

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
LEEDS DISTRICT REGISTRY
Mr James Allen QC sitting as a Deputy High Court Judge
Claim No: 6LS30267**

Royal Courts of Justice
Strand, London, WC2A 2LL
05/02/2010

Before:

**LORD JUSTICE MAURICE KAY
LORD JUSTICE RIMER
and
SIR PAUL KENNEDY**

Between:

NORMAN BOOTH	Appellant
- and -	
(1) HERBERT BOOTH	
(2) BARBARA MAY CONACHER	
(3) JOAN MARY FARMILOE	Respondents

**Ms Sarah Harrison (instructed by Ramsdens Solicitors LLP) for the Appellant
Mr Raphael Cohen (instructed by Gordons LLP) for the Respondents
Hearing date: 20 October 2009**

Lord Justice Rimer :

Introduction

1. This appeal, brought with the permission of Mummery LJ, is against an order of 6 February 2009 made by Mr James Allen QC sitting as a Deputy High Court Judge in the Chancery Division (Leeds District Registry). Before him were five preliminary issues in a claim relating to the administration of the estate of Lucy Booth, who died intestate on 23 June 1993 survived by: (i) her husband, Edward, who died testate on 1 March 2005, his last will being dated 26 December 2004; (ii) their four children, Norman, Barbara Conacher, Joan Farmiloe and Linda Lawson (now a bankrupt); and (iii) her (but not Edward's) son, Herbert. I will for brevity refer to all family members by their first names.
2. The claimants in the action (respondents to the appeal) are Herbert, Barbara and Joan. Norman is the defendant/appellant. Norman's case on the appeal was that the judge was wrong: (i) to refuse to strike the claim out as an abuse of the process; (ii) to hold that it was not barred by laches; and (iii) to find that certain farm property belonged beneficially to Lucy at her death and was property

in which the claimants had an interest under her intestacy. As regards point (iii), Norman, as the main beneficiary under Edward's will, claimed that such property was owned beneficially by Edward and devolved under his will.

The facts

3. To understand the issues, it is necessary to explain the facts fairly fully. I take them from the findings of the judge, which I have supplemented from the documents.
4. Edward was a farmer. In the 1970s he was the Saville Estate's tenant of Silver Ings Farm, Skelmanthorpe, Huddersfield, West Yorkshire ('the farm'), where he lived with his family. In the same decade he bought the farm. The farm comprised (i) the modern farmhouse known as Silver Ings, (ii) two cottages known as Baildon Cottage and Baildon Cottage North ('the cottages'), (iii) a disused farmhouse and other farm buildings, and (iv) 42 acres of land.
5. In 1976 Linda moved into Baildon Cottage with her daughter.
6. In about 1980 Edward entered into farming partnership with Norman, which they carried on under the name E. Booth & Son. As from about 1980, the farm was shown in the accounts as a partnership asset, brought in at a cost of £11,790. By 1982 the accounts ascribed to it a value of £13,111. The partnership shares were, according to the accounts, initially 55/45 in favour of Edward, but by 1987 they were 50/50.
7. In about 1982 Edward engaged a builder, James Wilkie, to carry out renovation works to the cottages. When they were complete, Linda moved into Baildon Cottage North. In 1986 Joan moved into Baildon Cottage.
8. By 1986 Mr Wilkie had sued Edward in the High Court for unpaid fees for the renovation works, an action that Edward defended with the assistance of a nil contribution Legal Aid Certificate. On 7 May 1986 Edward was ordered to pay £6,726 into court as a condition of defending. On 2 June 1988 the action was transferred to the Official Referees Court. The trial was listed for August 1989 but was adjourned to 20 November 1989, when Edward submitted to judgment for £7,000 and costs, the latter not to be enforced without the leave of the court.
9. In the meantime, Edward had retired from the farming partnership with effect from April 1988, his partnership with Norman was dissolved and the 1989 accounts for the farming business showed Norman as a sole trader. Edward and Norman agreed that upon such dissolution Norman was to retain for himself the farming business and the disused farmhouse, the other farm buildings and the 42 acres ('the farm land and buildings', namely items (iii) and (iv) listed in paragraph [4] above). Edward was to retain for himself the modern farmhouse and the two cottages ('the farmhouse and cottages', items (i) and (ii) so listed). (I will hereafter refer to the entirety of the farm simply as 'the farm'). It was left to Edward to arrange with the partnership accountants the formalities to give effect to the retirement agreement. Whatever formalities were carried out, they did not include a transfer to Norman of the farm land and buildings, the legal title to which remained vested in Edward.
10. 1990 arrived and Mr Wilkie was continuing to try to enforce his costs order against Edward (I presume that the money in court was paid out in satisfaction of the £7,000 judgment). Edward did not intend that he should recover a further penny. Towards that end, on 16 July 1990 he opened at Barclays an account (No 20040789) in Lucy's sole name and transferred to it the credit balance then standing in another Barclays account in their joint names. On 26 July 1990 an order was made on Mr Wilkie's application for Edward's oral examination as to his income, assets and liabilities. The examination was held on 15 August 1990 and Norman drove his father to court. Norman knew about the litigation and that Edward intended to ensure that Mr Wilkie made no recovery from him. Norman asserted in paragraph 28 of his witness statement of 25 July 2008 that at the examination '[Edward] indicated that he did not own the farm house or cottages and

that they belonged to my mother'. There is no reason to question the accuracy of Norman's account. There is also no suggestion that, as at August 1990, the legal and beneficial owner of the farmhouse and cottages was other than Edward alone. The inference is that Edward's 'indication' was a lie directed at defeating or delaying Mr Wilkie's ability to attach his assets in satisfaction of the costs order.

