness of an earlier signature by that witness on the will. In my judgment, the acknowledgment of the earlier signature takes the place and function of an attestation of the testator's signature.

105. For myself, and with great respect to the view of deputy judge Simon Gleeson in the *Sangha* case, I do not see how the 1982 amendments can have changed the requirement that the testator's signature must be on the testamentary paper *before* a witness can attest. It is not enough to witness the existence of *an unsigned paper*. In that case the witness does not witness the making of the signature, and nor does s/he witness the acknowledgment of the signature. It follows that I respectfully agree with the *obiter* view expressed by Lewison LJ in *Barrett v Bem* as to the temporal sequence concerned.

Presumptions

106. A leading practitioner textbook on this area of the law, *Theobald on Wills*, 19th ed, 3-033 states:

> "The presumption that everything was properly done (*omnia rite et solemniter esse acta*), arises whenever a will, regular on the face of it and apparently duly executed, is before the court, and amounts to an inference, in the absence of evidence to the contrary, that the requirements of the statute have been duly complied with."

107. Even where there is evidence to the contrary, the presumption may still prevail. In *Wright v Rogers* (1869) LR 1 PD 678, Lord Penzance said (at 682)

> "The Court ought to have in all cases the strongest evidence before it believes that a will, with a perfect attestation clause, and signed by the testator, was not duly executed, otherwise the greatest uncertainty would prevail in the proving of wills. The presumption of law is largely in favour of the due execution of a will, and in that light a perfect attestation clause is a most important element of proof. Where both the witnesses, however, swear that the will was not duly executed, and there is no evidence the other way, there is no footing for the Court to affirm that the will was duly executed."

108. An example of the strength of the presumption is *Wright v Sanderson* (1884) 9 PD 149. In that case, the testator had prepared a holograph codicil to his will which included an attestation clause. He asked two witnesses to 'sign this paper' which they did. Their evidence, given 4 to 5 years later, was that they did not see the attestation clause, and nor did they see the testator sign. One witness said that she did not know what she was signing; the other said that she did not know what she was doing. The trial judge did not doubt their honesty, but felt that he could not rely on their evidence to rebut the presumption arising from the regularity of the codicil on its face as regards all the formalities of signature and attestation when no suspicion of fraud arose.

109. The Court of Appeal dismissed an appeal. The Earl of Selborne LC said (at page 161),

> "I observe that the very learned President of the Probate Division, in the judgment appealed from, has stated that there have been many cases, within his own experience, in which, upon evidence substantially similar, he has pronounced in favour of wills, although the witnesses (being credible and respectable persons) have stated that they did not see the testator sign. I do not know how many wills, really well executed and duly attested, might not be brought into peril if, upon the sort of evidence which we have here, after a lapse of several years, probate were refused".

110. Fry LJ said (at 163):

> "The codicil propounded is ex facie perfectly regular as regards all the formalities of signature and attestation. The presumption omnia rite esse acta, therefore, applies to the codicil. But the conduct of the testator, both in the preparation of the codicil and in the calling together of his witnesses, shews an anxious and intelligent desire to do everything regularly. That fact strengthens the presumption. That presumption is not, in my opinion, rebutted by the evidence of the two witnesses who think that the testator did not sign in their presence, for these witnesses were somewhat nervous and flurried on the occasion, and are accordingly confused and forgetful in the witness-box. They were witnesses about whose honesty the learned President of the Probate Division entertained no doubt, but on whom he, who saw and heard them, felt that he could not rely to rebut the presumption which arises from the admitted facts of the case. The decisions cited in argument, and referred to by the Lord Chancellor, shew that the judges who have presided over the Court of Probate have long been accustomed to give great weight to the presumption of due execution arising from the regularity ex facie of the testamentary paper produced, where no suspicion of fraud has occurred. In so doing they have, in my opinion, acted rightly and wisely."

Cotton LJ gave a judgment concurring in the decision, but not expressing a view on this point.

111. A more modern case to the same effect is *Sherrington v Sherrington* [2005] EWCA Civ 326. There, Peter Gibson LJ, giving the judgment of the court (himself, Waller and Neuberger LJJ) said:

> "42. It is not in dispute that if the witnesses are dead, the presumption of due execution will prevail. Evidence that the witnesses have no recollection of having witnessed the deceased sign will not be enough to rebut the presumption. Positive evidence that the witness did not see the testator sign may not be enough to rebut the presumption unless the court is satisfied that it has 'the strongest evidence', in Lord Penzance's words. The same approach should, in our judgment, be adopted towards evidence that the witness did not intend to attest that he saw the deceased sign when the will contains the signatures of the deceased and the witness and an attestation clause. That is because of the same policy reason, that otherwise the greatest uncertainty would arise in the proving of wills. In general, if a witness has the capacity to understand, he should be taken to have done what the attestation clause and the signatures of the testator and the witness indicated, viz. that the testator has signed in their presence and they have signed in his presence. In the absence of the strongest evidence, the intention of the witness to attest is inferred from the presence of the testator's signature on the will (particularly where, as in the present case, it is expressly stated that in witness of the will, the testator has signed), the attestation clause and, underneath that clause, the signature of the witness."

112. It may also be noted that, at [67], the Court of Appeal accepted that, where the presumption of due execution applied, it would presume the signature (or acknowledgment of the signature) of the testator and the attestation of the witnesses to have taken place in the correct order.

113. In *Channon v Perkins* [2005] EWCA Civ 1808, Neuberger LJ (with whom Mummery and Arden LJJ agreed) said:

> "7. There is good reason for the requirement that one must have 'the strongest evidence' to the effect that a Will has not been executed in accordance with section 9 when, as in this case, it appears from the face of the Will that it has been properly executed in all such respects and where there is no suggestion but that the contents of the Will represented the testator's intention. Where a Will, on its face, has been executed in accordance with the section 9, and where there is no reason to doubt that it represented completely the wishes of the testator, there are two reasons, one practical and one of principle, why the court should be slow, on the basis of extraneous evidence, to hold that the Will was not properly executed.
>
> 8. The practical reason is that oral testimony as to the way in which a document was executed many years ago is not likely to be inherently particularly reliable on, one suspects, most occasions. As anyone who has been involved in contested factual disputes will know, people can, entirely honestly and doing their very best, completely misremember or wholly forget facts and events that took place not very long ago, and the longer ago something may have taken place the less accurate their recollection is likely to be. Wills often are executed many years before they come into their own.
>
> 9. Furthermore, when one is dealing with the recollection of witnesses to a Will, one is, as my Lord, Mummery LJ, pointed out in argument, often, indeed normally, concerned with the evidence of persons who have no

> interest in the document that has been executed, and therefore to whom the signing of the Will would not, save in usual circumstances, have been of particular significance.
>
> 10. The principled reason for being reluctant to hold that a Will, properly executed on its face, representing the apparent wishes of the testator, should be set aside on extraneous evidence, is that one is thereby declining to implement the wishes of the testator following his death. That would be unfortunate, especially in a case he has taken care to ensure, as far as he can, that his wishes are given effect in a way which complies with the law."

114. In the present case, probate was not granted of the original codicil, because it could not be found. Instead, it was granted of a photocopy. The question arises as to whether the presumption applies in such circumstances. In *Harris v Knight* (1890) 15 PD 170, Lindley LJ said (at 179):

> "A person who propounds for probate an alleged will, and who is unable to produce it, or any copy or draft of it, or any written evidence of its contents, is bound to prove its contents and its due execution and attestation by evidence which is so clear and satisfactory as to remove, not all possible, but all reasonable doubts on those points.
>
> If he can do this, he is entitled to probate, as is shewn by the case of *Sugden v. Lord St. Leonards*."

115. In passing, I mention that the remarkable case of *Sugden v. Lord St. Leonards* (1876) 1 PD 154 was one where the will of the late Lord St Leonards (formerly Sir Edward Sugden, and Lord Chancellor in 1852) was found to be missing after his death at the age of 93. He had been a prolific chancery barrister and author, as well as Lord Chancellor first in Ireland, and then subsequently in Great Britain. His only unmarried daughter, Charlotte Sugden, who lived with him to the end of his life, gave oral evidence of the will's contents at the trial of a probate action to propound the missing will. The testator had taken great pride in the products of his industry, and accordingly of his will, by which he was able to provide for his large family. Charlotte had herself had many opportunities to read the will, and had also heard him read it out to her. In addition, on a number of occasions she had even read it out to him. The judge at first instance admitted and accepted her evidence as to the contents of the missing will, and the Court of Appeal unanimously affirmed that decision.

116. The important point, however, is that Lindley LJ in *Harris v Knight* saw no need for the "so clear and satisfactory evidence" required to get over the absence of the original will *or a copy*. A copy was enough to obtain probate. In the late nineteenth century, of course, a copy would have been a handwritten copy. These days, and certainly in this case, we are dealing with photocopies, which are of course much better than a mere handwritten copy. I can see no good reason why, if probate is granted of a copy – and necessarily limited until the original is found – should not be subject to just the same presumptions as the original would be. It is true that it is harder to detect a forged copy of a document than a forged original, but that is a matter of degree only.

