[2020 Gib LR 165]

R. MARRACHE v. HASLAHA LIMITED, LAVARELLO and HYDE (as joint liquidators of MARRACHE & COMPANY), and LAVARELLO (as official trustee of I. MARRACHE, B. MARRACHE and S. MARRACHE)

SUPREME COURT (Restano, J.): May 5th, 2020

Estoppel—res judicata—cause of action estoppel—where, in previous action, judge had declared that claimant had been paid by his brothers' firm for his interest in estates of grandfather and mother (including valuable family property), claimant estopped from reopening issue because of error in previous proceedings as to nature of claimant's interest in property (i.e. indirectly as beneficial owner of shares in company which owned property)

The claimant sought an order that shares be registered in his name or vested in and transferred to him from the third defendant or his nominees.

The claimant had six siblings, five brothers and a sister. Their grandfather died in 1968. By his will, part of his estate devolved on trust to his son (the siblings' father) for life and then, upon the father's death in 1993, to the claimant and his brothers in equal shares. The father's estate devolved to his wife, the siblings' mother. She died intestate in 2008 and her estate devolved to all of her children. They each therefore had a one-seventh share. The estates owned a number of properties.

Three of the claimant's brothers (Isaac, Benjamin and Solomon) had set up a legal practice, Marrache & Co. They had misapplied and appropriated clients' moneys. A winding-up petition was presented against Marrache & Co. and the second defendants were appointed as liquidators. Isaac, Benjamin and Solomon were adjudged bankrupt and the third defendant was appointed official trustee of their estates. Isaac, Benjamin and Solomon were convicted of conspiracy to defraud.

The second and third defendants discovered that payments amounting to some £1.1m. had been made by Marrache & Co. to the claimant. They brought a claim ("the 2016 claim") seeking, *inter alia*, a declaration that the £1.1m. was consideration paid by Marrache & Co. for the sale by the claimant of his shares in the estates of his grandfather and mother, and an order vesting the shares in the defendants. The claimant denied that he had entered into such an agreement and asserted that any moneys he had received arose in the course of his employment with the firm. He denied that all of the moneys attributed to him were for his benefit or were in fact received by him.

In 2018, the Supreme Court (Yeats, Ag. J.) declared that the claimant had been paid by Marrache & Co. for his shares in the estates of his grandfather and mother, including the claimant's share in a valuable family property, Fortress House (that decision is reported at 2018 Gib LR 24). In further proceedings (reported at 2018 Gib LR 171), the Court of Appeal rehearsed the facts of the case and stated: "On the death of [the Marrache siblings'] mother, all seven children inherited equal shares in the family home in Gibraltar called Fortress House . . ."

The claimant did not proceed with his appeal as required by the rules and it was deemed to have been withdrawn.

Possession proceedings in respect of Fortress House were commenced by the defendants. New evidence came to light, notably a letter of wishes dated in 1983, which showed that Fortress House did not in fact form part of the siblings' mother's estate. The letter of wishes provided that the siblings' father would give Fortress House and other properties to Isaac Marrache and that ten years' later Isaac Marrache's interest in those properties would be transferred to single property owning companies. Fortress House was transferred to the first defendant ("Haslaha") in 1993. 1,000 shares were divided into seven equal parts of 142 shares for each of the Marrache siblings, with their mother owning one share, and the remaining shares held for the siblings jointly. The third defendant held the shares of the three bankrupt Marrache brothers (Isaac, Benjamin and Solomon) for the benefit of their respective estates. The claimant's 142 shares were held by a company. It was therefore clear that the claimant's interest in Fortress House arose from his shareholding in Haslaha and not as a beneficiary of the estate.

Abraham, Joshua and Rebecca Marrache's shares in Haslaha were registered in their names at their request. The second and third defendants refused the claimant's request on the basis that he had no interest in the shares of Haslaha and that, irrespective of how he had obtained an interest in the family properties, including Fortress House, he had sold them to Isaac and Benjamin Marrache for more than £1m.

The claimant brought this claim seeking an order that 142 shares in Haslaha be registered in his name or vested in and transferred to him by the third defendant or his nominees. He alleged that the 2018 judgment did not deal with his beneficial interest in Haslaha and the shares should be held for his benefit.