11. On 23 November 1991 Mr Wilkie issued an application for leave to enforce that order, the costs being by then taxed and certified at £10,461.66. On 10 February 1992 Edward executed a transfer of the farm into Lucy's sole name. The transfer was prepared by a solicitor, Mr Manchester, and was expressed to be in consideration of natural love and affection. The reason for the transfer was to put the farm beyond Mr Wilkie's reach: Edward was converting his lie of August 1990 into fact. Mr Manchester advised Edward that his motive would be apparent to anyone who had to adjudicate in any insolvency proceedings and that the transfer was likely to be voidable. On 10 February 1992 Edward swore an affidavit in answer to Mr Wilkie's application of 23 November 1991. The court made the order as asked by Wilkie. Edward still did not pay the costs.
12. Lucy died intestate on 23 June 1993.
13. On 31 January 1994 Mr Wilkie served a statutory demand on Edward for payment of the costs. He failed to satisfy it and on 28 February 1994 Mr Wilkie presented a bankruptcy petition, which was listed for hearing on 25 April 1994. Ewan Conacher, Edward's son-in-law, lent Edward the money with which to pay Mr Wilkie and the petition was dismissed. Edward later repaid Ewan.
14. Edward obtained a grant of letters of administration of Lucy's estate on 20 May 1994, having sworn an oath on 3 May 1994 that he was the person solely entitled to her estate. He swore that her gross estate in the United Kingdom did not exceed £125,000 in value, that her net estate did not exceed £70,000 and that it was accordingly not an estate in which an Inland Revenue account had to be delivered. Consistently with his February 1992 transfer to Lucy, he treated the farm as comprised in Lucy's estate; and in valuing it for the purposes of obtaining the grant, he treated it as comprising 42 acres worth £1,000 an acre. According, however, to agreed valuation evidence before the deputy judge, the farm was, at Lucy's death, worth £209,000 (with the farmhouse and cottages being worth £139,000). I would not be prepared to assume that Edward's material undervaluation of the farm was other than dishonest. On 8 June 1994, again consistently with the farm forming part of Lucy's estate, Edward assented to its vesting in himself. He also collected £30,229.74 from Lucy's Barclays account No 20040789.
15. For the rest of his life, Edward appears to have regarded himself as the sole beneficial owner of the farm. In 2001 he had discussions with Linda and Joan about giving them the cottages they occupied. They instructed a solicitor, Mr Lofthouse, to act for them. Edward met him in April 2002 following which his proposal to make the gifts evaporated. He was apparently concerned that the daughters had plans to obtain extra land from him. Mr Lofthouse's evidence in the probate action (to which I shall come) was that the Edward was angry about the boundaries marked on the plan.
16. Edward made his last will on 26 December 2004. He died on 1 March 2005. His will named Andrew Williams as his sole executor. The relevant dispositions read:

'I give and bequeath unto Norman and Patrick Booth [Norman's son] the house at Silver Ings and the 2 cottages known as Baildon Cottages [what I have called 'the farmhouse and cottages']. My 2 daughters named Joan Farmiloe and Linda Lawson presently residing there may continue to do so as long as they shall wish at a reasonable rent to be agreed.

The land and buildings [what I have called 'the farm land and buildings'] were given to Norman Booth with the Firm E. Booth & Son when I retired from the partnership. Herbert Booth has been reasonably provided for by his auntie and uncle's estate (Minnie and Maurice Whitlam) and so he and his children have not been included in my will.'

The first action

17. Herbert, Barbara, Joan and Linda commenced a probate action in September 2005 although Herbert ceased to be a party at the start of the trial (DNA evidence had proved he was not Edward's son and so had no interest in Edward's estate under any intestacy). The defendants were Andrew Williams (Edward's executor) and Norman (the main beneficiary under Edward's 2004 will). The claimants challenged the validity of that will on the grounds of forgery, lack of capacity and want of knowledge and approval, their case being that Edward had died intestate. Norman's responsive case was that the 2004 will was Edward's true last will, failing which he sought to prove a will said to have been made by Edward in 1981 under which he was also the main beneficiary. That was a difficult case as neither the original will nor a copy was in evidence and there was also an issue as to whether it had been executed. The claimants' riposte to that case was to set up a codicil to the 1981 will under which they claimed to be beneficiaries. That was also a difficult case as proof of the alleged codicil suffered the like difficulties.
18. The trial, before His Honour Judge Langan QC in the Chancery Division (Leeds District Registry), lasted 15 days. Judge Langan dismissed the claim with costs on 5 May 2006, pronounced in favour of Norman's 2004 will and ordered probate of it to be granted in solemn form to Mr Williams. In their closing submissions, the claimants had abandoned their lack of capacity case. The judge rejected the forgery case and found to be fanciful the 'want of knowledge and approval' case. He expressed serious reservations as to the honesty of Barbara, Joan and Linda, found that they gave exaggerated and untrue evidence as to Edward's capacity, found them disingenuous in refusing to recognise that they had made an accusation of forgery and described Joan's evidence as lacking credibility. He noted Mr Lofthouse's concern about Joan's conduct in relation to the proposed cottages transaction, found that Linda had probably destroyed Edward's previous will and accepted that upon the dissolution of the farming partnership Norman had been told by Edward that the farm land and buildings were his.
19. Part way through the trial, Barbara, Joan and Linda alleged for the first time (although only outside court) that Edward had in 1992 made a gift of the farm to Lucy, who became its absolute owner. They did not, however, seek to amend their pleadings to raise such case. Their claim was brought on the basis that, at his death, Edward was the beneficial owner of the farm, which formed part of his free estate. They continued to assert that claim (or at least that Edward owned the farmhouse and cottages) right down to judgment.

