Neutral Citation Number: [2025] EWCA Civ 606

Case No: CA-2024-001494

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)
MRS JUSTICE JOANNA SMITH
Claim No. PT-2023-000591

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/05/2025

Before :

LORD JUSTICE STUART-SMITH
LORD JUSTICE ZACAROLI
and
MR JUSTICE COBB

- -

Between :

ROBERT JACQUES LORENZ	**Appellant**
- and -	
(1) SHEILA CARUANA	**Respondents**
(2) ANTHONY MICHAEL LORENZ	
(3) VIVIEN ANGELA VANESSA MANESSAH	

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Richard Wilson KC and Jamie Randall (instructed by **Withers LLP**) for the **Appellant**
Penelope Reed KC and Arabella Adams (instructed by **Osbornes Law LLP**) for the **First Respondent**
The Second and Third Respondents were not represented

Hearing date: 30 April 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday, 9 May 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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Judgment Approved by the court for handing down.

Lord Justice Zacaroli:

Introduction

1. Alan Lorenz died on 13 February 2021, leaving a will dated 12 November 2020 (the "**Last Will**") in which he left the whole of his residuary estate (after payment of expenses and debts) to his civil partner, the first defendant Sheila Caruana.

2. In this action, commenced by a claim form issued under part 8 of the CPR on 17 July 2023, Robert Lorenz seeks a declaration that Sheila holds one half of the residuary estate on the basis of a "secret trust" for him and his siblings, Anthony Lorenz and Vanessa Manasseh. For convenience, and meaning no disrespect to them, I will refer to the deceased and the parties by their first names.

3. The basis of Robert's claim is that at the time of, or shortly after, making the Last Will, Alan gave instructions to Sheila, which she accepted, to apply one half of the residuary estate in making gifts to others. Robert's primary case is that Alan's instruction was that Sheila should give one half of the residuary estate to Robert, Anthony and Vanessa in equal shares. His alternative case, if it turns out that Alan did give instructions but they were to some other effect, is for a declaration as to the subject matter and beneficiaries of the secret trust.

4. Sheila applied to strike out the claim, or for reverse summary judgment, on the basis that there were no reasonable grounds for bringing the claim.

5. In a judgment dated 5 December 2023, Master Kaye (the "**Master**") dismissed that application. Sheila appealed and, in a judgment dated 12 June 2024, Joanna Smith J (the "**Judge**") allowed the appeal, and dismissed the claim.

6. This is an appeal, brought with the permission of Nugee LJ dated 5 September 2024, against the Judge's decision.

The requirements for a secret trust

7. A secret trust may arise in circumstances where a testator leaves a will which on its face leaves property to a legatee under the will but where the testator and the legatee have agreed that the legatee will hold that property for the benefit of others.

8. The basis of the trust is that the legatee, having expressly or implicitly promised to comply with instructions from the testator to make gifts from the property given to him under the will, is bound in equity to carry out the promise on the faith of which the legacy to him was founded: see, for example, *Ottoway v Norman* [1972] Ch 698, per Brightman J at p.709E-F, citing Warrington LJ in *Re Gardner* [1920] 2 Ch 523.

9. It is common ground that in order to establish a secret trust the person claiming to be a beneficiary (the onus being on them) must establish:

   (1) An intention by the testator to create a trust, satisfying the traditional requirement of three certainties: (a) certain language in imperative form; (b) certain subject matter; and (c) certain objects or beneficiaries;

   (2) The communication of the trust to the legatee under the will; and

(3) Acceptance of the trust by the legatee.

(See *Kasperbauer v Griffith* [2000] W.T.L.R. 333 ("***Kasperbauer***").)

10. At p.343C-D of his judgment in *Kasperbauer* Peter Gibson LJ identified the crucial question in that case to be whether there was the requisite intention to create a trust. As to that, he said:

> "…as Mr Justice Brightman said in *Ottoway v Norman* [1972] Ch 698 at 711, it is an essential element that the testator must intend to subject the legatee to an obligation in favour of the intended beneficiary. That will be evidenced by appropriately imperative, as distinct from precatory, language. Similarly in *In re Snowden (deceased)* [1979] Ch 528 at 534, Sir Robert Megarry V-C, in considering whether a secret trust was imposed on a legatee by an arrangement, raised the question at 534: 'In particular, did it impose a trust, or did it amount to a mere moral or family obligation?'"