Laches and delay

117. In *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221 Lord Selborne LC said (at 239-40):

> "Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

118. More recently, *Fisher v Brooker* [2009] 1 WLR 1764, HL, was a case of a claim to joint authorship and joint ownership of a musical copyright after a delay of 38 years. One issue raised was laches. Lord Neuberger (with whom Lords Hope, Walker, Mance and Lady Hale agreed) said this:

> "64. Fifthly, laches is an equitable doctrine, under which delay can bar a claim to equitable relief. In the Court of Appeal, Mummery LJ said that there was 'no requirement of detrimental reliance for the application of acquiescence or laches' - [2008] EWCA Civ 287, para 85. Although I would not suggest that it is an immutable requirement, some sort of detrimental reliance is usually an essential ingredient of laches, in my opinion. In *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221, 239, the Lord Chancellor, Lord Selborne, giving the opinion of the Board, said that laches applied where 'it would be practically unjust to give a remedy', and that, in every case where a defence 'is founded upon mere delay … the validity of that defence must be tried upon principles substantially equitable.' He went on to state that what had to be considered were 'the length of the delay and the nature of the acts done during the interval, which might affect either party, and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy'."

119. Subsequently, Lord Neuberger said this:

> "79. The argument based on laches faces two problems. The first is that, as pointed out by David Richards J, laches only can bar equitable relief, and a declaration as to the existence of a long term property right, recognised as such by statute, is not equitable relief. It is arguable that a declaration should be refused on the ground of laches if it was sought solely for the purpose of seeking an injunction or other purely equitable relief. However, as already mentioned, that argument does not apply in this case. Secondly, in order to

> defeat Mr Fisher's claims on the ground of laches, the respondents must demonstrate some 'acts' during the course of the delay period which result in 'a balance of justice' justifying the refusal of the relief to which Mr Fisher would otherwise be entitled. For reasons already discussed, the respondents are unable to do that. They cannot show any prejudice resulting from the delay, and, even if they could have done so, they have no answer to the judge's finding at [2006] EWHC 3239 (Ch), para 81, that the benefit they obtained from the delay would outweigh any such prejudice."

120. It will be noted that a claim to revoke a probate or letters of administration is not a claim to equitable relief. So, the relevance of equitable laches can only be to some *underlying* claim to equitable relief which can be pursued only if the probate or letters of administration is indeed revoked. If that underlying claim is the only reason for seeking revocation, and if laches must bar that claim, there is no point in seeking the revocation at all.

121. However, Mr Kirby for the first defendant submitted that there was a further laches-like doctrine in the law of probate, a kind of cousin (rather as the probate doctrine of undue influence resembles, but is different from, the equitable doctrine of undue influence). In this connection I was referred to the decision in *Williams v Evans* [1911] P 175. But that decision refers to and is somewhat based on *Mohan v Broughton* [1899] P 211 (the facts of which are also the foundation for another case to which I was referred, *Re Coghlan* [1948] 2 All ER 68). So, I will take the cases in chronological order, and begin with *Mohan*.

122. In that case, a wealthy widower died intestate on 24 November 1892. Letters of administration to his estate were granted to his cousin on 24 December 1892, and on 27 December 1892 the administrator commenced an administration action. In January 1893, a kin enquiry was directed, which resulted in a certificate of the chief clerk in November 1893 that the next of kin were four named cousins (including the administrator). In May 1894 the plaintiff took out a summons in the administration action asking for liberty to make a claim in the action as a further first cousin of the intestate. At a hearing in June 1894 the chief clerk made no order, but allowed the plaintiff time to consider whether to take her application to the judge. In fact, she did not, and the estate was distributed among the four cousins named in the certificate. A final order was made in the administration action in April 1896, when all further proceedings were stayed.

123. In March 1898, the plaintiff's solicitor wrote to the administrator giving notice of a claim by her to be entitled as next of kin to a grant of letters of administration on the ground that the administrator could only claim relationship with the intestate through an illegitimate ancestor, and so should not have been granted administration, since he was not a beneficiary of the estate. The present claim was instituted in June 1898, as an action to revoke the letters of administration already granted, and for a grant to herself.

124. The administrator took out a summons to show cause why the action should not be dismissed on the grounds of *res judicata* and vexatiousness. It is important to notice that this was an intestacy, and the rules of inheritance would be the same whoever was the administrator. The challenge was as to the capacity of

the administrator to act in that office. It was not an application to strike out the claim, but a trial of specific issues.

125. The parties agreed to the court's deciding whether, on the assumption that the plaintiff was indeed one of the next of kin of the intestate, it was appropriate to revoke the letters of administration. In his judgment, Gorell Barnes J said there were two issues in particular raised by way of defence. One was *res judicata*, and the other was laches. However, as to the second, it was clear that the judge meant *equitable* laches, because he formulated the defence in this way (at 216):

> "that the plaintiff, having taken no steps, from June, 1894, until the present action, to dispute the orders in Chancery under which the estate had been distributed, had been guilty of such laches that she could not maintain a suit in Chancery to follow the estate into the hands of those who had received it; and ought not, therefore, to be allowed to maintain this suit to revoke the letters of administration for a useless purpose."

126. Gorell Barnes J considered various authorities, and said this (at 218-19):

> "It is clear that there is a broad distinction between the position of a person who had no notice of the proceedings in an administration suit in which a fund has been distributed, and who, upon becoming aware of the facts, seeks to make the recipients of the fund refund, and that of a person who, with notice of such proceedings and with knowledge of the questions which can be raised therein, neglects to contest the matters upon which his rights, if any, depend, and allows the fund to be distributed; and then, after a time, seeks to reopen the whole matter.
>
> In the one case, the claimant has done nothing which ought to affect his rights against the recipients ; whereas, in the second, it would, in my opinion, be inequitable to allow him to come forward and compel the recipients to refund, after he has lain by and allowed them to act upon the belief that the fund has been properly distributed among them, and when there is little or no doubt that their positions and obligations have been affected by acting, as they apparently would be entitled to do, in such belief. In the present case it is clear that the plaintiff was aware of the Chancery proceedings as early as 1893, and no steps whatever were taken by her except those upon the summons which I have already stated. It is also clear that the plaintiff was aware, at the time of the Chancery proceedings, that there was a question as to the legitimacy of the said Emma Broughton, through whom the parties, who have been found entitled to the fund, claimed relationship to the deceased."

127. Later in his judgment (at 220), the judge said:

> " … as I have already pointed out, the plaintiff was always aware of the question of legitimacy which could be raised in connection with the relationship of those who have been found next of kin to the deceased ; and, notwithstanding that knowledge, she took no steps, for three years at least after the money had been distributed amongst the next of kin, to question the Chancery proceedings and the orders made therein.

> In my opinion, the plaintiff has practically acquiesced in the Chancery proceedings, and has been guilty of such laches as to disentitle her, according to the authorities to which I have referred, to maintain a suit against those who have received the estate to compel them to refund. Therefore, as the only object of the present suit to revoke the letters of administration and obtain a grant in her own favour is to assist her in an attempt to recover the funds which have been distributed, it follows that this Court ought not to assist the plaintiff, who has been guilty of laches in the way I have indicated, to obtain a grant which would be useless to her. This point of laches being decided against the plaintiff, it is unnecessary that any other questions which might be raised in the case should be gone into. In my judgment the suit must be dismissed with costs."

128. The decision was taken by the plaintiff to the Court of Appeal ([1900] P 56). That court dismissed the appeal on the basis that, since the rules of intestacy applied in any event, and the plaintiff's claim was that she was entitled under those rules, there was nothing to prevent her from instituting Chancery proceedings for that purpose, and the identity of the administrator was (in this respect) irrelevant. Sir Nathaniel Lindley MR (with whom Vaughan Williams and Romer LJJ agreed) said (at 58):

> " … she wants this revocation for the purpose of asserting her right. In other words, she wants to follow the assets into the hands of the persons who have got them. I do not myself see any difficulty in her commencing an action for that purpose in the Chancery Division. I hope that I shall not be supposed to advise her to do it. It appears to me that her case there would be almost, if not utterly, hopeless; but still, theoretically, she could do that, although the letters of administration had not been revoked."

So the plaintiff's claim to revoke the letters of administration was pointless.

129. But there was a second ground. The Master of the Rolls went on (also at 58):

> "Now, if her case is hopeless, and that is the view which Gorell Barnes J. has taken, because, having looked into the matter, he says, 'You cannot succeed in getting what you want, and, inasmuch as you will not succeed in getting what you want, I will not revoke the letters of administration,' I think that he was perfectly justified in dismissing the action. I do not say that it was frivolous or vexatious. Still less do I think that technically there is anything like res judicata."

Thus, in any event the underlying equitable claim was bound to fail, on grounds of (equitable) laches, and that was a good reason also for dismissing the revocation claim. Neither at first instance nor on appeal was anything said about laches as a defence to a probate claim as such.

130. A case going the other way is *Williams v Evans* [1911] P 175 itself. In that case, a testator had made a will dated 26 September 1906 and died on 29 November 1908. The testator's widow had applied for probate of the will, and obtained it on 19 January 1909. However, the widow died the same day. The defendants obtained probate of *her* will on 1 February 1909. On 16 March 1909 the

testator's son, who wished to challenge his will, was advised by solicitors that it was too late to do so. He therefore took out double probate to the testator's will, on 7 May 1909.

131. The son at first acted in the administration of the estate, but subsequently brought the present claim to challenge the will on four grounds, and thus to revoke the probate. The four grounds were: defective execution, lack of capacity, undue influence and want of knowledge and approval. The defendants argued that his claim should fail, because of either laches or estoppel. The matter was argued and decided on 18 May 1911, some two and a half years after the death of the testator, and some two years after the son had taken out probate. It was, however, not alleged that the estate had been distributed in the meantime.

