In Summary: a review of summary disposal in light of recent caselaw, Part 4

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INTRODUCTION

There has been a quartet of interesting recent judgments concerning the summary disposal of claims. This is the fourth in a series of five parts which consider this important jurisdiction with reference to the four decisions.

This note focusses on the case of *Margulies v Margulies* (2022) EWHC 2843 (Ch)

THE FACTS

This was a probate dispute. The parties were brothers, Marcus and Stephen Margulies. This was the sixth set of proceedings between them about their parents' estates. The mother died in 1990, the father the following year.

The father established a successful watches business. Marcus spent all of his working life with the company, rising to be chairman. Stephen left after six months. He moved to Peru. For reasons which do not emerge from the judgment, the parents were concerned about his lifestyle.

In 1971, the parents made mutual wills, leaving their estate to the two brothers and their sister, Judith, in equal shares. In 1978, they revoked them and made new wills.

In 1980, the father wrote a letter addressed to "my children" which indicated, with eccentric capitalisation, that "*to the extent of the interests I have abroad at the Date of my Death, I give the same to my son Marcus absolutely*". He made a new will in 1982 leaving everything to Marcus. After the mother's death, the father maintained that she had destroyed her 1978 will with the intention of revoking it. The effect of this would be that her estate would pass to the father and then to Marcus on his death.

In the first set of proceedings, issued in 1990, the Judge found that the father had not wanted to cut out Stephen altogether and asked Marcus to look after him, which he promised to do. In proceedings commenced in 1997 ('the 1997 Proceedings'), Stephen argued that a secret trust in his favour had come into existence. He referred to a Swiss bank account opened by the father and suggested that it could be inferred, in effect, that the 1982 will was a sham and that the reality was that Marcus was to distribute the estate via the Swiss bank to evade tax.

The proceedings were struck out. Stephen appealed. The Court of Appeal upheld the judgment. It concluded that none of the 'three certainties' required for the creation of a trust was present. Nourse LJ commented, "*Search as we may, the evidence is just not there*".

In the instant proceedings, which Stephen brought as a litigant in person, he framed his case differently. Instead of saying that a trust had come into effect on the father's death, he maintained

that there was a fiduciary obligation arising from an *inter vivos* transfer. He no longer claimed an entitlement to a third of the father's estate but rather to a share of the monies held in the Swiss bank, which he said was outside the father's estate.

Marcus applied to strike out the claim on grounds that it was barred by *res judicata*, alternatively for summary judgment.

THE LAW ON RES JUDICATA

Res judicata loosely translates as 'a matter judged'. As Lord Sumption observed in his illuminating judgment in *Virgin Atlantic v Zodiac Seats* (2013) UKSC 46, it is a portmanteau term which describes a number of different legal principles with different origins. Each of them exists to stop parties relitigating matters which have or ought to have been determined in earlier proceedings between them.

Three of the principles outlined by Lord Sumption were potentially relevant to the instant case. These were *cause of action estoppel*, which prevents a party relitigating whether a cause of action exists when that has been determined in earlier proceedings between the parties; *issue estoppel*, which applies where the cause of action in the later proceedings is different but some issue common to both was decided in the earlier action; and *Henderson v Henderson estoppel* which is applicable where new matters are raised in later proceedings which could and should have been raised in the previous litigation.

THE JUDGMENT

Sir Julian Flaux C allowed the application. He accepted submissions on behalf of Marcus that Stephen's pleaded case in the 1997 proceedings was deliberately broad and extended to the Swiss bank account. He found that his present case was entirely subsumed within it. Accordingly, the claim was barred by cause of action estoppel and should be struck out.

Even if there were not a cause of action estoppel, the Chancellor added, the claim would clearly be barred by issue estoppel. A critical precondition of both the claims advanced in the 1997 proceedings and in the instant case was that the father manifested a trust over some or all of his assets. While Stephen had been able to point to nuggets of further information which had emerged since the earlier litigation, the Chancellor concluded that these came "*nowhere close*" to justifying the exception of the 'special circumstances' exception.

He was *"very firmly of the view"* that the claim should be struck out for abuse of process. That left it unnecessary for him to determine Marcus's application for summary judgment but he went on to do so *obiter*. The Court of Appeal concluded that the 1997 proceedings were bound to fail. The question, therefore, was whether the new material altered the position. The Chancellor was satisfied that it clearly did not. None of it supported the case that the father had manifested an intention to create a trust.

Stephen took the Judge to *Okpabi v Shell* (2021) UKDSC 3 and warned him not to conduct a mini-trial. The Chancellor rejected the suggestion that this is what he was doing. Nothing in *Okpabi*, he said, was intended to subvert the well-established principle that if, on the material before the court, the claim does not have a realistic prospect of success, summary judgment can be entered. It cannot be resisted on the basis that something might turn up which might help the Claimant. He dismissed Stephen's position as *"pure Micawberism*". Marcus would, therefore, have been entitled to summary judgment even if the claim had not struck out.

DISCUSSION

Margulies was not a professional liability claim, but the theme of a disappointed beneficiary asserting that a will did not record the testator's true intentions will resonate with those who insure and defend

solicitors. The litigant in person who refuses to see a defeat in court as a reason to give up on a claim will likewise be a familiar character.

It is open for debate whether the same outcome would have been achieved if, on different facts, Stephen had sued the solicitors who drew up the will after losing the 1997 proceedings. *Res judicata* would not apply where one of the parties was different. It would be open to the solicitors to argue that the claim should be struck out as an abusive collateral attack, but as we have seen in a previous note, the trend of modern authority would be against them.

The thinness of the new evidence, however, would likely still have presented difficulties for Stephen. Any claim was inherently vulnerable to summary judgment, if not to being struck out.

While not a new point arising from this case, it is reassuring that there are a number of different tools available to the courts to prevent a claimant from refighting the battles which they have already lost and that the courts are perfectly prepared to use them.

Further Information

Given the generality of the note it should not be treated as specific advice in relation to a matter as other considerations may apply.

Therefore, no liability is accepted for reliance on this note. If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

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