11. Precatory language is that which merely expresses a wish or desire, in contrast to imperative language, which is intended to impose an enforceable obligation.

Robert's pleaded case

12. At the time of the application to the Master, Robert's case was contained only in witness statements. By the time of the appeal before the Judge, however, his case had been set out in a pleading. The material parts of the particulars of claim, on which the claim for a secret trust is based, are as follows:

(1) In earlier wills, Alan had divided his residuary estate into two, leaving one half for Sheila and the other half to be divided between his three siblings (subject to prior gifts of his interest in, variously as between the wills, a substantial business called "Herbalife" and real property in London and Malta);

(2) Accordingly, Alan had a long-settled intention (and always intended, including when making the Last Will) to leave half of his residuary estate to be divided between his siblings;

(3) Alan had a long-standing aversion to paying tax, and was willing to enter into arrangements where the relevant authorities would or might be deceived as to the real purpose or effect of the transactions;

(4) The Last Will was executed in contemplation of Alan entering into a civil partnership with Sheila;

(5) In the period from October 2017 until the execution of the Last Will, Alan had various meetings or discussions with his solicitors, often in the presence of Sheila, in which it was explained that if he married, or entered into a civil partnership with Sheila, she would receive all of his assets tax free;

(6) At one of those meetings, on 22 January 2020, Alan said that he intended to give all of his estate to Sheila on the basis that (as recorded in the solicitors' attendance note) "she will sort out his family in due course";

(7) At a further meeting on 6 October 2020, according to the attendance note, the following occurred:

(a) Alan stated that his intention was for Sheila to make lifetime gifts to his family and wanted to know if he needed a formal agreement but said that ideally he wished to avoid it being in writing;

(b) Later in the conversation, the solicitor explained the concept of a life interest trust, whereby Sheila would have a right to the income of one half of Alan's estate and began a conversation as to which assets would go into the trust;

(c) Immediately following that discussion, a conversation took place between Alan and Sheila which was inaudible to the solicitor;

(d) After it took place, Alan said that he would prefer it if they would scrap the life interest trust and give everything to Sheila;

(e) The attendance note records that Alan said "that he trusts [Sheila] implicitly and knows that she will do the right thing by him and his family. He is happy to have his Will drafted so that everything goes to [Sheila] outright";

(8) Prior to and after that meeting, Alan told and/or assured Robert and the other siblings that Sheila would receive his estate on the understanding that she would make substantial transfers to them in accordance with his wishes;

(9) On the basis of the above matters, the Court is asked to infer that:

(a) Alan's intention in entering into a civil partnership with Sheila was to avoid a charge to inheritance tax by making use of the exemption that applies to transfers to spouses;

(b) In order for that intention to be effective, Sheila had to (and did) agree to make a substantial provision in favour of Alan's siblings in accordance with Alan's wishes;

(c) Alan expressed and explained those wishes to Sheila and she either expressly or by acquiescence agreed to honour them; and

(d) Alan made provision in favour of Sheila in the Last Will upon Sheila's agreement;

(10) In the event that the agreement reached with Sheila negated the intended tax saving, there was nevertheless a binding obligation;

(11) It is apparent from Alan's conversations with his solicitors, and from the content of his prior wills, that the residuary estate was to be divided between Sheila (as to one share) and the siblings (as to the other). It is then pleaded (at §15) that:

> "Whether and what assets were not to form part of the residue is for the Claimant [it is common ground that this was intended to read "the first Defendant"] to establish but the evidence suggests that she was to have outright the home in London and the home in Malta."

The Master's judgment

13. The Master noted (at §4 and §5 of her judgment) the parties' agreement as to the test to be applied on an application to strike out a statement of case pursuant to CPR 3.4(2)(a) and an application for summary judgment under CPR Part 23.4, where it is contended that the case as pleaded discloses no reasonable grounds. The principles were summarised by Lewison J in *Easyair v Opal Telecom* [2009] EWHC 339 (Ch), per Lewison J at §15:

> "i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]
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> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller

> investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

14. At §7 of her judgment, the Master said that the question of whether to strike out or grant summary judgment is an exercise of the Court's broad discretion. At §8, she concluded that the case gave rise to interesting questions of mixed law and fact, and that a strike out or summary judgment on assumed facts was not a suitable vehicle to determine the issues in the case. At §9 she said that the essence of a secret trust is that it is secret, and to determine its existence it is necessary to conduct a multi-factorial enquiry involving circumstantial and inferential evidence. It was not for her to conduct a mini trial or engage in a granular examination of the evidence.