The claimant submitted that the defendants could not show that he had sold his shares in Haslaha as that would be inconsistent with the 2016 claim which concerned the sale of his interest in "the Family Properties" as defined in the particulars of claim, *i.e.* his interest in the estates of his grandfather and mother. Although the list of "the Family Properties" included Fortress House, it did not encompass the sale of any legal or beneficial interest in Haslaha and the judge's declarations reflected this. The court should not look too carefully for estoppels based on matters which were not in issue, namely the ownership of the shares in Haslaha. The claimant did not assert that Haslaha owned Fortress House in the

2016 claim but he did not need to do so and he had been unrepresented. The claimant was not estopped from bringing the present claim, nor was it abusive, as the defendants alleged, because the cause of action or issue in the present claim concerned the beneficial ownership of 142 shares in Haslaha and not whether the claimant sold his interest in the properties devolving from his grandfather's and mother's estates. Any estoppel or abuse arguments should operate against the second and third defendants as they could and should have got this matter right. The claimant was not misusing the process of the court but simply asking for the declarations in the 2016 claim to be worked out having proper regard to the factual reality of the ownership of the shares in Haslaha.

The defendants contended that the claimant's one-seventh share vested in the third defendant as confirmed by the previous judgment of the Supreme Court which meant that the third defendant gained majority control over Haslaha, enabling the commencement of possession proceedings in respect of Fortress House.

The defendants submitted that under the principle of *res judicata* (specifically cause of action estoppel and issue estoppel) the claimant was estopped from proceeding with the present claim. At the time of the 2016 claim, everyone believed that the claimant's interest in Fortress House devolved through the estate of the Marrache siblings' mother but it was now plain that that was incorrect and that each of the siblings had equal beneficial ownership of the shares in Haslaha. This mistaken belief did not detract from the fact that the judge specifically decided in the 2016 claim that the claimant sold his contingent interest in Fortress House by whichever means that arose. The 2016 claim involved the same parties as the present claim except for Haslaha, which was a privy of the third defendant. As such, cause of action estoppel or issue estoppel debarred the claimant from raising the same claim again in the present proceedings. The documents that had recently come to light, particularly the letter of wishes, could have been obtained by the claimant using reasonable diligence and did not undermine the judge's decision in the 2016 claim. Alternatively the present claim was an abuse of process under the rule in *Henderson* v. *Henderson*, which required litigants to bring their whole case before the courts, and there were no special circumstances allowing the claimant to make the claim. It was clear that the claimant's full contingent interest in Fortress House, and other properties, was the subject of the 2016 claim and he had suffered no prejudice. Even if the defendants were wrong about the claimant being debarred from bringing the present proceedings, the claim should nevertheless fail as the claimant had failed to show that he should be entitled to 142 shares in Haslaha.

Held, dismissing the claim:

(1) A cause of action was a factual situation the existence of which entitled one person to obtain from the court a remedy against another person. In determining the nature of a cause of action in a claim, a broad inquiry should be undertaken including full consideration of the facts

established, the reasons given by the judge for his decision, the statements of case and the evidence. In the present case, while an error had clearly been made concerning the ownership structure of Fortress House and how the claimant acquired a contingent interest in the property, the fact was that all the parties to the 2016 claim, including the claimant, had proceeded on the basis that the claimant's alleged sale of his entire contingent interest in Fortress House (and other interests) represented the gravamen of that action. While it was regrettable that there was an error in the 2016 claim concerning the basis on which the claimant held his contingent interest in Fortress House, a full review of the judge's reasoning in the 2018 judgment bore out the fact that the factual situation which the court was concerned with was whether the alleged sale of the claimant's contingent interest in Fortress House (and other properties) had taken place. This was reinforced by the Court of Appeal's judgments. The judge's references to the claimant's interest in the estates of his grandfather and mother came about because that was the basis on which all parties (wrongly) understood the claimant's interest in Fortress House arose. If the narrow approach commended by the claimant were adopted, it would mean that because it was now known that the claimant's interest in Fortress House did not come from the estate of his grandfather or mother the conclusion to be drawn would be that the 2016 claim was not concerned at all with the claimant's contingent interest in Fortress House. Such a conclusion could only be reached by a selective and decontextualized assessment of the 2016 claim rather than a broad and pragmatic inquiry. Whilst it was now known that the claimant's interest in Fortress House arose indirectly as a beneficial owner of 142 shares in Haslaha and not as a beneficiary of his grandfather or mother's estates, it was the sale of that interest to which the parties and the court directed their minds. Estoppels had to be applied to work justice and not injustice. It would not be just to reopen the issue which had been determined by the judge in previous proceedings following a trial because an error had found its way into the proceedings (paras. 70–74).