The second action

20. The second action (the present one) was commenced on 18 May 2006, 13 days after Judge Langan's judgment. The claimants were Herbert, Barbara, Joan and Linda, but Linda dropped out at an early stage. The sole defendant was Andrew Williams, who was sued as Edward's executor, Edward having been Lucy's sole administrator. The claim was for an account of what was due to the claimants under Lucy's intestacy. Mr Williams had not yet obtained a grant of probate of Edward's 2004 will in accordance with Judge Langan's order, nor has he since done so.
21. The Particulars of Claim, as amended in August 2006, asserted that Lucy had died intestate and that her estate had comprised (i) stocks and securities worth £2,500, (ii) cash of £30,500, and (iii) the farm; that Edward had deposed that the value of her estate (including the 42 acres of farm land) did not exceed £70,000; that that was a false undervaluation, as the farm included the farmhouse and cottages; that the estate was worth considerably more than the £75,000 statutory legacy to which Edward was entitled as Lucy's widower; and that in consequence the claimants, as Lucy's children, had an entitlement to it. So of course did Norman, although the claimants did not say so. Such entitlement was that provided by section 46 of the Administration of Estates Act 1925, namely: (a) subject to Edward's life interest in half the residue after satisfaction of his statutory legacy, a reversionary interest in such half in equal shares; and (b) an absolute interest in the other half in equal shares. The claimants asserted that Edward had been guilty of a

devastavit in distributing the farm and cash to himself on the basis that he alone was beneficially entitled to them.

22. In May 2007 Norman applied to be added as a defendant to the claim. Ms Harrison told us that, in the meantime, nothing had happened in it. Norman's application was supported by his witness statement of 29 May 2007, to which he exhibited a draft of his proposed Defence. He asserted that Edward had placed the farm in Lucy's name 'as a bare trustee because he was being sued'. He explained that Edward had given him the farm land and buildings in 1988 so that at the time of the transfer to Lucy Edward was the beneficial owner of only the farmhouse and cottages. There had, however, been no transfer to Norman of the farm land and buildings and so Norman was impliedly saying, but did not do so expressly, that following the 1992 transfer Lucy held the farm upon trust (i) for Norman as to the farm land and buildings given to him in 1988, and (ii) for Edward as to the farmhouse and cottages.
23. Norman also asserted that the claim was an abuse of process. He said that during the trial of the first claim the claimants 'were aware that [Edward] had placed the farm into [Lucy's] name simply because he was being sued and that he was not making a gift to her and that they were aware how [Edward] had administered her estate.' He said that the claimants' present allegations ought to have been raised before or during the currency of the first claim. He also – probably allowing hope to triumph over reality – asserted that the farm was anyway not worth more than £75,000 in 1993. He explained that Mr Williams had not obtained a grant of probate of Edward's will and had no funds to defend the second claim; and said that he, Norman, had a financial interest in being substituted or added as a defendant.
24. Norman's draft Defence pleaded fully to the amended Particulars of Claim. It admitted that Edward had administered Lucy's estate 'as if it included the Farm' but again asserted that it did not. Norman's case was the unattractive one that Edward's transfer of the farmhouse and cottages to Lucy was effected simply for the purpose of deceiving Mr Wilkie that they were not available to satisfy his costs order; but that 'in the event that purpose was not carried through and [Edward] paid [Mr Wilkie]'. That was said to enable Norman to assert that the farmhouse and cottages continued to belong beneficially to Edward. The Defence also pleaded that the claim was barred by laches.
25. Paragraph 10 also pleaded that the claim was an abuse of the process. That rested on the point that in the first action (the defence of which had cost Norman over £300,000) the claimants had asserted that at least the farmhouse and cottages had remained vested beneficially in Edward until his death; whereas in the second action they were asserting that they passed beneficially to Lucy and formed part of her estate. Norman asserted that the allegations in the second action ought to have been raised in the first and that it was an abuse to raise them for the first time in the second action.
26. By an order of 22 June 2007 Norman was substituted as the sole defendant.

The preliminary issues tried by the Deputy Judge

27. On 10 April 2008 His Honour Judge Behrens directed five preliminary issues to be tried, which (as re-drafted to incorporate my abbreviations) were (with the deputy judge's answers to them) as follows:
 - (i) Was Lucy's estate at her death in 1993 worth more than the statutory legacy of £75,000? Yes.
 - (ii) Did the beneficial interest in the farm land and buildings vest in Norman upon the dissolution of the farming partnership in 1988? Yes.

- (iii) Did Lucy have a beneficial interest in the farmhouse and cottages, and the farm land and buildings? Yes, but subject to (ii) above.
 - (iv) Should the claim be struck out as an abuse? No.
 - (v) Was it barred by the issues of limitation and laches raised in paragraph 10(ii) of Norman's Defence? No.
28. The substance of the judge's answers was therefore that the second claim was neither an abuse nor barred by laches; and that, at her death, Lucy was beneficially entitled to the farmhouse and cottages (then worth £139,000) and the money in her bank account; but not to the farm land and buildings given to Norman in 1988, which were by then owned beneficially by Norman.
 29. It is a common experience that the directing of preliminary issues can cause problems. The issues directed in this case appear to me, with respect, to have been unsatisfactory. There is first the slight oddity of listing only as issue (iv) the logically prior question of whether the claimants were entitled to pursue the second claim at all; and listing as issues (i) to (iii) the logically secondary issues that would only arise if they were.
 30. This consideration went, however, merely to form. There was a more fundamental point. That was that the parties had to prepare for a trial on all five issues, so that they had to make their cases on issues (i) to (iii) even though (so far as Norman was concerned), his case was that they ought not to be considered at all because the claim should be struck out as an abuse; and commonly, when preliminary issues are directed, the court is required to decide all of them, as the judge did in this case.
 31. The effect of Judge Behrens' order was therefore to require a trial of substantive issues arising in, or concerning, the second claim, including an issue as to whether the bringing of the second claim was an abuse. That seems to me to have been an inappropriate order to make. Whilst the merits of a laches defence can often only be determined at the trial, the same is not true of Norman's abuse point. As Lord Bingham of Cornhill observed in *Johnson v. Gore Wood & Co (a firm)* [2002] 2 AC 1, at 34B, an assertion that a claim is such an abuse is not a *defence* to the claim, it is an objection to its being brought at all.