15. At §12, the Master commented that the evidence was not yet fully developed and that, as the claim continued (as a Part 7 claim) the parties would have the opportunity to set out their claim and defence in statements of case, there would be further evidence from the parties, and that evidence would be subject to cross-examination. At §13, she said that much of the evidence would be based on recollection of conversations over a period of years.

16. As to the contention made on behalf of Sheila that for Alan's objective of saving tax to be achieved his entire estate had to be left with Sheila, the Master concluded (at §14) that this was not inconsistent with the possible existence of a secret trust. That very objective meant that there was little in writing (see §15) and it appeared that Alan was concerned to ensure that remained the case, as recorded in an attendance note of Alan's meeting with his solicitors on 6 October 2020:

> "Alan wanted to know if he needed to make a formal agreement about this [Sheila making gifts to Alan's family], but ideally, he wants to avoid, if it is in writing, if it is seen as something else. James [his solicitor] confirmed that we will need to document this discussion for the purposes of our file, however we will not mention anything in the will."

17. Having referred to various extracts from the documents, the Master's conclusion at §41 was that some were inconsistent with the existence of a secret trust, but others pointed in the other direction, and that there was also missing evidence and documents. Ultimately, she was not persuaded to strike out the case or grant summary judgment, it appearing that there was a real prospect of further relevant documentation and evidence coming to light (see §44). Accordingly, while this was not the strongest case, it did overcome the low bar required on summary judgment or strike out (see §45).

18. Sheila relied before the Master on *Kasperbauer*, in which a claim to a secret trust was dismissed because the testator, not willing to put his wishes in writing because he feared that would defeat his wish to avoid inheritance tax, was found to have accepted the risk that the legatee would choose not to carry out his wishes, over the risk that a written statement of intention would lead to the payment of inheritance tax. The Master found that the case was of little assistance. Just because the case determined that on its own facts the intention to avoid inheritance tax meant that there was no secret trust "did not mean that an intention to avoid inheritance tax has become a developed principle of law that in such cases there is no secret trust" (see §40).

The Judge's judgment

19. Having outlined the facts and the Master's conclusions, the Judge identified the test to be applied on appeal, as that summarised by Saini J in *Azam v University Hospital Birmingham* [2020] EWHC 3384 (QB) at §50 to §52:

> "50. An appellate court will only interfere with a discretionary evaluation where an appellant can identify one or more of the following errors:
>
> (i) a misdirection in law;
>
> (ii) some procedural unfairness or irregularity;
>
> (iii) that the Judge took into account irrelevant matters;
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> (iv) that the Judge failed to take account of relevant matters; or
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> (v) that the Judge made a decision which was 'plainly wrong'.
>
> 51. Error type (v) requires some elaboration. This means a decision which has exceeded the generous ambit within which reasonable disagreement is possible.
>
> 52. So, even if the appeal court would have preferred a different answer, unless the judge's decision was plainly wrong, it will be left undisturbed. Using terms such as 'perversity' or

> 'irrationality' are merely likely to cause confusion. What is clear is that the hurdle for an appellant is a high one whenever a challenge is made to the outcome of a discretionary balancing exercise. The appellate court's role is to police a very wide perimeter and it will be rare that a judge who has exercised a discretion having regard to relevant considerations will have come to a conclusion outside that perimeter. I would add that an appellate court is unlikely to be assisted in such challenges by a simple re-argument of the points made to the judge below..."

20. The Judge noted that she had the advantage (over the Master) of having Robert's fully pleaded case. With the benefit of that pleading, she considered it was clear that Robert's case on secret trusts disclosed no reasonable grounds for bringing a claim. At §16 she said:

> "I, of course, bear in mind the high hurdle that an appellant to a discretionary decision of this sort must overcome but, ultimately, I am satisfied that Robert's case comes down to little more than submitting that something may turn up at trial. What that something might be is entirely unclear. Certainly, the possibility of extracting useful information in cross-examination at trial is not enough and absent somewhat vague submissions about future disclosure, Mr Dew was unable to satisfy me that there is a real prospect of any further evidence becoming available which is likely to affect the views of the trial judge."