(2) The court also rejected the claimant's submission that the failure to correctly plead the nature of the interest which was being sold meant that the contractual claim failed due to uncertainty of subject matter. Whether the claimant's one-seventh interest arose as the beneficial ownership of 142 shares in Haslaha or as the beneficiary of his mother's estate, all parties understood what was being sold. There was therefore no uncertainty so as to render the contract unenforceable or to affect the operation of the estoppel (para. 75).

(3) Whether or not the claimant's sale of his contingent interest in Fortress House represented the cause of action which was determined in the 2016 claim, it was at least an issue which was raised and determined in the 2016 claim even though there was a mistake in the way that the claimant's interest was referred to. Therefore, in the alternative, issue

estoppel applied as against the claimant. There were no special circumstances which prevented the operation of issue estoppel. The late discovery of the letter of wishes showed that there had been an inaccuracy concerning the legal basis on which the claimant's contingent interest in Fortress House was founded but it did not make any difference to the determination as to whether the claimant had sold that interest. The other documents which had emerged since the 2016 claim was determined similarly did not prevent the estoppel from operating against the claimant (paras. 76–77).

(4) The present claim was also an abuse of process. When considering the rule in *Henderson* v. *Henderson*, in order to determine whether a subsequent claim was abusive, a broad merits-based approach was required which took into account the public and private interests and the facts of the case focusing attention on whether in all the circumstances a party was misusing or abusing the process of the court by seeking to raise before it an issue which could have been raised previously. This was not a true case of *res judicata* but rather based on the principle of public policy in preventing multiplicity of actions and that there should be an end to litigation. The fact that all parties proceeded on the wrong footing as to the legal basis on which the claimant's contingent interest in Fortress House arose did not detract from the fact that the subject of the 2016 claim concerned the sale of that interest by whichever legal means that arose. Whilst it was unfortunate that a mistake was made regarding the legal basis on which the claimant owned his contingent interest in Fortress House, there was no need for any "working out" of the declarations made in the 2016 claim, and to the extent that any such working out was required it would only require a correction as to the legal basis on which the claimant's contingent interest in Fortress House arose. There were no special circumstances justifying the disapplication of the rule in *Henderson*. The public interest behind the rule was to prevent a party being vexed twice in the same matter and to promote efficiency and economy in the conduct of litigation. To allow the present claim to proceed would run counter to that policy as it would represent the reopening of an issue based on an error which was not material to that decision and which had been conclusively determined (paras. 78–80).

(5) If the court were wrong in holding that the claimant was debarred from proceeding with his claim, the court agreed with the defendants that the claimant had relinquished his rights over the 142 shares in Haslaha and regardless of whether the decision of the judge in the previous proceedings estopped the claimant from bringing his claim, it supported that conclusion as the judge was clearly concerned with the claimant's one-seventh interest in Fortress House which the shares represented, albeit indirectly (para. 83).

Cases cited:
(1) *Arnold* v. *National Westminster Bank*, [1991] 2 A.C. 93; [1991] 2 W.L.R. 1177; [1991] 3 All E.R. 41, *dicta* of Lord Keith of Kinkel considered.
(2) *Divine-Bortey* v. *Brent LBC*, [1998] I.C.R. 886, referred to.
(3) *Henderson* v. *Henderson* (1843), 3 Hare 100; 67 E.R. 313; [1843–60] All E.R. Rep. 378, considered.
(4) *Johnson* v. *Gore Wood & Co.*, [2000] UKHL 65; [2002] 2 A.C. 1; [2001] 2 W.L.R. 72; [2001] 1 All E.R. 481; [2001] BCLC 313; [2001] BCC 820, *dicta* of Lord Bingham applied.
(5) *Letang* v. *Cooper*, [1965] 1 Q.B. 232; [1964] 3 W.L.R. 573; [1964] 2 All E.R. 929, applied.
(6) *Spens* v. *IRC*, [1970] 1 W.L.R. 1173, referred to.
(7) *Virgin Atlantic Airways Ltd.* v. *Zodiac Seats UK Ltd.*, [2013] UKSC 46; [2014] 1 A.C. 160; [2013] 3 W.L.R. 299; [2013] 4 All E.R. 715, considered.