The judge's findings of fact and conclusions

32. Having reviewed the evidence, the judge found that (if she was not previously aware) Barbara knew by the end of 1993: (i) of Edward's dispute with Mr Wilkie; (ii) of Edward's transfer to Lucy of his assets, including the farm; (iii) that the purpose of such transfer was to defeat Mr Wilkie's claim against Edward; and (iv) that Lucy had died intestate. Barbara was close to her sisters, Joan and Linda, and the judge further found that the whole family also then knew of points (i) to (iv). He found that when Barbara made her witness statement of 14 December 2005 in the first action, she and her co-claimants (Joan and Linda) possessed all this knowledge but had made no inquiries to ascertain what Lucy's estate comprised at her death. Nor had any inquiries been made to ascertain its true value because, as Ewan Conacher said in evidence, 'nobody bothered to look into what had happened'.
33. The judge turned to the five preliminary issues before him, giving his reasons for answering them as I have summarised. He dealt with them in this order.

Issue (iv): abuse of process

34. Norman's case was that in the first action the claimants had challenged the validity of Edward's 2004 will on three grounds, the claim being advanced on the basis that at least the farmhouse and cottages formed part of Edward's estate. The issue of whether the farm land and buildings had also formed part of his estate, or belonged beneficially to Norman (as he claimed), was expressly

reserved. The claimants adopted the position they did despite the fact that (as the judge said in paragraph [70]) by 14 December 2005 at the latest (the date of Barbara's witness statement in the first action), and possibly earlier, they knew that Edward had transferred the farm and his other assets to Lucy in order to defeat Mr Wilkie's claim and that Lucy had died intestate. (The judge had, in paragraph [57], earlier found that the claimants had known all this by the end of 1993). Even when Sarah, Barbara's daughter, raised those matters with their solicitors during the trial of the first action, pointing out that they might render that action inappropriate, the claimants continued with the trial. In particular, the claimants in the first action failed to raise any question as to the nature, extent and value of Lucy's estate at her death or as to her beneficiaries under her intestacy. Their explanation for that was that 'no one bothered to look into what had happened' and Ewan described it as 'jiggery pokery'. They were however represented by solicitors and counsel who knew of the fact and purpose of the transfer of Edward's assets to Lucy.

35. Norman's assertion was, therefore, that for the three present claimants (who included two of claimants in the first action) to advance their present claim – one that was factually inconsistent with the basis of the first claim – was an abuse of the process. The key inconsistency was that (a) the first action proceeded on the basis that – despite the claimants' knowledge of Edward's transfer to Lucy, the purpose of that transfer and her death intestate – the claimants *accepted* that Edward was the sole beneficial owner of at least the farmhouse and cottages; whereas (b) the second action proceeded on the basis that, by reason of such events, Edward was *not* the sole beneficial owner of the farmhouse and cottages but had transferred them beneficially to Lucy, with the consequence that the claimants had an interest in them under Lucy's intestacy.
36. The judge referred to *Henderson v. Henderson* (1843) 3 Hare 100; *Greenhalgh v. Mallard* [1947] 2 All ER 255; *Yat Tung Investment Co Limited v. Dao Heng Bank* [1975] AC 581; and *Johnson v. Gore Wood & Co (a firm)* [2002] 2 AC 1, in particular to the familiar passage in Lord Bingham's speech at page 31. He derived from those cases the need for finality in litigation, the consequential requirement that in principle a party should not raise in a subsequent action matters which could and should have been litigated in an earlier one and the interest in ensuring that a party to litigation should not be vexed twice in the same matter. There was, however, no automatic bar that prevented the raising in a second claim a matter that could have been raised in a prior one; and, drawing on Lord Bingham at page 31, the judge directed himself that the court should in making its decision adopt a broad, merits-based judgment which takes account of the public and private interests involved.
37. In the judge's view, Norman was not entitled to complain that the second claim was an abuse. That was because he had defended it on the merits. Norman knew, or ought to have known, whether the case raised by the claimants ought to have been raised by them in the first claim. It was his express position that at the time of their first action the claimants knew all the facts and circumstances now relied upon by them in the second one. If he considered the second claim to have been an abuse, he could and should have applied to strike it out as such; and, said the judge in paragraph [79], 'he might well have succeeded in that application'. By not doing so, but instead defending it on its merits, he had acquiesced in its prosecution. He had precluded himself from objecting that it was an abuse of the process.
38. The judge provided his judgment to the parties in draft on 6 January 2009 and formally handed it down on 6 February 2009. Ms Harrison told us that on that occasion the judge said that, but for the acquiescence point, he would have struck the claim out as an abuse. Mr Cohen was unable to confirm that the judge had said that.

Issue (v): laches

39. Whilst Norman ultimately raised no defence under the Limitation Act 1980, he did submit that the second claim was barred by laches. The judge described that defence as requiring a substantial lapse of time coupled with the existence of facts making it inequitable to enforce the claim. The claim – directed against Edward's estate – required Norman to make good the

devastavit occasioned by Edward's maladministration of Lucy's estate. It was for an account. The judge said that delay may be fatal to such a claim if it has resulted in the loss of evidence by which it might have been rebutted or if the claimant has so acted as to induce the defendant to alter his position on the reasonable basis that the claim has been released or abandoned.

40. Ms Harrison submitted to the judge, that the claimants had known the material facts for years. They had deliberately not raised any issues about Lucy's estate because they did not believe they had an interest in it. They would not have raised this claim during Edward's life. Once he was dead, however, they chose to do so. Edward's evidence was now not available, whereas during his lifetime he could have explained his intentions with regard to the transfer to Lucy in 1992. Thus Norman had suffered prejudice by the delay, in addition to his great expense in defending the allegations of a criminal nature levelled against him in the first action.
41. Mr Cohen's counter-argument was that Edward had understated the value of Lucy's estate in his administrator's oath and had misapplied it by vesting it in himself. He was entitled to no more than the statutory legacy and a life interest in half the residue and held the balance of the estate as a constructive trustee for Lucy's children. It would be unconscionable if Norman could defeat the claimants' claim by a plea of laches. Norman was fixed with Edward's unconscionable conduct as his successor.
42. The judge referred for guidance as to the meaning of laches to this court's decisions in *Frawley v. Neill*, The Times, 5 April 1990; and *Patel v. Shah* [2005] EWCA Civ 157, which referred to *Frawley* and earlier authorities. He held that there was no evidence of a deliberate choice by the claimants to await Edward's death before raising the present claim and he did not accept that they did so. Nor had the absence of Edward's evidence prejudiced anyone. The claimants had known all the relevant facts. The judge directed himself that the correct approach to the issue of laches required him to ascertain:

'... whether it would, in all the circumstances of this case, be unconscionable for the Claimants to be allowed to assert their claim against [Norman] as successor to [Edward] to Silver Ings Farm. For the reasons advanced by Mr Cohen, I consider it would not'

Issue (iii): was the 1992 transfer of the farm to Lucy a gift?