132. So, this case was different to *Mohan v Broughton* in two important ways. First, the will itself was challenged, and therefore if the challenge succeeded the distribution of the estate would be different. Second, the court had to proceed on the basis that the estate had not yet been distributed. In relation to laches, Horridge J said this (at 178-79):

> "Secondly, there is the question of laches. The case of *Mohan v. Broughton* is very much stronger on the facts than the present case. In the course of his judgment in that case Gorell Barnes J. deals with this question of laches. He says [at 218]: 'It is clear that there is a broad distinction between the position of a person who had no notice of the proceedings in an administration suit in which a fund has been distributed, and who, upon becoming aware of the facts, seeks to make the ion recipients refund, and that of a person who, with notice of such proceedings and with knowledge of the questions which can be raised therein, neglects to contest the matters upon which his rights, if any, depend, and allows the fund to be distributed; and then, after a time, seeks to reopen the whole matter.'
>
> There is no evidence in this case that the parties have distributed the assets among themselves. In a later part of his judgment Gorell Barnes J. says [at 220]: ' ... and, notwithstanding that knowledge, she took no steps, for three years at least after the money had been distributed amongst the next of kin, to question the Chancery proceedings and the orders made therein.'
>
> The only alteration in the position of the parties that can here be alleged is that during the wife's survivorship of her husband, a period of about seven weeks, no proceedings were taken, and that owing to her death her evidence is not now available, but this was not relied upon as being a delay of such a character as amounted to laches.
>
> One matter relied upon was the taking out of double probate, but I think the plaintiff has on the assumed facts as stated given a satisfactory explanation as to why he made the affidavit.
>
> On the whole I cannot say the facts in this case are such that I am able to hold that there has been such laches that it would be inequitable for the plaintiff to be allowed to contest the validity of this will."

133. In this case, then, the son needed to have the probate revoked in order to set up different succession dispositions for his father (presumably more favourable to him). And, since the estate had not yet been distributed, no-one would have been prejudiced by the challenge to the will. The judge referred to the possibility of laches barring *the contest of the will*, rather than any underlying equitable claim (as in *Mohan*). Now, the grounds of attack put forward in this case went beyond the (probate) doctrine of undue influence, to defective execution, incapacity and want of knowledge and approval. *Equitable* laches could not be a defence to such claims. So Horridge J must have been referring to a parallel doctrine of laches in the law of probate, even though on the facts it did not apply. The two cases he put during his judgment which might have caused him to apply the doctrine were (i) prior distribution of the assets and (ii) alteration of the position of the parties. This resembles the way that equitable laches sometimes operates, *ie* acquiescence or delay leading to a change in position making it unconscionable to assert a legal right thereafter.

134. Next, in *Re Coghlan* [1948] 2 All ER 79, CA, the affairs of the very same intestate as had been the subject of *Mohan v Broughton* were once more in contention. By now, it was thought that the estate had been fully administered and distributed. Part of the assets so distributed were now in the hands of the defendants, as trustees of a certain settlement and resettlement. In 1943, the plaintiff issued proceedings for the revocation of the letters of administration, claiming that the deceased had in fact died testate, having made a will dated 23 December 1891. That will purported to leave the entire estate to a cousin, one Samuel Williams, and to appoint him sole executor. Mr Williams died intestate in 1909, and in 1912 a Mrs Casey obtained letters of administration to his estate. Mrs Casey died in 1922. In 1936 the plaintiff (Mrs Casey's nephew), having been aware of the will since 1912, obtained letters of administration *de bonis non* in relation to the estate of Mr Williams. Clothed with that title, in 1943 he brought the present proceedings.

135. The defendants applied to have the action dismissed as frivolous and vexatious, on the basis that any subsequent chancery proceedings would be defeated by reason of laches, whether the plaintiff's or that of those in whose shoes he stood. For the purposes only of the present proceedings, the defendants admitted that there were assets still in their hands which it might be possible to follow in chancery proceedings, if the will were established. After a procedural reconstitution of the proceedings put forward by the defendants' solicitors in a letter of 11 September 1945, Willmer J dismissed the action as frivolous and vexatious ([1948] 1 All ER 367). The plaintiff appealed. By the time of the appeal, it also appeared that there remained a small piece of land containing a family vault (in Highgate Cemetery) belonging to the estate, which was still unadministered. The Court of Appeal allowed the appeal. Unfortunately, the three judges were not unanimous in their reasons for doing so.

136. Tucker LJ identified one question (of several) arising as follows (71A):

> "(1) Is laches on the part of the plaintiff of his predecessors in itself a bar to proceedings in the Probate Court apart from its effect on any subsequent and consequential proceedings in Chancery or elsewhere?"

In other words, was there a *probate* doctrine of laches as well as an equitable doctrine?

137. He summarised counsel's submission (at 71B-D) as:

> "that, although he would, if necessary, eventually contend under No (1) above that laches would be a defence to the probate proceedings themselves, he had not sufficient authority for this proposition to justify him in asking us on this ground to support the learned judge's order dismissing the action as vexatious. He based his whole case on the ground that on a summons to dismiss a probate action as frivolous and vexatious under its inherent jurisdiction the court will investigate the facts, and, if satisfied that laches would bar any subsequent proceedings in Chancery for which purpose the action had been brought, will dismiss the action *in limine* as frivolous and vexatious. His authority for this proposition was *Mohan v Broughton* … "

So, the argument *on this occasion* was not that the claim should now be struck out as barred by (probate) laches, but that the underlying claim was barred by (equitable) laches, and that therefore the court should dismiss the action. (It is interesting to note that the defendant's counsel was HC Leon, later a judge, but better known as the author Henry Cecil. This appears to have been his only reported case in the Probate Division.)

138. Tucker LJ went on to consider the decisions of the courts in *Mohan v Broughton*. He held that they were "no authority for the circumstances in which an action should be dismissed *in limine* as frivolous and vexatious and an abuse of the process of the court". He said that that accounted for the observation by Sir Nathanial Lindley MR in the Court of Appeal that he did not "say it was frivolous or vexatious". After considering another authority (*Willis v Earl Beauchamp* (1886) 11 PD 59, CA) which he said did "not … afford much assistance", Tucker LJ concluded as follows (at 73A):

> "Having regard to the facts that the jurisdiction to dismiss *in limine* is one which is sparingly exercised and then only in exceptional and clear cases, I have come to the conclusion, having regard to the terms of the letter of 11 September 1945, the state of the authorities with regard to laches as applied to probate actions, and the fact that some of the material facts with regard to laches are in dispute, that the defendants have not been able to discharge the heavy burden that lies on them to show that this action should be dismissed as frivolous and vexatious and an abuse of the process of the court."

So, although the point was raised, it was not argued, and Tucker LJ specifically did not reach any conclusion about the existence or application of a probate doctrine of laches.

139. Evershed LJ said (at 73D-E) that

> " … the plaintiff's claim in the action is startling in the extreme. It is a claim to establish an alleged will 54 years after the death of the testator, the whole

> of whose estate has, with the exception presently mentioned, long since been distributed (for the most part pursuant to orders of the court) on the footing that he died intestate. Moreover, the plaintiff … has by his own admissions been fully aware of the existence and terms of the will since the year 1912. Not only that, but … an aunt of his, by name Mrs Casey, obtained a grant of letters of administration to the estate of the universal legatee and devisee named in the alleged will in 1912, but herself took no step before her death in 1922 to establish the will which the plaintiff, clothed since 1936 with the representative capacity formerly attached to Mrs Casey, now seeks to propound".

140. However, he went on (at 73H-74A, D-F):

> "For the purposes of the present appeal counsel for the defendants has not thought it right, in the absence of any authority directly in point, to contend that this delay—even though amounting to such laches as would in a court of equity be a bar to any proceeding to follow and recover property—is a bar in the Probate Court to a claim to establish a will assumed to be valid, or that the statutes of limitation apply to defeat such a claim. It follows, therefore, that the case of the defendants in this court for summary dismissal of the action must rest on the proposition that (as Willmer J held) the plaintiff, even though he obtained his grant, could not possibly succeed either in his capacity of personal representative of the testator or as beneficiary under the testator's will in deriving any practical advantage—*ie*, in recovering any property from the defendants or from any other persons. …
>
> And on the main proposition advanced by the defendants *(viz*., that the court may, in the exercise of its inherent jurisdiction, dismiss an action *in limine* where it is shown that though the action itself may succeed no useful or fruitful result can thereby be achieved by the plaintiff) I find myself, for my part, in agreement with Willmer J. For, in approaching the question whether the action is frivolous or vexatious, the court is entitled to ask of the plaintiff, what is his object? If it is apparent that the plaintiff can achieve no real or material advantage for himself or for anyone else from his success, then I think that the court may fairly hold his proceeding to be, in truth, vexatious. I think further that the court is properly entitled to take account of the fact that to any proprietary claim which the plaintiff may make either the relevant statutes of limitation or laches would be a conclusive defence, if, in all the circumstances, it is plain that such pleas will be raised though the time for raising them has not yet, strictly, arrived."