21. The Judge then addressed the case on each of the three certainties required to establish the trust. As to the requirement that there be language in imperative form, she said that the contemporaneous documents speak only of Alan's wishes, whilst evidencing that his intention was to leave everything in the Last Will to Sheila: "Mr Dew [counsel who appeared below, but not before us, for Robert] has not identified any evidence (which is not currently available to the court) which might shed a different light on this at trial."

22. As to certainty of subject matter, the Judge noted that the particulars of claim sought a declaration either that one half of the residuary estate was held on trust for the siblings in equal shares, alternatively a declaration as to the subject matter and objects of the trust. She found (at §27) that the difficulty with this was that it was impossible to know what was meant by "residuary estate". The residuary estate in the previous wills had varied over time (as the nature of the specific gifts to be made first had varied). She concluded (at §28) that the submission that sufficient certainty might be established through cross-examination was nothing more than the suggestion that "something may turn up".

23. As to certainty of objects, she found that the highest it was put in Robert's evidence was that Alan wanted to benefit "the family". The Judge concluded (at §30) that nothing in the evidence came close to establishing certainty of objects.

24. At §32, the Judge said:

> "…ultimately it is not feasible as a matter of law for Robert to establish a case on the basis of moral obligation only: an

> immediate binding trust is required. In my judgment, it is impossible to see what further evidence would be available at trial to establish this trust and, importantly, Mr Dew was unable to identify any."

25. Accordingly, the Judge concluded that the Master had been plainly wrong to fail to consider that Robert was unable to establish the required certainties for a secret trust and had no prospects of being able to do so at trial. She also allowed the appeal on the additional ground that the Master had failed to take into account the paucity of Robert's relevant evidence and the extent to which the evidence contradicted the contemporaneous documents.

The grounds of appeal to this Court

26. There are nine grounds of appeal to this Court, which can be grouped as follows.

27. Under the first ground, it is said that the Judge failed in the approach to her appellate jurisdiction. She did not identify anything that was "plainly wrong" about the Master's decision or any considerations that the Master had wrongly taken into account or failed to take into account. Instead, the Judge approached the appeal as if she were exercising her discretion afresh and allowed the appeal on the basis that she would have reached a different decision to the Master.

28. Grounds 2 to 4 relate to the requirement as to certainty of subject matter. It is contended that the Judge was plainly wrong to hold that there was no realistic prospect of establishing that "the residuary estate" is sufficiently certain to constitute the subject matter of a secret trust; that she wrongly took account of paragraph 15 of the particulars of claim in circumstances where it is clear on the face of the will what is included within the residuary estate; and that she wrongly took account of the fact that under previous wills the residuary estate differed from that under the Last Will because of the prior legacies.

29. Grounds 5 to 7 relate to the requirement as to certainty of objects. It is contended that the Judge was plainly wrong to hold that there was no realistic prospect of establishing with sufficient certainty that Robert, Anthony and Vanessa were the objects of the secret trust, that she failed to take into account contemporaneous evidence which demonstrates a continued and settled intention to that effect, and that she wrongly placed substantial weight on references to benefitting the "family".

30. Grounds 8 and 9 relate to the possibility of there being further evidence at trial. It is contended that the Judge failed to take into account that, in the case of a secret trust established orally, the principal evidence will be that of the primary donee, in this case Sheila, that to date she has not provided detailed witness evidence addressing the claim or matters which arise from the documentary evidence, but that such evidence can reasonably be expected to be available at trial.

The test on appeal

31. As this is a second appeal, the question for us is whether the Judge was correct to find that the Master's decision was "plainly wrong". Both the Master and the Judge viewed the question as requiring an exercise of discretion. That is not correct. The question,

according to *Easyair*, is whether the claimant has a realistic prospect of success. That involves an evaluative judgment rather than an exercise of discretion. This makes no substantive difference in this case, however, an appeal court will only interfere with an evaluative judgment of that kind if it can be shown to be wrong "…by reason of some identifiable flaw in the treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermined the cogency of the conclusion": see, e.g., *Re Sprintroom Ltd* [2019] EWCA Civ 932, at §76.