43. The claimants asserted that Edward's purpose in the transfer to Lucy was genuinely to divest himself of the farm. Norman's counter-argument was that the presumption of advancement, although applicable, was easily rebutted and the evidence supported the conclusion that the transfer was a sham. The judge found that Edward intended to put his assets beyond Mr Wilkie's reach by vesting both the legal *and* the beneficial interest in Lucy. I shall explain his reasoning when dealing with the appeal against this part of his decision.

Issue (ii): did the beneficial interest in the farm land and buildings vest in Norman on the dissolution of the farming partnership?

44. The judge found that there was an oral agreement between Edward and Norman that the farm land and buildings should so vest in Norman, who had acted upon such agreement to his detriment so that Edward became estopped from denying Norman's title. Although the judge did not say so, it followed that the purported gift to Lucy of (inter alia) this land did not and could not also vest the beneficial interest in it in her: she held it as a trustee for Norman.

The appeal

45. By the appeal Norman challenged the judge's conclusions (i) that he was barred by acquiescence from having the claim struck out as an abuse; (ii) that it was not barred by laches; and (iii) that the farmhouse and cottages belonged beneficially to Lucy at her death. He is of course content with the judge's determination of preliminary issue (ii), relating to his beneficial ownership of the

farm land and buildings, and I presume that he does not intend that any strike out should undo that determination. There is, however, something odd about such determination surviving the striking out of the action which achieved it.

46. As for the abuse point, Ms Harrison said that there was no basis on which the judge could properly conclude that Norman was barred by acquiescence from asserting at the hearing of the preliminary issues that the action was an abuse. Acquiescence ordinarily means conduct from which a waiver of rights can be inferred. Norman was substituted as the sole defendant on 22 June 2007, having by his Defence served in draft on 29 May 2007 pleaded that the claim was an abuse, a point also made in his statement supporting his joinder application. On 10 April 2008 Judge Behrens directed the trial of five preliminary issues, including the abuse issue. There was nothing in Norman's conduct that could be said to amount to acquiescence in the prosecution of the second claim. Moreover, in the post-judgment discussion at the trial of the first action, Ms Harrison had warned the claimants that if any new proceedings were commenced on the basis that Lucy was the beneficial owner of the farm, they would be challenged as an abuse, a warning prompted by the fact that, towards the end of that trial, the claimants had indicated that if they lost they would bring new proceedings based on their entitlement to Lucy's estate.
47. Ms Harrison submitted further that, contrary to the judge's view, there is no requirement that an abuse submission can only be made by way of a strike out application. There is, she said, no reason why it cannot be advanced at the trial; and as Judge Behrens had directed the trial of the abuse issue, it ought to have been dealt with on its merits. Another reason why the judge was wrong to reject the argument on the ground of acquiescence was that such ground was neither pleaded nor argued. It was his own point, and one upon which he did not even invite submissions. The closest he came to doing so was to ask Ms Harrison why Norman had not applied to strike the second claim out.
48. As for the substance of the argument, the judge had made the findings he did as to the knowledge of the Booth family by the time of the commencement of the first action. Ms Harrison pointed to the inconsistent nature of the claims advanced in the two actions, which I have identified, and submitted that this was obviously a case in which the issue as to the ownership of the farm should have been litigated in the first claim and that there was and is no good reason for bringing successive claims based on the inconsistent cases. The second claim unfairly vexed Norman twice in the same matter.
49. Mr Cohen submitted that the question required the judge to balance and evaluate the relevant factors, with the consequence that this court will ordinarily only review his decision if he left a material consideration out of account, took an immaterial consideration into account or made a decision that was clearly wrong. In support of that, Mr Cohen referred us to the observations of Arden LJ (giving the judgment of the court) in *Wallbrook Trustees (Jersey) Ltd and Others v. William Simon Fattal and Others* [2009] EWCA Civ 297, at paragraph [23]. He said that Lord Millett's speech in *Johnson's* case, at [2002] 2 AC 1, at 61, showed that the defence of a second claim on the merits will be taken as acquiescence sufficient to bar the assertion that the claim is an abuse, a proposition endorsed in *Wallbrook Trustees*, at paragraph [5]. Mr Cohen said that the judge was clearly aware that the abuse point had been pleaded in the Defence and directed to be tried as a preliminary issue. He submitted that the respondents' omission to assert acquiescence in answer to it was not fatal to the integrity of the judge's decision, any more than was his omission to invite argument on such point from counsel.
50. As to the substance of the decision, Mr Cohen submitted that the judge carried out the type of 'merits-based' inquiry referred to by Lord Bingham in his speech in *Johnson's* case. He also submitted that the abuse and laches arguments overlapped and that, if the judge was right to reject the laches defence, he must have been right to reject the abuse argument. The judge's finding on the laches point was that it was not 'unconscionable' for the claimants to bring their second claim. If so, it could not be 'unjust' to bring that claim. Mr Cohen pointed to Lord

Bingham's statement, at [2002] 2 AC 1, 31, that 'there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party.'