141. Evershed LJ would therefore have agreed with Willmer J (he also considered that *Willis v Earl Beauchamp* was a helpful authority). But he held that the recently discovered family vault remaining unadministered was fatal to the defendant's application to dismiss the action:

> " … as the evidence stands, it is, in my judgment, impossible to deny that that piece of property still remains outstanding as part of Mr Coghlan's estate, to which none save Mr Coghlan's personal representative can make title" (at 75C).

He also therefore dismissed the appeal.

142. The third judge, Hodson J, first of all focused on the letter of 11 September 1945. In effect, he said, the defendants had proposed the reconstitution of the proceedings *so that* the question of the validity of the alleged will could be tried:

> "In these circumstances, the defendants ought not, in my judgment, to succeed *in limine* in preventing the plaintiff from seeking to prove the validity of the will" (at 76A).

But he also relied on a second ground, by holding (at 76B) that:

> "Apart from the objection outlined above, it is, in my view, not established by authority that the mere existence of laches such as would bar a claim in subsequent proceedings would justify the court in taking the drastic step of dismissing the action *in limine*. … [T]here are grave difficulties in determining on affidavit evidence whether the facts proved against the plaintiff establish laches against him."

In saying that, even if there were laches in the underlying claim, that would not justify dismissing the probate claim, this seems to go even further than Tucker LJ. Then, thirdly, he also agreed with Evershed LJ in relation to the family vault (at 76D):

> "I see great difficulty in applying the *de minimis* principle, even to the tomb alone, so as to justify the dismissal of the action *in limine*. In my judgment, the appeal succeeds … "

143. Accordingly, it is not easy to say what is the ratio decidendi of the decision. Tucker LJ contemplates that it is *possible* to dismiss a case of this kind as frivolous and vexatious, but holds that that has not been shown here. Evershed LJ says it is possible, and holds that it *has* been shown here, except for the vault, and allows the appeal solely on that ground. Hodson J says there is no authority to justify dismissing the claim *even where* laches can be shown to bar the underlying claim, and for good measure says it is difficult to establish laches on paper.

144. On the face of it, there is a majority for saying that it is possible to bar a probate claim by reason of (equitable) laches barring the *underlying* claim which it is the object of the probate claim to permit to be brought, but also a (different) majority for saying that it is very difficult to achieve. There is also (yet another) majority for holding that the appeal succeeded because there remained some unadministered assets. What the case does *not* decide is whether there is a separate probate doctrine of laches. Neither *Williams v Evans* nor any of the early probate cases later referred to in this judgment was cited, and the defendant chose not to argue that point.

145. The question as to what proposition *Re Coghlan* actually stands for was raised in a subsequent case, *Re Flynn* [1982] 1 WLR 310, a decision of Slade J. It was a case with some similarities to the present. A grant of probate had been made in 1974 in relation to a will and a codicil. In 1980 the plaintiff issued

proceedings to revoke the probate for the codicil (which gave him half the residuary estate), but pronounce for the will (which gave him the entire residuary estate). The third defendant , who benefited under the codicil, but not the will, applied to strike out the proceedings on the grounds of delay. Although *Re Coghlan* was cited to and discussed by the judge, *Williams v Evans* once more was not.

146. Slade J said (at 318C-E):

> "My general conclusion from the authorities cited to me, in particular *In re Coghlan. decd.* [1948] 2 All E.R. 68 is that they tend to support the view that the court will never strike out an action to revoke a grant of probate or letters of administration on the mere ground of delay in instituting it, unless it is satisfied that the claim is otherwise frivolous or vexatious or is for other reasons an abuse of the process of the court. The apparent absence of any authorities specifically affirming the existence of the alleged power which the third defendant now invokes itself tends to suggest that the power does not exist. I have canvassed the question at some length in deference to the careful and interesting arguments of counsel. In the end, however, I do not think it necessary finally to decide whether the court has the power to' strike out an action of this nature solely on this ground, For I am satisfied that, even if the power exists, it should not be exercised in favour of the third defendant by the court in its discretion on the facts of the present case … "

So the decision was inconclusive.

147. Next, there was *Re Loftus* [2007] 1 WLR 591, where there were several claims being made against an administratrix. The Court of Appeal held that a claim to remove her from the administration of an estate did not fall within section 22 of the Limitation Act 1980, and hence there was no period of limitation applicable to that claim. The court went on to hold that in principle the doctrine of laches *could* apply to a separate claim against the administratrix for an account and payment. (It then held on the facts that the defence failed.) So far as I can see, the court expressed no view on whether the doctrine of laches could apply to the claim to remove the administratrix. This would not be an equitable claim, but one arising under section 50 of the Administration of Justice Act 1985. I do not think that this decision assists me.

148. In *Wahab v Khan* [2011] EWHC 908 (Ch), Mr Wahab appealed against the striking out by the master of his claim for the revocation of probate of his brother's purported will, on the ground that the claim was an abuse of process. The deceased died in February 2005, and probate of an apparent will was granted to Mr Khan and Mr Jamal (the second defendant) in June 2005, under which they were the sole beneficiaries. In July 2007 another brother of the deceased began a claim for the revocation of the probate on the grounds that the will was a forgery. In August 2007 Mr Wahab was substituted as claimant in that claim. The claim was not prosecuted, and in April 2009 Peter Smith J struck it out. In October 2009 the claimant began a second claim against the defendants for the same relief. In April 2010 the master struck out the claim on the application of Mr Khan.

149. On the appeal, Briggs J (as he then was) was referred to, and discussed, a number of authorities concerned with striking out claims for abuse of process. However, he was not referred to any decisions relating to probate claims, and in particular none of the authorities which I have earlier discussed, with the sole exception of *Re Flynn*. He commented on this case as follows:

> "24. While it is true that Slade J went on to hold that there was no prior authority supporting the case that delay in institution might warrant the striking out of a probate claim, he made no comment, one way or the other, on the soundness of counsel's submission. In my judgment, in particular after the introduction of the Civil Procedure Rules, there can be no such special rule applicable to probate cases, derived from any supposed sanctity of a grant of probate."

The judge allowed the appeal, and set aside the master's order. Essentially, he decided that case on general abuse of process principles, holding that there had not been such abuse of process as justified striking out the claim.

150. Finally, and most recently, there is the decision in *Re McElroy* [2023] EWHC 109 (Ch). In that case the deceased, Ray, a divorcee, died in 2011 having made a will in 2002 leaving the whole of his estate to his brother, Paul, the claimant. Thereafter, the deceased met and married the defendant, Lynne, as his second wife. On his unexpected death in 2011 (at a time when his solicitors had prepared, but he had not executed, a new will) the defendant obtained letters of administration to his estate. This was on the basis that he was both domiciled in England and Wales and married (so that the subsequent marriage revoked the earlier will, and he therefore died intestate). The administration of the estate was completed by April 2012. In October 2021, the claimant issued proceedings to revoke the letters of administration, on the basis that the deceased had been domiciled *in Scotland* both at the time of his marriage and the time of his death, and that under Scottish law a will is not revoked by subsequent marriage. There was directed to be a trial of the preliminary issue whether the claim for revocation was "barred by laches, acquiescence and/or issue estoppel".

151. HHJ Richard Williams (sitting as a judge of the High Court) considered *Re Coghlan* in some detail, looking at the judgments of all three judges. He held:

> "50. In my view the critical factors identified by the Court of Appeal in allowing the appeal in ***Coghlan*** and distinguishing ***Mohan*** were:
>
> a. The absence of pleadings/a trial of the issue of laches; and
>
> b. The existence of unadministered assets of the estate (the family tomb)."
>
> 51. Neither of those distinguishing features exist in the present case … "

152. The judge also referred to *Wahab v Khan* [2011] EWHC 908 (Ch). HHJ Richard Williams then said:

> "59. In furthering the overriding objective under the CPR, judges are necessarily required to be more proactive and interventionist. The particular need for proportionality involves a cost/benefit analysis where the expense of pursuing an action is weighed up against the advantage to be derived from the action, if successful.
>
> 60. In conclusion, (and subject to the question of the interplay with Scottish law dealt with next):
>
> a. The assets of Ray's estate were distributed some considerable time ago;
>
> b. The sole purpose for seeking revocation of the grant of letters of administration to Lynne is to then enable Paul to seek to recover from Lynne the assets she received from Ray's estate;
>
> c. Any recovery claim against Lynne would be equitable relief against which Lynne would be entitled to raise the defence of laches;
>
> d. The defence of laches has been fully pleaded and responded to in the parties' statements of case;
>
> e. If the recovery claim against Lynne is bound to fail on the ground of laches, it would be wholly contrary to the overriding objective of saving expense and avoiding delay to permit the probate claim to continue in circumstances where it would serve no useful purpose;
>
> f. Therefore, it is entirely understandable that, in exercising its case management powers to further the overriding objective, the court ordered, with the consent of the parties, that the issue of laches be tried as a preliminary issue;
>
> g. The court has now read and heard evidence/argument to enable it to determine the preliminary issue of laches; and
>
> h. In the event that I determine that the laches defence is made out, I would be entitled and indeed bound to dismiss a probate claim that has thereby been rendered utterly academic. To otherwise allow the probate claim to proceed would simply expose the parties to significant expense for no discernible benefit."

153. I respectfully doubt whether the judge was right to hold that the Court of Appeal's decision to distinguish *Mohan* was really based simply on the two factors set out in paragraph 50 of his judgment. After all, the three judges all gave different reasons for their (unanimous) decision to allow the appeal. Tucker LJ did not refer to either factor in terms, though he probably agreed with the first. Evershed LJ seemingly disagreed with the first, and his decision was based entirely on the second. Hodson J seems also to have disagreed with the first, agreed with the second, and then also assigned a further reason, not mentioned by either of the other two.