32. Mr Wilson KC, who appeared with Mr Randall for Robert, submitted that the Judge was wrong, because in respect of each of the three certainties for the establishment of a secret trust the Master was correct (or had at least not been plainly wrong) to find that Robert's claim passed the relatively low bar of real prospect of success at trial.

33. I address below the grounds of appeal by reference to each of the three certainties which Robert must establish to satisfy the requirements of a secret trust.

34. First, however, I address the first ground of appeal.

The first ground of appeal

35. This can be disposed of shortly. The principal reason for the Judge's conclusion related to the seventh and eighth grounds of appeal to her: that it was "plainly wrong for the Master to fail to consider that Robert was unable to establish the required certainties". In allowing the appeal on that ground, there is no doubt in my judgment that the Judge had in mind, and applied, the correct legal test (albeit, as I have already noted, framing it by reference to an exercise of discretion rather than an evaluative judgment).

Certainty of language

36. As Mr Wilson submitted, it is important to keep in mind that where the communication by a testator to the intended legatee was oral, the only remaining witness to what was said is the intended legatee, i.e. Sheila. References in contemporaneous documents may provide support, even strong or compelling support, for one conclusion or the other, but only Sheila can speak to what was actually said to her.

37. The only evidence from Sheila at the moment is the following short passage in her witness statement dated 7 August 2023:

> "Alan's main concern was to save inheritance tax and he understood that this meant his assets were being left to me. At no time did he say to me that there would be any restrictions on my use of the assets. Neither did he ever give me instructions to deal with the assets he was leaving me in a particular way."

38. There are, however, references in contemporaneous documents which provide at least support for the proposition that Alan had given "instructions" of some sort to Sheila, and that she and he had agreed on a "plan" of some kind as to gifting his assets to members of the family.

39. First, on 3 January 2021, which was shortly before Alan went into hospital, Anthony had a lengthy telephone conversation with him. The conversation was recorded by

Anthony. According to the transcript of that call, Alan said – in the context of a discussion as to whom he would leave his property in his will:

> – "Instead of leaving it to my brothers and sisters, I'm only going to leave it to whoever needs it. Maybe something to Vanessa and her daughters and something to [Robert] but I won't be leaving any of … I'm giving instructions to Sheila who gets what."

40. A little further on, the following exchange occurred:

> "Alan: Anyway, it's all in Sheila's hands and I'm giving instructions…
>
> Anthony: And what if Sheila doesn't abide by your instructions?
>
> Alan: She will do."

41. Second, in an attendance note from the will file of Alan's solicitors, RIAA Barker Gillette ("Barker Gillette"), of a meeting on 12 November 2020 at which both Alan and Sheila were present to sign their wills, there is a record of the following conversation between Alan and a senior member of the firm, Qaiser, who was a long-term friend of Alan's:

> "In the conversation, Alan was informing Qaiser that he intends to transfer his entire estate to Sheila and so Sheila could make various gifts to his family members which would form a potentially exempt transfer in her estate. Alan said he is confident Sheila will survive 7 years and then the gifts will fall outside of his estate. **Sheila confirmed that this was the plan** and Alan asked Qaiser if he needs to document this anywhere and again Qaiser said there is no need to document it on the will because the point is for these gifts to pass outside of Alan's estate and they will pass as a part of Sheila's estate being a lifetime transfer, an *inter vivos* disposition." (emphasis added)

42. This passage is certainly consistent – even strongly consistent – with the conclusion that Alan intended to make a gift of his estate to Sheila "outright", because that was necessary in order to avoid inheritance tax. I will return to this in a moment. For present purposes, however, its importance lies in the reference to Sheila having confirmed "the plan" that the estate would be transferred to her so she could make various gifts.

43. The strongest pointer in favour of striking out the claim is that, as submitted by Ms Reed KC, who appeared with Ms Adams for Sheila, Barker Gillette's attendance notes are littered with references to Alan's intention to avoid paying inheritance tax.