51. Coming to my conclusion on the abuse point, I consider, with respect, that the judge was wrong to reject the argument on the basis of Norman's alleged acquiescence in the bringing of the second claim.
52. I have noted Lord Bingham's observation in *Johnson's* case at [2002] 2 AC 1, at 34B, that a challenge to the bringing of a claim on the ground that it is an abuse is not a defence to the claim; it is an objection to the claim being brought at all. It may be that Norman's better course, once substituted as a defendant, would have been to make a prompt application for a strike out of the claim as an abuse. In fact, he did not. He made no such application and was later a party to an order for the trial of that point as one of five preliminary issues, including substantive issues raised by the claim.
53. I infer that the judge's conclusion that Norman had acquiesced in the bringing of the claim was influenced by the fact that he had pleaded to the merits of the claim in his Defence and was then a party to that order. What he should have done, said the judge, was instead to apply (by inference, promptly) to strike the claim out. The judge did not elaborate his reasoning for his conclusion that Norman had acquiesced in the bringing of the claim but I regard it as probable that it was influenced by Lord Millett's observations in *Johnson's* case at [2002] 2 AC 1, at 61E:

'But the premise in the present case is that Mr Johnson has a good cause of action which he should have brought earlier if at all. I do not consider that a defendant should be permitted to raise such an objection as late as this. A defendant ought to know whether the proceedings against him are oppressive. It is not a question which calls for nice judgment. If he defends on the merits, this should be taken as acquiescence. It might well be otherwise if the ground on which the proceedings are alleged to be an abuse of process were different. But in a case of the present kind the court is not so much protecting its own process as the interests of the defendant.'

54. Those observations were obiter, but I would, with respect, not question the correctness of their application to the facts of *Johnson's* case; and this court in the *Wallbrook Trustees* case said (at paragraph [5]), after referring to Lord Millett's speech, that 'where a defendant defends a claim on its merits, he should be taken to have acquiesced in the later claim being brought'.
55. It is, however, essential to note the facts that underlay Lord Millett's observations. Lord Millett explained at [2002] 2 AC 1, 57, the history of Mr Johnson's claim that became the subject of the abuse challenge. That account shows that it was not until some seven years after Mr Johnson had first threatened to bring his claim – and after the obtaining of a trial date – that the defendants first raised the abuse point, upon which the court then ruled as a preliminary issue. *Johnson's* case was one in which, by the time the abuse point was raised, the defendants had so conducted themselves as implicitly – perhaps explicitly – to evince their willingness to meet the claim on its merits.
56. The present case is a long way on its facts from *Johnson's* case. Whereas in *Johnson's* case it took seven years for it to dawn upon the defendants (apparently following a change of leading counsel) that Mr Johnson's claim might be challenged as an abuse, Norman made his objection in that respect crystal clear from the outset. Ms Harrison raised the warning that she did at the end of the trial of the first claim. When Norman applied to be substituted as a defendant to the second claim, he again made the point expressly in his evidence and draft Defence. It may be that, for reasons given, it was strictly unnecessary to plead the point in the Defence, but to do so could do no harm. On the contrary, it spelt out expressly – and promptly – that Norman objected to the bringing of the second claim. True it is that he also pleaded a substantive Defence to it. But I do not consider that that can constitute 'acquiescence' in its bringing when his prompt, overt and continued, challenge to it as an abuse was the reverse of such acquiescence.

57. In my view, therefore, Norman nailed his ‘abuse’ colours to the mast sufficiently clearly and early to exclude any ‘acquiescence’ argument; and he obtained a direction for a trial of his abuse argument as a preliminary issue. The fact that it was directed to be tried with other preliminary issues did not, I consider, enable it fairly to be said that he was acquiescing in the bringing of the claim on its merits. He was not so acquiescing: his primary intention was to satisfy the judge that the claim should be struck out, although the consequence of Judge Behrens’ order was that he also had to, and did, deal with the other preliminary issues, including those going to the merits of the claim. The point about *Johnson’s* case, however, was that, by the time they raised the abuse point, the defendants had *already* so conducted themselves as to show that they had acquiesced in the bringing of Mr Johnson’s claim. In this respect it was, I consider, relevantly different from the present case. I therefore consider that the judge was wrong to adopt of his own motion, and to accept, the unargued acquiescence argument as an answer to the abuse point.
58. That means that the position in which this court finds itself is that, I consider, the judge dismissed the abuse case on the basis of a false point. It also means that he did not consider it on its merits beyond saying that, had Norman applied promptly for a strike out, ‘he might well have succeeded ...’.
59. It has not been suggested that we should remit the matter to the judge for him to consider the matter afresh. I also consider that this court is in as good a position as was the judge to decide the point on its merits. I have, however, not found easy the decision as to how this court should deal with the point.
60. Viewing the matter through Norman’s eyes, the substance is that overlapping claimants have brought successive claims against him. The first claim, a probate claim, challenged Edward’s last will. The second claim asserted that Norman is accountable for Edward’s misapplication of Lucy’s estate. The claims are, therefore, superficially different. But the objective underlying both was and is the same: to make good, if it could be done, the claimants’ bid to share in the farm, or at least the farm house and cottages. The judge’s findings show that by the end of 1993 the claimants knew all they needed to know in order to assert their entitlement under Lucy’s estate. They did not do so but instead apparently regarded Edward during the rest of his life as the beneficial owner of the assets they now assert belonged beneficially to Lucy; and the basis of their first claim was that his last purported will had not validly disposed of those assets but that he had died intestate. When that claim failed they changed tack and mounted the second claim in which they instead asserted that he had in fact disposed of at least the farm house and cottages to Lucy in 1992, who became and remained their beneficial owner.
61. Central to both lines of attack was the legal effect of Edward’s transfers to Lucy. There were real questions as to whether, or to what extent, they operated to vest the beneficial interest in Edward’s assets in Lucy. By the end of 1993 the claimants knew all the facts necessary to know that such questions arose. When, nearly 12 years on, they brought their first claim, that was the opportunity to raise these issues for decision. They did not, however, do so but instead persisted in one factual scenario, namely that Edward was the beneficial owner of the assets in which they sought their share. Norman’s position is that, having failed in that claim, it was abusive for them to commence their second claim by which they advanced a different, and inconsistent factual case. It was abusive because it meant he was harassed by a further claim directed at achieving a like result as the first, but now raising new issues that ought to have been raised in the first.
62. It is, however, not enough for Norman merely to show that the claims raised in the second claim could have been raised in the first claim but were not. Mere proof of such facts will not by itself justify a striking out of the second claim as an abuse. That was made plain in *Johnson’s* case and was recognised by this court in *Wallbrook Trustees*. What is required is a ‘broad, merits-based judgment which takes account of the public and private interests involved ...’, as Lord Bingham explained in *Johnson’s* case at [2002] 2 AC 1, at 31D.