154. That said, I agree with the judge that both factors played at least *some* part in the (collective) decision. I also agree with him that, if there is a sufficient trial of the laches issue for the court to be satisfied that the underlying claim for which the revocation of probate is sought cannot succeed, then the court "would be entitled and indeed bound to dismiss a probate claim that has thereby been rendered utterly academic". In *Mohan*, Tucker LJ did not say "never" but "hardly ever", and Evershed LJ obviously went rather further than that. Only Hodson J dissented on that point, saying that there was no authority for it.

The old probate authorities

155. The question remains, on the authorities whether there is a probate doctrine of laches or something like it, and, if so, what its elements are. In addition to the cases cited and discussed above. I also read *Braham v Burchell* and *Merryweather v Turner*, the early 19th century cases referred to in the judgment of Slade J in *Re Flynn*. These led me to find other authorities which might bear on the subject, and so I asked counsel if they wished to provide any written comments or submissions on these further cases. The cases were: *Hoffman v Norris* (1805) 2 Phill 230n; *Newell v Weeks* (1814) 2 Phill 224; *Bell v Armstrong* (1822) 1 Add 365; *Ratcliffe v Barnes* (1862) 2 Sw & Tr 486; and *Young v Holloway* [1895] P 87. I also consulted copies of Coote's *Common Form Practice of the Court of Probate*, 1858, and Tristram's *Contentious Probate Practice*, 1881, but was unable to find any additional assistance in either.

156. The editors of *Williams, Mortimer and Sunnucks, on Executors, Administrators and Probate* (21st ed, 2018) say:

> "2-01. The law relating to executors and administrators is of some complexity. In understanding that law and the nature of the formidable duties owed by an executor or administrator, it is useful to understand something of the history of probate jurisdiction."

To my mind, this is somewhat of a (cheerful) understatement.

157. Before the institution of the Court of Probate in 1858 (itself folded into the High Court of Justice in 1875), probate jurisdiction in relation to *personalty* was exercised largely, but not exclusively, by the ecclesiastical courts. (Realty of a deceased vested directly in the devisee if there was a will, and in the heir at law if there was not. There was no "real" representative.) Cases where the deceased left personal estate worth at least £5 in at least two different dioceses (£10 in London) were not dealt with in the consistory court of a single diocese. Instead, they were dealt with in the Prerogative Court of the relevant ecclesiastical province, Canterbury or York.

158. All the probate cases referred to above dating from before 1858 are decisions of the Prerogative Court of Canterbury, which sat in Doctors' Commons, near St Paul's Cathedral in London. It dealt with considerably more business than the Prerogative Court of York, as the Province of Canterbury had some 22 dioceses at that time, compared to just four for the Province of York. The judges of the Prerogative Courts were senior Doctors of Civil Law, and usually former holders of the office of King's (or Queen's) Advocate.

159. By section 3 of the Probate Act 1857 all the contentious and non-contentious jurisdiction in relation to the probate of testamentary documents and the administration of estates was removed from the courts previously exercising it. By section 4 of that Act, all that jurisdiction was vested in the new Court of Probate. By section 23, the new court was to have the same powers throughout all England as the Prerogative Court of Canterbury formerly had in that province. Section 29 then provided that

> "The practice of the Court of Probate shall, except where otherwise provided by this Act, or by the rules or orders to be from time to time made under this Act, be, so far as the circumstances of the case will admit, according to the present practice in the Prerogative Court."

160. By section 3 of the Supreme Court of Judicature Act 1873, the Court of Probate, together with the other high courts, as from 1 November 1875, became "united and consolidated" in "one Supreme Court of Judicature in England". By section 4 of that Act, the Supreme Court was divided into a High Court and a Court of Appeal. By section 16, the High Court was to exercise all the jurisdiction which at the commencement of the Act was exercised by (amongst other courts) the Court of Probate. By section 31, there were to be five divisions of the High Court (later reduced to three).

161. One of these was the Probate Divorce and Admiralty Division. This accommodated the old "civilian" lawyers of Doctors' Commons, who dealt with probate, matrimonial causes and maritime and international law. To this division, by section 34, all probate jurisdiction (contentious and non-contentious) was assigned. By section 23, the High Court was to exercise its jurisdiction, subject to any rules and orders of court, in as nearly the same manner as the courts which it replaced. By section 24, the Court was to administer law and equity concurrently, so that, for example, equitable defences could be taken into account without resort to a court of equity.

162. By the Land Transfer Act 1897, the idea of the "real" representative was introduced. Probate was henceforward granted of real property as well as of personal, and even if there was no personal estate. But the title "personal representative" was not altered to reflect this extension.

163. Section 20 of the Supreme Court of Judicature (Consolidation) Act 1925 (replacing the Act of 1873) provided:

> "20. Subject to the provisions of this Act the High Court shall, in relation to probates and letters of administration, have the following jurisdiction (in this Act referred to as 'probate jurisdiction'), that is to say:—
>
> (a) all such voluntary and contentious jurisdiction and authority in relation to the granting or revoking of probate and administration of the effects of deceased persons as was at the commencement of the Court of Probate Act, 1857, vested in or exerciseable by any court or person in England, together with full authority to hear and determine all questions relating to testamentary causes and matters:

> (b) all such powers throughout England in relation to the personal estate in England of deceased persons as the Prerogative Court of Canterbury had immediately before the commencement of the Court of Probate Act, 1857, in the Province of Canterbury or in the parts thereof within its jurisdiction in relation to those testamentary causes and matters and those effects of deceased persons which were at that date within the jurisdiction of that court:
>
> (c) such like jurisdiction and powers with respect to the real estate of deceased persons as are hereinbefore conferred with respect to the personal estate of deceased persons:
>
> (d) all probate jurisdiction which, under or by virtue of any enactment which came into force after the commencement of the Act of 1873 and is not repealed by this Act, was immediately before the commencement of this Act vested in or capable of being exercised by the High Court constituted by the Act of 1873:
>
> and the court shall, in the exercise of the probate jurisdiction perform all such like duties with respect to the estates of deceased persons as were immediately before the commencement of the Court of Probate Act, 1857, to be performed by ordinaries generally or by the Prerogative Court of Canterbury in respect of probates, administrations and testamentary causes and matters which were at that date within their respective jurisdictions."

164. Section 25 of the Supreme Court Act 1981 (now the Senior Courts Act 1981), replacing the 1925 Act, said the same thing in substance, but in more concise and modern language. The critical words are these:

> "(1) … the High Court shall … have the following probate jurisdiction, that is to say all such jurisdiction in relation to probates and letters of administration as it had immediately before the commencement of this Act …
>
> (2) … the High Court shall, in the exercise of its probate jurisdiction, perform all such duties with respect to the estates of deceased persons as fell to be performed by it immediately before the commencement of this Act."

165. The Administration of Justice Act 1970, section 1, from 1971 changed the name of the Probate Divorce and Admiralty Division to the Family Division. It also transferred Admiralty jurisdiction to the Queen's Bench Division, and contentious probate jurisdiction to the Chancery Division, leaving non-contentious probate jurisdiction (but as defined by section 128) with the Family Division. Nonetheless, the High Court remained (as it still remains) a *single* court, in which every judge of every division could exercise all the powers of the High Court: see now the Senior Courts Act 1981, section 5(5).

166. As I said, I invited submissions from the parties as to the old probate cases referred to. I received and considered such submissions from the claimant and from the first defendant, but not from the third defendant (who played only a

limited role). The claimant pointed out (correctly) that none of the cases referred to used the word "laches". He also submitted (*inter alia*) that, because all except the last two were decided at a time when probate matters were heard in the ecclesiastical courts, great care had to be applied in relying on any such cases. He said that they were examples of what would now be referred to as abuse of process (*ie* under CPR rule 3.4), and submitted that the notion of a probate claim for laches was not supported by authority. The law had moved on from the 1800s.

167. The first defendant, on the other hand, submitted (*inter alia*) that, that, while delay *in itself* could not bar a probate claim, it *could* do so where the delay made it unjust to allow the claim to proceed. This was (she said) indistinguishable from the equitable doctrine of laches, and was applied in the later High Court case of *Williams v Evans*. She also submitted that other cases similarly showed that it would be unjust to allow a case to proceed, even without delay, for example because the claimant had positively acquiesced in the probate.

168. Both sides also made written submissions in reply to the other. The claimant said that the leading cases on equitable laches, which were binding on this court, made clear that the equitable doctrine was not sufficient by itself to bar a *legal* right. I may say at once that I accept this proposition (which is in any event inherent in my earlier discussion of the decision of the House of Lords in *Fisher v Brooker* [2009] 1 WLR 1764). But the question here is not whether the *equitable* doctrine can apply to bar probate claims. Instead, it is whether there is a separate *probate* doctrine which can do so. The claimant also submitted that laches as applied to the inquisitorial and supervisory jurisdictions of probate would be more restricted than in relation to the adversarial jurisdiction. He also submitted that the failure of Parliament to refer to probate claims in the Limitation Act 1980 was significant.