44. As the Master rightly concluded in rejecting the argument that she was obliged to follow *Kasperbauer*, the fact that a testator has an intention to avoid inheritance tax by making use of the spousal exemption does not inevitably mean that they cannot have intended to impose an obligation on the legatee under the will to make gifts to others, sufficient to establish a secret trust.

45. Mr Wilson rightly accepted that if the communications between Alan and Sheila were sufficient to create a secret trust, then to the extent of the assets that are subject to that trust a charge to inheritance tax will arise.

46. Ms Reed contended, however, that the contemporaneous documentary evidence demonstrates that Alan's intention went further. He had a clear understanding of the requirement that in order to take advantage of the spousal exemption his estate must be transferred outright to Sheila. With that knowledge, his intention as recorded in the attendance note of 6 October 2020 that he wished to "give everything to Sheila outright" is flatly inconsistent with an intention to impose any obligation on Sheila in respect of the property left to her in the Last Will.

47. There is considerable force in this point, and the balance of evidence currently available strongly supports that conclusion. There is, however, some evidence which at least potentially goes the other way. That evidence is found in Barker Gillette's two attendance notes of the meeting with Alan and Sheila on 6 October 2020. The first note contains the passage which the Master quoted (see §16 above) where Alan said he wished to avoid the arrangement being reduced to writing "if it's seen as something else".

48. In the second note, which appears to be an attempt at a more verbatim account of what was said, the following appears:

> "AL: everything to go to Sheila. Tax free. SC to make gifts of millions to AL's family. PET in SC's estate but there will not be a 7 year problem as SC is young. Al thinking if he needs to tell B what the agreement is. **Thinks he should avoid putting it in writing so HMRC do not catch wind.**" (emphasis added)
>
> JM: we will just document our discussions but nothing in will."

49. Ms Reed submitted that this latter reference indicated that Alan was concerned to put his intentions in writing so as to avoid making it a binding commitment, knowing that a binding commitment would negate the intended tax advantage. That interpretation is supported by the first note ("if it's seen as something else") but, on its face, the second note is inconsistent with it: it is difficult to interpret "so HMRC do not catch wind" in that way. Ms Reed also submitted that it may be that the reluctance to put anything in writing was to avoid HMRC taking the approach that the gifts subsequently made by Sheila were part of a pre-ordained series of steps. The fact, however, that the notes might be read in a way which precludes the intention to impose a trust is not enough to warrant the strike out of the claim if they might also be read in a way which is consistent with it.

50. In circumstances where there is no evidence (yet) from the authors of the attendance notes, where the details of conversations between Alan and Sheila are known only to Sheila, and where her current evidence is limited to a sentence in which she says she received no instructions, but the contemporaneous evidence includes references to Alan saying he was giving "instructions" to Sheila, there is sufficient material in my judgment to meet the low bar of a real prospect that the evidence at trial could support Robert's case on this issue.

51. In this respect, I note that although there has been disclosure of the will file, there has as yet been no disclosure from Sheila, there is scope for making requests for further information, and there may well be evidence from the authors of the attendance notes. If Sheila chooses to give no further evidence herself, then – while not underestimating the hurdle that Robert's case would need to overcome at trial – it may be possible to draw inferences from her failure to do so. If she does give evidence, then there is material in the contemporaneous documents which could realistically form the basis of cross-examination. Accordingly, this case goes beyond the mere hope that "something might turn up".

52. I note in passing that there was some suggestion during the course of argument that the arrangement may have been for Sheila to make gifts to the family from time to time, in contrast to being under an obligation to distribute one half of the residue immediately upon it vesting in her under the Last Will. Whether that would be sufficient – assuming all other requirements were established – to create a secret trust was not explored before us, and I do not express any view on it.

Certainty of subject matter and certainty of objects

53. As with certainty of language, it is necessary to bear in mind, when addressing the remaining two certainties for a secret trust, that the only available source of evidence as to what was said by Alan to Sheila is Sheila herself (whether through disclosure, further evidence, or inferences that might be drawn from her failure to give evidence).

54. It is also important to keep in mind that the certainty required is as to the nature of Alan's instructions. The fact that there is currently no or insufficient certainty in Robert's case is not the point. The question will be whether there is a real prospect of the court at trial being satisfied on the evidence (and inferences) *then* available that there is sufficient certainty of subject matter and objects.