63. We had no argument on matters of public interest. So far as private interests are concerned, I well understand Norman's perception that the bringing of the further claim is unfair. He was expensively tried in defending the serious charges brought against him in the first claim. Having now to deal with the second claim is obviously burdensome for him. Mr Cohen's submission, however, is that the critical question is whether the bringing of the second claim will constitute 'unjust harassment' to Norman. That, he said, is an essential part of the 'broad, merits-based' assessment required by *Johnson's* case and he referred us to Lord Bingham's words at [2002] 2 AC 1, 31:

'... there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party'.

64. Mr Cohen's point was ultimately a simple one. That was, whilst the judge did not answer that inquiry when considering the abuse issue, he did answer it in his rejection of the laches defence on the ground that it was not 'unconscionable' for the claimants to bring the second claim even given the long delay since Lucy's death and the non-availability of Edward's evidence as to his intentions when transferring his assets to Lucy. If it was not 'unconscionable' for the second claim to be brought, it cannot be said that its bringing would cause 'unjust harassment' to Norman.
65. Norman's second ground of appeal is that the judge was also wrong to dismiss the laches argument; and, if Norman is right on that, it would undermine Mr Cohen's submission. For reasons I will shortly give, I would, however, dismiss the second ground of appeal. But I would anyway not accept Mr Cohen's submission for this short reason: namely, that in holding that the bringing of this claim was not 'unconscionable', the judge was not focusing on whether its status as a *second* claim caused 'unjust harassment' to Norman. By the time he dealt with the laches argument, he had moved on from the abuse point; and the laches argument raised different considerations. I would not be prepared to hold that the judge has implicitly found that the raising in the second claim of issues that could have been raised in the first did not and would not cause such 'unjust harassment'. He never reached the point at which he had to consider that. He found that the abuse argument fell at an earlier fence.
66. How, therefore, should this court deal with the abuse point? There are two options. One is to strike the whole claim out as an abuse. The other is to allow it to proceed. We were told that, even given the answers to the preliminary issues, further questions remain to be tried if the action is not struck out.
67. In my judgment, having regard to distance down the road that the claim has now travelled, it would be wrong for it now to be struck out as an abuse. Whilst I disagree that Norman has acquiesced in its prosecution, he has participated in a trial of questions central to its disposition, including whether the farmhouse and cottages formed part of Lucy's estate. The judge has held that they did. Norman's third ground of appeal is that he was wrong about that too, but for reasons that I shall also shortly give, I consider that there is no basis for a challenge to that part of his decision either. That means that the relevant circumstances are that there is a finding of the High Court that Edward executed a beneficial transfer of the farmhouse and cottages to Lucy in 1992, made what was probably a dishonest undervaluation of her estate in obtaining a grant of letters of administration of her estate and then – whether deliberately or negligently, but anyway in breach of trust – misappropriated her estate to his own sole use and so deprived his children of their lawful inheritance.
68. Now that this court now knows all this, I do not begin to understand how it can be expected to subscribe to a striking out of the second claim so that Norman can then be left to appropriate to, and retain for, his own sole use property in respect of which he has no such right. The claim has been tried to the extent that the private rights of the family members have been substantially determined; and it is, I consider, important that those private rights should be respected and enforced. I would therefore dismiss the appeal against the rejection of the abuse argument. I

recognise that Norman may well have regarded the second claim as unfairly harassing. But, by reason of the distance it has now travelled, the bulk of such harassment has already been suffered. The claim has now reached the point at which its few remaining issues can be resolved and it can be brought to a conclusion.

69. Turning to the appeal against the judge's decision to refuse to hold that the claim was barred by laches, Ms Harrison submitted that the delay in bringing the claim was self-evident and that in the meantime Norman had suffered the expense and harassment of the first claim. Her main point was that the claim could and should have been brought during his lifetime but was not. She said that the judge was wrong to conclude, as he did, that there was no evidence that the claimants deliberately chose to leave until after Edward's death their claim that Lucy was the beneficial owner of the farmhouse and cottages; and, further, that such delay had caused prejudice to Norman since he could not now adduce Edward's evidence to prove what he intended when he transferred the farm to Lucy.
70. In my judgment, there is no substance in these points. I accept that the claimants knew enough to assert their claim via Lucy's estate much earlier; as the judge found, they knew the key facts by the end of 1993. But Ms Harrison referred us to nothing that indicated that they deliberately delayed their claim until after Edward's death so as to avoid the prospect of possibly unhelpful evidence from him. Nor is it credible that they did delay it for that reason: the first action did not exploit what I might call the Lucy route.
71. As for the claimed prejudice in the lost opportunity to adduce Edward's evidence as to his intentions in relation to the transfers, that appears to me to be little more than Micawberism. Of course things do sometimes turn up (as they did for Mr Micawber himself: see *David Copperfield*, Chapter 63). But Ms Harrison showed us nothing that might have indicated what words Edward might have uttered in evidence about his transactions with Lucy. What we do know is that, by his *actions*, he treated the assets he had transferred to her as forming part of her estate, and I am not persuaded that this court could or should conclude that the judge was wrong to decide the laches issue as he did purely on the ground that Edward (shown by Norman's evidence to be a ready liar in the witness box) might have been able to give some material, and probably self-serving, evidence about his intentions in relation to the transfer of assets to Lucy. I would dismiss this ground of appeal. The issue whether the claim was barred by laches required a value judgment by the judge after weighing the relevant considerations. This court cannot substitute a different one.
72. Finally, Ms Harrison challenged the judge's conclusion that Edward had made a gift to Lucy of the farmhouse and cottages. We were invited to hold that he should have found that Lucy held them on a resulting trust for Edward. This was a challenge to the judge's fact-finding exercise, one which he dealt with in paragraphs [94] to [111] of his judgment and there did so with apparent care.
73. Mr Cohen had submitted to the judge that Norman admitted that Edward transferred the farmhouse and cottages to Lucy to prevent enforcement action against them by Mr Wilkie; that there was a presumption of advancement in favour of Lucy; and that, consistently with his having made a gift to Lucy, Edward then administered her estate on the basis that the assets were hers beneficially. Ms Harrison had submitted that the presumption, although applicable, was rebuttable by slight evidence and that Edward intended to do no more than transfer the legal estate in the farmhouse and cottages, not the beneficial interest, a submission perhaps attributing an understanding of trust law to Edward unsupported by any evidence to which we were referred.
74. Norman adduced the evidence of Mr Manchester, a solicitor who had acted for Edward in relation to the transfer. Mr Manchester had made a witness statement which was put in unchallenged. It was to the effect that Edward was concerned about the impact on his assets of Mr Wilkie's claim and so instructed Mr Manchester to achieve a transfer of his assets to Lucy. It was not a case of Mr Manchester advising Edward to do that, but rather one of Edward (who had