169. In her reply submissions, the first defendant agreed with the claimant that caution had to be exercised in relation to the pre-1858 cases. But that did not mean they were to be ignored where there was good reason to accept them as correct. In addition, she submitted that there was a difference between an abuse of process and a substantive defence. She also took the opportunity to refer me to a further, more recent, decision in relation to the barring of a probate claim, namely, *Re the Estate of Langton* [1964] P 163, CA. I will deal with this case in due course.

170. Enlightened by these submissions, I have now to consider the cases. But, before that, I make a preliminary point. I do accept that one must be careful in applying old legal authorities in modern times. Language changes, and society (and the legal system) changes too. There is a danger of misunderstanding both archaic language and superseded procedures. Thus, for example, the idea of "praying a tales", as described by Dickens in *The Pickwick Papers*, Ch 34, would have been understood even by his lay readers at the time, despite its being incomprehensible to most lawyers today. Yet, even if the words are sometimes unfamiliar, and the institutions themselves change, the ideas with which lawyers deal may remain the same. So too "praying a tales" lives on as a legal concept in the Juries Act 1974, section 6, even though rarely, if ever, used in civil cases nowadays.

171. The same is true in the probate context, as well. The statutes to which I already have referred show that the law and practice of the probate courts have been handed on, subject only to subsequent amendment. The cases decided by the old probate courts are still relevant. Well known authorities such as *Hewson v Shelley* [1914] 2 Ch 13, CA, and *Re the Estate of Langton* [1964] P 163, CA, make that abundantly clear.

172. I turn then to the cases themselves. In *Hoffman v Norris* (1805) 2 Phill 230n, the deceased died in 1795 and his will (which excluded his brother Lewis) was proved in common form by his executors. The deceased's brother William (a legatee) died. A chancery suit was brought against the executors and also Lewis, seeking an account. Lewis answered that he believed the will was the deceased's will and had been duly proved. He claimed to inherit on a partial intestacy caused by William's death, which was upheld by the master in chancery in June 1796. Lewis received the benefit of his share of the intestacy until 1804, when he filed a decree to require the executors to prove the will in solemn form.

173. Sir William Wynne held that the claim was barred. He said:

> "Where the opposing party has been in a situation which rendered it impossible or difficult for him to have proceeded earlier; if he has been absent from the country, a minor, under imbecility, he may be admitted. But without reason, and where there are such strong reasons as there are here to shew that he was not in such a state of incapacity as to have prevented him, and further that he could not be ignorant of all the circumstances relating to the deceased, from the suit in Chancery soon after the probate was taken out, the case is different. By his answers [Lewis] admitted both the will and the probate, a decree was made operating on the lapsed legacy, and he acted under that decree not upon an intestacy, and continued to receive the interest for five years together – not offering to bring up what he has received, but stating only that he had strong reasons to doubt, but did not know that he could call them in question after probate – ignorance of the law is no excuse, hut this is so plain, and having advice as to the deceased's affairs by the suit in Chancery, I cannot admit this."

174. In *Newell v Weeks* (1814) 2 Phill 224, the deceased died in December 1808. Initially it was thought there was no will, but one was subsequently found and Weeks was the executor who propounded it against the claims of some of the next of kin. They asserted that others (who were not parties) were also next of kin of the deceased. In 1811, after a trial involving 70 witnesses, the court held for the will, and the following year the Court of Delegates affirmed the decree on appeal. Probate in solemn form was issued in April 1812. In 1814, two of the next of kin who had not been parties to the earlier proceedings, but who had been named as being also next of kin of the deceased, sought to bring probate proceedings against the same executor. It appeared that these two were well aware of the earlier proceedings, and indeed consulted with the next of kin and their lawyers in them, supplying information to them.

175. Sir John Nicholl held that the proceedings were barred. He said (at 231):

> "In the present case the deceased has been dead six or seven years – but here a suit has been instituted, the will has been proved per testes, and solemn proceedings have been had between competent parties in the same interest, and averring the interest of the parties who now wish to institute proceedings afresh, and the judgment of this Court has been affirmed by that of the Court of derniere resorte [*ie* the Delegates]. Newell and Weeks have not only been privy to all these proceedings; but substantially have been parties themselves to this suit, quite as much as if they had actually appeared – Spectators to the whole, and privy to the whole, if they had been dissatisfied, they might have intervened at any moment of the proceedings. This right of intervention, coupled with their privity to the proceedings, is decisive to shew that they can have sustained no prejudice by not having been before cited, and not having before given a formal appearance. In the former cause they had not only a right, but it was their duty to intervene if they meant not to abide by the decision – their interests were directly affected; if the will had been set aside, they would have established their claim. The lis pendens served as a public notice on which they were bound to act."

176. In *Bell v Armstrong* (1822) 1 Add 365, the deceased died in July 1818. In December 1820, probate of his will was obtained in common form by Armstrong as sole executor and residuary legatee. In April 1822 the deceased's brother and next of kin (who knew of the will and the probate, and took a legacy under the will) cited the executor to prove the will in solemn form, on the basis that the deceased lacked capacity to make it. The brother lived in a remote district, and had limited means. The executor entered a formal protest, by which he sought to bar the claim. Sir John Nicholl held however that it should proceed.

177. He said (at 373-75):

> "Much is insisted in the protest on the brother's acquiescence in the executor's taking probate of the will. Now, without at all adverting to the grounds upon which that acquiescence is said to have been founded, I may observe that a mere acquiescence (that is, an acquiescence accounted for by no special circumstances) on the part of the next of kin, to an executor's taking probate, is no bar whatever to his calling it in and putting the executor on proof of the will. If it were, no probate could be called in by a next of kin, unless immediately upon its becoming known to him that probate had been taken – the very contrary of which is matter of every day's experience. Nor, again, is acquiescence a bar – even though accompanied, as in this case, by receipt of a legacy, under the very will sought to be controverted. This has been determined in a great variety of cases. …
>
> I hold that I am bound, in overruling this protest, to direct the legacy to be brought in before the brother proceeds. The bringing in of his legacy will be a test of the sincerity of his opposition to the validity of the will; and will prove it to be not merely vexatious. At the same time it will be a security to the executor, in case of the next of kin being condemned in costs: for I hold that a next of kin (or the executor of a former will, for the same reasons apply in both cases) who calls in a probate once taken, even though in common form, and puts the executor upon proof, per testes, of his will, does

> it at the peril of costs – his ordinary exemption from liability to costs upon such occasions not extending to one of this particular description.
>
> The case of nearest resemblance to the present, in which a protest was admitted, and the executor dismissed, is that, which has been cited in the argument, of *Hoffman and White* v. *Norris* (see 2 Phillimore, 230). At the same time, though similar to it in one important feature, it is distinguished from it in a great variety of particulars. It is true that in that, as in this case the will had never been propounded, and probate had been taken only in common form. In that case, however, there had been an acquiescence, not even attempted to be accounted for by any special circumstances, of nine years. In a suit, too, in Chancery, arising out of that will soon after probate, Hoffman, the next of kin taking out the citation, in his answers had admitted both the will and the probate."

178. In *Braham v Burchell* (1826) 3 Add 243, the deceased died in August 1817, leaving a will appointing Burchell her executor. He obtained common form probate in October 1817. The deceased was illegitimate, and her only next of kin was her mother, who acquiesced in the proving of her daughter's will (providing an affidavit) and indeed helped to put it into execution in a number of ways. She herself died in May 1821, leaving a will appointing Braham (said to be the deceased's illegitimate son, and therefore her grandson) as her executor. In June 1824, Braham cited Burchell to prove the deceased's will in solemn form, arguing that it was invalid (because, it was said, the deceased was in fact married at the time) and that consequently the deceased died intestate. Burchell formally protested, arguing that the mother could not have cited Burchell to do this, because of her own actions, and Braham as the mother's representative could be in no better position. Sir John Nicholl agreed.

179. He said (at 268-69):

> "Upon the whole, I am clearly of opinion that it would not have been competent to the mother of the deceased, had she been living, to have put the executor on proof of this will, after an interval of seven years, upon any such grounds as are now suggested. The mother was the deceased's sole next of kin. At the time when probate was taken by the executor she apparently entertained no doubts of the validity, although she might, and no doubt did, regret the existence of this will: but even supposing that she did entertain any such doubts, she was at liberty to waive those doubts; and her conduct throughout, already described, to the period of her own decease, nearly amounts, I think, to a full waiver of them. She urges the executor-to take probate; she is a party to its being taken; she acquiesces in the will, and is even active in giving it effect in a variety of ways. The executor, it has been said in argument, should have proved this will, per testes, at the time: but against whom was he to have done this, and to what effect? The mother, the sole next of kin, and who alone had a right to oppose, was before the Court, sustaining the will; and what could a mere examination of the subscribed witnesses to the factum of the will have done in support of it? they would doubtless have proved the mere factum of the will; but this, the mere factum of the will, as it ever was, so it still is, unquestioned by any party.

> Could, however, her representative do, in June, 1824, what the mother of the deceased herself, if then living, can not have done? If he could, as already said, this can only be upon some special shewing. Of these two suggestions, the first is not only without proof; it is against proof: it is in proof that the mother acted with the full knowledge and apprehension of her own legal rights, in the event of her daughter's intestacy; and that she was a sensible woman, well acquainted with money matters and accounts, and perfectly conversant with matters of business …
>
> As to that other suggestion, of any such advice having been given her by the executor at the time to induce her not to contest the will, it is a suggestion equally against proof as the first, and it is one still more destitute of probability."