55. Mr Wilson's first criticism of the Judge is that she was wrong to find that there was insufficient certainty as to subject matter because there was uncertainty as to what was comprised in the residuary estate. It is said that the logical conclusion of the Judge's view is that it is impossible to establish a secret trust over a testator's residuary estate. As Ms Reed submitted, however, this is based on a mis-reading of the judgment.

56. The uncertainty to which the Judge referred was as to what Alan intended by "residuary estate": did he mean the residuary estate *per* the Last Will (which was the entire estate after payment of expenses and debts) or did he mean what was left in the residuary estate *per* the Last Will after certain other specific gifts had been made, for example of the real property in London and Malta?

57. Paragraph 15 of the particulars of claim (quoted above) appears to refer to the possibility that those properties were not intended to form part of the residue (although it is at least possible to read that paragraph as referring to the fact that those properties were simply to form part of Sheila's half share of the residue). This raises no issue of law, but one of fact. The Judge's point (which Ms Reed reiterated on appeal) is that this demonstrated a lack of certainty as to what part of the estate was to be gifted by Sheila to other members of the family.

58. There is clearly no sufficient certainty on the basis of the evidence currently available, as to what the subject matter of the trust was to be. Ms Reed was also correct to point out that the burden of establishing the secret trust lies on Robert (so the plea at paragraph 15 of the particulars of claim that it is for Sheila to establish is wrong).

59. Nor is there currently any sufficient certainty as to the objects of the trust. Ms Reed pointed in particular to Anthony's evidence, including the transcript of his telephone call with Alan on 3 January. In his witness statement, Anthony said that Alan said that he would not be leaving anything to him or his son. He also said that he intended to give some money to Vanessa's children.

60. In the passage from the transcript of the telephone call quoted above at §39, Alan is recorded as saying that he is not leaving anything to his brothers and sister but that he was "only going to leave it to whoever needs it".

61. As Ms Reed submitted, Alan's intentions – as relayed to Anthony – are inconsistent with him having given instructions to Sheila that one-half of his residuary estate should be given to Robert, Anthony and Vanessa in equal shares. The fact that Alan said he was "giving" instructions to Sheila was also inconsistent with the case that he had already done so either when giving instructions for the Last Will or when he executed it.

62. Mr Wilson submitted, however, that although it is currently uncertain what the subject matter and objects of the secret trust are, there is a real prospect that sufficient certainty could be established at trial.

63. It was common ground between the parties that instructions sufficient to establish a secret trust may be given before, at the time of, or after the execution of the will. The important requirement is that at the time of the testator's death, their decision to leave property to the legatee (either by making a new will or by not changing an existing will) was made on the basis of the promise by the legatee to carry out the testator's instructions.

64. The fact that Alan may have changed his mind, therefore, both as to the subject matter (i.e. whether Sheila was to make gifts out of one half of the whole residue as defined in the Last Will or only of one half of what was left of that residue after she took particular property or properties for herself absolutely) and as to the objects (i.e. which members of the family should benefit, and by how much) is not fatal to the contention that there was a secret trust. It may be fatal to the first head of relief sought, but the possibility of some other distribution of the property is recognised in the alternative form of relief claimed. What matters is whether Alan did (as he said to Anthony) give instructions to Sheila before he died, and what the content of those instructions was.

65. For similar reasons as in relation to the first required certainty, there is on balance a real prospect, on the basis of the current evidence, to believe that the evidence at trial might sufficiently fill the gaps as to subject matter and objects, whether through disclosure, responses to further information, further evidence tested at trial through cross-examination, or inferences the Court may feel able to draw if Sheila declines to answer further requests or give any evidence at trial. The only person who can speak to what Alan actually said is Sheila, and there is at least a potential inconsistency between her

current witness statement and the contemporaneous documents as to whether any instructions at all were given to her.

Conclusion

66. For the above reasons, I consider that the Master was entitled to reach the conclusion that there is a real prospect of further relevant evidence being available at trial which could support the contention that there was a secret trust. Accordingly, I conclude that the Judge was wrong to overturn the Master's decision. I would allow the appeal and restore the decision of the Master.

Mr Justice Cobb

67. I agree.

Lord Justice Stuart-Smith

68. I also agree.