definite views and knew his own mind) instructing Mr Manchester to assist him in implementing what he had already decided upon. Mr Manchester said that he advised Edward that his motive in making the transfer would be apparent and that if Edward became bankrupt, the transfer would be voidable. He gave no evidence of any discussion to the effect that the Edward intended to retain the beneficial interest in the property, although in paragraph 10 he expressed his view (unsupported by any source material, so it was probably evidentially worthless) that he believed that Edward's transfer of assets to Lucy was 'not with the intent of genuinely benefiting Lucy but solely for the purpose of divesting himself of assets out of reach of creditors'. Mr Manchester did not give oral evidence, and so that judge was entitled to give what weight he judged appropriate to his statement, including that observation.

75. The judge expressed himself as satisfied on the probabilities that Edward intended to transfer the legal and beneficial interest in the farm assets to Lucy. His assessment was that the evidence not only did not rebut the presumption of advancement, it supported the making of a gift. He found that Edward was a strong minded man, who knew that, even though she was the beneficial owner, Lucy would deal with the assets as he directed. He did not instruct Mr Manchester to effect a transfer under which he retained an interest in the assets. Mr Manchester's claimed belief was, the judge said, merely that – a belief – and he attached no weight to it. Mr Manchester's advice that the transfer to Lucy was voidable was good advice, but until it was avoided the transfer was effective to vest the assets beneficially in her. Edward's conduct in the administration of Lucy's estate was consistent with his recognition that the farmhouse and cottages formed part of her estate.
76. The judge said that if Edward *had* intended to retain the beneficial ownership, with the purpose of the transfer being merely to defeat Mr Wikie, that would have been a transfer for an illegal purpose. The authorities showed, however, that it would have been open to him to recover the property provided (i) Lucy had known of and acquiesced in the arrangement, and (ii) the illegal purpose had not in fact been carried into effect so as to deceive Mr Wilkie. The judge held that there was no evidence that Lucy had agreed to any such arrangement. Nor did the evidence establish that Mr Wilkie had not been deceived.
77. In criticising the judge's conclusion, Ms Harrison submitted that he failed to give proper consideration to the evidence from the witnesses which is said to have pointed towards the conclusion that Edward did not intend to make a gift of the farmhouse and cottages. Beyond asserting that the claimants had referred to the transfer as an exercise whereby Edward put the farmhouse 'in the name of' Lucy, or words to that effect, Ms Harrison did not refer us to the evidence that she claimed was insufficiently analysed. She did, however, submit that Norman's evidence, based on discussions with Edward, was that the transfer was a mere façade. We were not, however, shown any transcript of any oral evidence that Norman gave on that topic. Mr Cohen referred us to what Norman said in paragraphs 28 and 29 of his witness statement of 25 July 2008, which amounted to no more than an assertion that Edward had not intended to benefit Lucy, but provided no basis for such assertion and would not justify any judicial finding that Edward did not intend to make a gift. So far as I am aware, the only persons who could have spoken to Edward's intention were Edward, Lucy and Mr Manchester.
78. Ms Harrison submitted that the right inference was that Edward intended no more than to achieve a transfer of the legal estate and that the presumption of advancement in Lucy's favour was and is easily rebutted. That the purpose was to defeat Mr Wilkie's interests was, she said, no bar to Norman's assertion that this was the arrangement provided only that the illegal purpose has not in fact been so carried out as to deceive Mr Wilkie. In support of that proposition, Ms Harrison referred us to *Symes v. Hughes* (1870) LR 9 Eq. 475; *Taylor v. Bowers* (1876) 1 QBD 291; and *Tribe v. Tribe* [1996] Ch 107. She said Mr Wilkie had not been deceived because he had been paid off in 1994, over two years later.
79. In my judgment, this challenge to the judge's findings also fails. In coming to his conclusion that Edward made a gift of the farmhouse and cottages to Lucy, the judge focused – rightly in my

view – not on assertions by members of the family as to what they believed to have been Edward's intention, but on what Edward actually did and on what Mr Manchester had to say on the topic, he being the one witness who could give positive evidence on it. His advice to Edward was that the transfer would be voidable in Edward's insolvency. That strictly only made sense if he regarded the whole interest in the farm, legal and beneficial, as being transferred to Lucy. The judge concluded that the probabilities were that Edward intended to gift the farmhouse and cottages to Lucy. He was entitled to come to that conclusion. There is no basis on which this court can substitute a different finding.

80. I would dismiss the appeal.

Sir Paul Kennedy :

81. I agree.

Lord Justice Maurice Kay :

82. I also agree.