180. In *Merryweather v Turner* (1844) 3 Curt 802, the deceased died in September 1829, a widower and a wealthy man. He was survived by his only child, Mrs Merryweather, who was accordingly his heiress at law and sole next of kin *if* he died intestate. Under the disputed will, the daughter received merely a legacy of £500 and an annuity. The residue of the estate was to be held in trust for the deceased's grandchildren. So Mr and Mrs Merryweather had good reason to show, if they could, that the will was invalid. It is important to notice that, as I have already said, at this time the probate courts dealt only with wills and probates of *personalty*. A challenge to a will of realty had to be brought at law, on the issue "*devisavit vel non*?", or "Is the devise good?". (Sometimes the two different courts involved reached diametrically opposed decisions about the validity of the same will: see *eg Baker v Hart* (1747) 3 Atk 542, 546.)

181. Mr and Mrs Merryweather entered a caveat to prevent probate – as to personalty – issuing to the executors named in the will (Turner and others). The caveat was warned. The daughter failed to file an affidavit of scripts by the due date and so probate in common form issued to the executors in December 1829. Simultaneously a bill was filed in Chancery on behalf of the infant grandchildren by their next friend for the establishment of the trusts and for new trustees to be appointed. In June 1830 the daughter and her husband filed an answer admitting the due execution of the will, and sought payment of the legacy (which was indeed paid). In 1830 they also brought an action of ejectment, in effect to try the validity of the will, but after a while they discontinued the action and paid the defendants' costs. In December 1830 they also petitioned the Lord Chancellor for directions to be given for payment of the annuity. These were duly given, and payments made.

182. In 1831 the Court of Chancery held, without opposition, that the will was well proved. The daughter now sought and obtained an order in the same Court for the issue to be tried whether the devise of land in the will was good. However, before the issue could be tried, the daughter withdrew the record. In 1832, the executors obtained an order to take over the issue as plaintiffs. However, in 1833, before the issue could be tried, the daughter and her husband applied to set this order aside, on their "undertaking to admit the validity of the will and codicil, and submitting to have the trusts thereof performed and carried into execution under the direction of the Court." The Court made the order on that basis. More than a decade later, the daughter and her husband went back on their

agreement, and cited the executors to prove the will in solemn form. The executors argued that it was too late to do so. Sir Herbert Jenner Fust held that they were right.

183. He said (at 811):

> "Now I fully admit that executors are bound to prove a will by solemn form of law, where they are called on to do so by those entitled in case of an intestacy; and that under common and general circumstances neither lapse of time, nor the receipt of a legacy, nor acquiescence in the will, will be sufficient to debar them that right – but after so great a lapse of time as in this case – fourteen years after the transaction in question, and ten years after the will has been declared to be well proved in Chancery – may parties not be barred of their remedy if there be no reasonable ground accounting for the delay?"

184. He referred to the decision in *Hoffman v Norris*, and said (at 813):

> "The ground or principle on which the Court proceeded in that case was, that the party was not barred by the lapse of time, if he could shew good reason why he had not proceeded at an earlier period; it affirms this principle, that if he does not shew good cause, this Court, unless pressed by superior authority, will not allow him to call in a will after such a lapse of time."

185. He referred to *Bell v Armstrong*, and said (at 814) that

> "The doctrine established in this case was very recently affirmed by the Judicia1 Committee of the Privy Council, in a case brought up on appeal from the Archi-episcopal Court of York *(Bell* v. *Raisbeck,* 20th of February, ult.); the question was raised on the admission of an allegation, and the Judicial Committee was of opinion that the right to call for solemn proof of a will was not barred by lapse of time."

As stated in other sources, such as Dodd and Brooks, *The Law and Practice of the Court of Probate*, 1865 (at 539), the reason that Sir Herbert Jenner Fust was well aware of this case was because he was in fact the judge delivering the opinion of the Judicial Committee. However, I have not been able to locate a report of the Privy Council decision itself.

186. Then the judge said (at 816):

> "I have this fact, the will has been declared to be well proved, upon the undertaking of the parties to make such admission; it was not an admission simply in an answer, but after the answer of the parties had been given in; after an issue had been ordered to try the validity of the will; after the carriage of the issue had been taken out of the hands of the plaintiffs, under whose management the record had been on a former occasion withdrawn, and the trial lost. All this is nowhere denied; I find no complaint as to the conduct of the issue being given to the executors; it cannot, I think, be denied it was a wise precaution to prevent the possibility of the will being

> collusively pronounced against, Under the terms of the last order the trial was about to proceed, when the parties prayed that the order might be discharged, and this is done upon their own undertaking to admit the will to be well proved. …

187. Lastly, he said this (at 817):

> "I do not wish it to be understood that in this case I am at all trenching upon the principle of the full right of next of kin to call upon executors to prove a will in solemn form, notwithstanding there shall have been lapse of time – notwithstanding acquiescence – notwithstanding the receipt of a legacy; but that the Court proceeds on this ground, that in this case the Court of Chancery. on the express petition of the parties, and not on a mere admission in answer, has declared this will to be well proved. I am asked to undo all that has been done by the Court of Chancery.
>
> I am of opinion that this case is fully distinguished from the cases cited, in which the parties were allowed to proceed after lapse of time, to call upon executors to prove in solemn form of law. Being of this opinion, I shall pronounce for the prayer of the executors, which objects to the enforcement of this decree against them, and shall dismiss them from its effect."

188. In *Ratcliffe v Barnes* (1862) 2 Sw & Tr 486, the plaintiff executors of a will of the deceased were required by one of the next of kin (the defendant's sister) to prove the will in solemn form. After trial, the Court of Probate pronounced for the will. When the plaintiffs applied for probate they were met with a caveat from the defendant, a son of the deceased. The defendant admitted that he was aware of the former suit, and had indeed assisted his sister in the conduct of it. The plaintiffs applied for an order for probate to issue despite the caveat, and succeeded. Sir Cresswell Cresswell (the first judge of the Court of Probate, and formerly a judge of the Court of Common Pleas), said:

> "It would be splitting hairs to attempt to distinguish this case from the case decided by Sir J. Nicholl [*ie Newell v Weeks*]. Probate must issue notwithstanding the caveat and the defendant must be condemned in costs."

189. In *Young v Holloway* [1895] P 87, in 1887 the court had tried a claim by the sister (and next of kin) of a deceased that the will was invalid, but had found for the will, and probate was granted in solemn form. Now an action was brought by the sister's son for the revocation of that probate. The plaintiff was aware of, and had assisted his mother in, the previous action; but, according to his affidavit, he had not then, so far as he knew, any interest in the suit and could not, therefore, have intervened. His case was that the will which had been declared valid was a forgery, and that he was a legatee under an earlier will which there had been a conspiracy to suppress, but that these facts had only come to his knowledge since the previous action.

190. Sir Francis Jeune P said (at 90-91):

> "I think that Lord Penzance [formerly Sir James Wilde, a former baron of the Exchequer, in *Wytcherley v Andrews* (1872) LR 2 PD 327] clearly

> intended to lay down that, in the Probate Court, the rule of a person being bound by proceedings to which he was no party depends on his cognizance of the proceedings, and his capacity to make himself a party; and further than this I do not think the authorities go.
>
> I think, therefore, that as the present plaintiff could not, so far as he knew, have intervened in the proceedings in 1887, though fully cognizant of them, he cannot be held bound by them.
>
> There are two further points to be considered. First, is the case now intended to be set up against the will so clearly frivolous that to put it forward would be an abuse of the process of the Court ? The plaintiff says in his affidavits that what he purposes to prove is not a repetition of the case set up in 1887, but an allegation that the will is a forgery. I will not examine in detail the evidence by which he suggests he will seek to prove this, because it may be my duty to try the case. I will only say that I cannot, on the evidence as it stands, hold it to be frivolous.
>
> Secondly, is the evidence by which it is proposed to shew that there was an earlier will of 1876, and that under it the plaintiff took a benefit as legatee, frivolous ? This lies, of course, at the foundation of the plaintiff's present proceedings; because, inasmuch as he cannot assert any right as next of kin, or as entitled in distribution, he has no interest to oppose the will of 1883, unless he can establish a former will in his favour. I have had doubts on this point, especially because, apparently, no will of 1876 is likely to be forthcoming, and the plaintiff will have to produce strong evidence of its execution and contents. …
>
> It is so important not to shut out a litigant from what may, even possibly, be the assertion of a just right, that I cannot take on myself, at this stage, to say that this part of the case is so clearly frivolous that I should stop the proceedings."

191. To these decisions I can add that in *Re Langton's Estate* [1964] P 163, to which I was referred by the first defendant. In that case the plaintiff had originally made a claim, in his personal capacity, to set aside common form probate of a 1949 will and seek solemn form probate of an earlier 1906 will. This original claim was dismissed. The plaintiff thereafter began a second claim for the same relief, but this time in his capacity of administrator of his mother's estate. This second claim was dismissed as frivolous and vexatious. The plaintiff appealed, unsuccessfully. The Court of Appeal held that the plaintiff in his representative capacity knew of the first proceedings, and had the opportunity to join in them (in his representative capacity), but did not do so. He was therefore bound by the first decision. The court applied the earlier decisions in *Newell v Weeks*, *Ratcliffe v Barnes* and *Young v Holloway*.

192. Diplock LJ said (at 178-79):

> "In exercising its jurisdiction in probate matters the High Court is acting as successor to the Prerogative Court of Canterbury, and, in so far as the matter is not regulated by Act of Parliament or Rules of Court, it applies the law

> and practice of that court. A judgment in a probate action pronouncing in favour of a will and granting probate thereof in solemn form is not comparable with a common law judgment in personam. It transfers, nunc pro tune, to the personal representatives the legal property in the estate of the deceased and, so long as the grant is not revoked, it creates enforceable rights in beneficiaries under the will pronounced for and admitted to probate irrespective of whether or not the beneficiaries were parties to the action. Because such a judgment can affect the rights of persons who are not parties to the action, it was the practice of the Prerogative Court to permit any person claiming an interest in the estate of the deceased, whose rights could be affected by the grant applied for, to intervene in the action at any stage … As a corollary to this right of intervention, the Prerogative Court applied the rule that a person interested in the estate of the deceased who was in fact cognisant of a suit with respect to the validity of a will by which his interest was to his knowledge affected and who stood by and took no part in the suit was nevertheless bound by the decree pronouncing in favour of the will. This was so whether or not a citation had been actually served upon him … This rule differs from the common law rule of estoppel per rem judicatam. It is peculiar to the probate jurisdiction of the court and is a rule of substantive law which, in my view, was not affected by the transfer of the jurisdiction of the Prerogative Court first to the Court of Appeal [sic] in 1857 and later to the High Court in 1873."

(I should say that the reference to the "Court of Appeal" in the penultimate line of the quotation above is an obvious slip for "Court of Probate".) The concurring judgments of Willmer LJ (at 169-71) and Danckwerts LJ (at 175) were to the same effect.

193. The last three cases discussed (*Ratcliffe v Barnes*, *Young v Holloway* and *Re Langton's Estate*) show that, in accordance with the statutes of 1857 and 1873, the law and practice of the prerogative courts was indeed carried over to that of the Court of Probate, and then over from that court to the unified High Court. The Acts of 1925 and 1981 have continued the position. The change of name in 1971 of the Probate, Divorce and Admiralty Division to the Family Division, and the consequent redistribution of business to the Queen's Bench and Chancery Divisions has made no difference to the applicable law.

194. It follows, in my judgment, that the doctrines of the prerogative courts in probate matters exemplified by the earlier authorities referred to above continue to be applicable today, to the extent that they have not been abrogated by statute (including the CPR) or overruled by subsequent caselaw. But, although I was referred to various authorities as establishing this or that point in *equity*, I am not aware of, and counsel did not refer me to, any such changes in the law relating to *probate*, with the possible exception of *Wahab v Khan*. I must therefore apply those cases, so far as applicable to the case at hand.

195. However, and as I said earlier, the claimant submitted that these cases were examples of what would now be called abuse of process, under CPR rule 3.4. I do not accept this submission. Abuse of process involves embarking on a deliberate course of (otherwise lawful) legal procedure for some improper purpose (which is why it is an abuse). Examples are: (a) attempting to relitigate

an already decided matter, (b) litigating a point later that should have been raised in earlier proceedings, (c) mounting a collateral attack on an earlier decision, (d) indulging in pointless litigation, and (e) harassing the defendant.

196. Acquiescence, waiver and estoppel are not examples of abuse of process, but quite separate doctrines operating to bar claims *in limine*. In such cases, the cause of action embarked upon is not in itself improper or abusive. It is simply that it does not lie in the circumstances. In *Re Estate of Langton*, the Court did not ascribe the failure of the second claim or the appeal to an abuse of process, but instead to a rule of probate law, distinct from the common law rule of estoppel per rem judicatam. I accept that in some cases the facts that give rise to a defence of acquiescence, waiver or estoppel may also demonstrate that the claim is *also* an abuse, but the two things are and remain conceptually distinct. Moreover, it is established that "mere delay in pursuing a claim, however inordinate and inexcusable, does not without more constitute an abuse of process": *Asturion Fondation v Alibrahim* [2020] 1 WLR 1627, [47], per Arnold LJ (with whom Ryder and Leggatt LJJ agreed).

197. Accordingly, in the light of the authorities, I consider that the following propositions are warranted:

(1) Where a person having a right to intervene in existing probate proceedings is aware of those proceedings and of that right, but deliberately abstains from joining in them, he or she is bound by the result: *Newell v Weeks* (1814) 2 Phill 224; *Ratcliffe v Barnes* (1862) 2 Sw & Tr 486; *Young v Holloway* [1895] P 87; *Re Langton's Estate* [1964] P 163.

(2) Explicable delay, even when coupled with taking a legacy under a will proved in common form, is not generally enough to bar a claimant from taking probate proceedings: *Bell v Armstrong* (1822) 1 Add 365; *Merryweather v Turner* (1841) 3 Curt 802.

(3) But unjustified delay, possibly on its own (see *dicta* in *Merryweather v Turner* at 813 and 814, and also now *Wahab v Khan*), and certainly when coupled with acts amounting to waiver of the claimant's right, will bar the claim: *Hoffman v Norris* (1805) 2 Phill 230n; *Braham v Burchell* (1826) 3 Add 243.

(4) Similarly where the delay has led to others' detrimental reliance on the inaction, such as distribution of the estate: *Williams v Evans* [1911] P 175.

Whether the propositions at (3) and (4) should be referred to as a probate version of the doctrine of laches, or by some other name, does not much matter. In my judgment, however they are called, they represent the probate law applicable to this case.

Discussion

198. In the present case, Ivor died in 2010. His executrix, Christine, obtained probate of both will and codicil in July 2011, and thereafter administered the estate. In 2013, the claimant instructed solicitors to explore the question of the invalidity

of the codicil of 2002. After receiving advice from the solicitors, he took the matter no further. Christine made a new will in 2014, and died in February 2018. One of the attesting witnesses, Noel, died in 2017, leaving only one of the four people in the room alive today, Dawn.

199. This claim was first intimated in 2019, and the claim form was issued in September 2020. In his particulars of claim, the claimant justified waiting for the death of Christine before issuing proceedings on the basis that (i) "this is a united family", (ii) Christine was entitled to sell Cranmere and buy Trethorns under the terms of the life interest trust in the original will, (iii) the capital of the Property Fund was therefore safe as a share in Trethorns, and (iv) the claimant understood that Christine intended to leave the equivalent of the Property Fund to the claimant's children.

200. I do not accept this justification. On the evidence before me, this was not a united family at all, but a fractured and re-composed one, divided into separate units whose elements changed from time to time. Next, the claimant fails to deal with the fact that the claimant had taken legal advice in 2013 about the possible invalidity of the codicil, but had then taken no proceedings. I do not accept that, had the advice been favourable, he would not have taken proceedings at the time. Instead, he has waited until Christine herself is dead and additionally (as it happens) one of the two attesting witnesses is dead as well. The only surviving attesting witness is his former partner's mother. As I have found on the evidence, the claimant, the former partner and her mother have concocted a story about how the codicil was executed, which I have rejected.

201. In 2014, between the death of Ivor and her own death, Christine made a new will giving 30% of her residuary estate (*ie* not confined to half the house value) to the claimant's children. If the claimant had brought these proceedings during her lifetime, she might not have given 30% to the "grandchildren" or (if the will was already made) she might have changed it. Her own live evidence (and that of Noel) would have been available at any trial, instead of which we have only letters to go on. Dawn's memory would have presumably been better. Some documentary evidence in existence in 2013 is simply missing (*eg* Dianne's 2002 diary). In the interim Christine also administered and distributed the estate of her late husband. Christine has now died, and her will cannot be changed. On her death, and before receiving any intimation of this claim, the first defendant as Christine's executrix cleared her house, meaning that documents will have been unwittingly destroyed.

202. I am entirely satisfied, applying the probate authorities discussed in the previous section of this judgment, that in the circumstances the claimant is barred by what I have called the probate doctrine of laches from bringing this claim. The claimant knew what the position was, but after instructing solicitors to investigate his claim, did nothing. Christine thereafter acted to her potential detriment on this inaction by making a fresh will partly in favour of the claimant's children, and by administering and distributing her late husband's estate. The interests of justice have also suffered, because of the loss of the best evidence from Christine (and indeed Noel), better evidence from Dawn and also the loss of potentially relevant documentation from Christine's house.

203. If I were wrong about the probate doctrine of laches, then, in my judgment, the *equitable* doctrine of laches would, for much the same reasons, equally apply to bar the *underlying* intended claim to recover from the beneficiaries of Christine's estate the Property Fund which (if the codicil were invalid) would have been distributed to the wrong persons. That being so, the claim to set aside the codicil would be, in the words of HHJ Richard Williams, "utterly academic", and ought to be struck out at this stage as without purpose.

204. However, in case I were wrong about *that*, I should go on to deal with the claimant's case on the footing that he was entitled to bring it. In the first instance, I hold that the evidence put forward in this case is not sufficient to disturb the operation of the presumption of regular execution arising from the completed attestation clause which is regular on the face of it. The evidence available to the claimant here is very far from "the strongest". But, even if the presumption were displaced, I would still be satisfied, on the evidence that I do have, and for the reasons that I have given earlier in this judgment, that what happened on 26 December 2002 amounted to the proper execution of the codicil in accordance with the terms of section 9 of the Wills Act 1837 (as amended).

Conclusion

205. There being no other ground of attack on the validity of the codicil, the claim is accordingly dismissed.