M. Young and *A. Seruya* for the claimant;
N. Cruz and *C. Wright* for the defendants.

1 **RESTANO, J.:**

Introduction

This is the hearing of a Part 8 claim where the claimant is seeking an order that 142 shares in Haslaha Ltd. ("Haslaha") be registered in his name or vested in and transferred to him from the third defendant or his nominees. I granted permission for oral evidence to be given at trial which resulted in the claimant and two of his brothers, Isaac and Benjamin Marrache, giving evidence in support of the claim and Mr. Lavarello giving evidence on the defendants' behalf in opposition to the claim.

Background

2 Fortress House is a large colonial property situated in the centre of Gibraltar acquired in 1968 by the claimant's father, Samuel Abraham Marrache, and which he then transferred to one of his sons, Isaac Marrache, in 1983 for ten years, subject to it being transferred thereafter to a limited company. In accordance with this direction, legal title to the property was transferred to Haslaha in 1993. Haslaha's shareholding consists of one thousand shares of £1 each. The beneficial ownership of Haslaha's shares was originally divided into seven equal parts consisting of 142 shares originally held in favour of the each of the seven Marrache siblings with their mother, Reina Marrache, owning one share and the remaining shares held for the siblings jointly. Ownership of these shares is currently held as follows: Emdir Ltd. holds 6 shares; Emsec Ltd. holds 142 shares; Rebecca Marrache holds 142 shares; Abraham Marrache holds 142 shares; and the third defendant holds 568 shares, which represents the

shares of Isaac, Benjamin and Solomon who are all bankrupts ("the bankrupt brothers") and which he holds for the benefit of their respective estates. The bankrupt brothers were formerly partners in Marrache & Co. which went into liquidation in 2010 following the theft of large amounts of money held in the firm's client accounts. The bankrupt brothers were convicted for offences of fraud, served terms of imprisonment and were declared bankrupt. It is also common ground that the third defendant will need to account to Abraham, Joshua and Rebecca Marrache for their respective shares. This means that ownership of the claimant's share, currently held by Emsec Ltd., will determine where the majority lies.

3 The defendants contend that the claimant's share vests in the third defendant and that this was confirmed by the judgment of Mr. Liam Yeats, Ag. J. (as he then was) dated February 7th, 2018 (reported at 2018 Gib LR 19) in claim no. 2016 ORD.13 ("the 2018 judgment" and "the 2016 claim") which means that he gained majority control over Haslaha which enabled the commencement of possession proceedings in respect of Fortress House. The claimant, however, alleges that the 2018 judgment does not deal with his one-seventh beneficial interest in Haslaha and that these shares should be held for his benefit. If the claimant is successful it is his intention, together with his sister and two of his brothers, to try to put a stop to the possession proceedings in respect of Fortress House.

The issues in this claim

4 As there were no statements of case filed in the claim, the parties filed an agreed list of issues which covered the following legal and factual issues:

Legal issues

5 The overarching legal issue in this claim is whether 142 shares in Haslaha should be legally and beneficially owned by the claimant and should be transferred to and vested in him by order of the court. This in turn raises the following subsidiary issues.

6 Whether the claimant is estopped from proceeding with this claim on the basis of *res judicata* (cause of action estoppel or issue estoppel) following the 2018 judgment.

7 Alternatively, whether this claim amounts to an abuse of process on the basis that the claimant is seeking to reopen the same subject of litigation which could have been brought forward by him in the 2016 claim but was not due to negligence, inadvertence or accident by the claimant or the defendants in that claim or both.

8 Whether the defendants are estopped from alleging by way of defence to this claim that the claimant has transferred the shares for the consideration relied on by them in the 2016 claim when that allegation was not pleaded by them in that claim and was not the basis of the 2018 judgment and the order which followed ("the 2018 order").

9 Alternatively, whether the defence to this claim is an abuse of process of the court because it was not raised as an issue by the claimants in the 2016 claim such that they ought not to be permitted to rely on it.

Factual issues

10 Is there any evidence, including facts found by the judge in the 2018 judgment, that the claimant contracted to sell his shares in Haslaha to Isaac and Benjamin for valuable consideration, the claimant contending that the only facts so found in that judgment which are admissible in this claim are those which were necessary to decide the issues raised by the claim decided in that judgment?

11 Is the belief of, or statements by, any of the Marrache siblings as referred to in the third defendant's witness statement relevant? In particular, this refers to various explanations given by the Marrache siblings in the liquidation and bankruptcies as to the position regarding the ownership of the property.

12 When should the respective parties, acting with reasonable diligence, have had knowledge of the letter of wishes dated September 9th, 1983 and/or the deed of conveyance dated December 14th, 1993 and/or the ownership of the property by Haslaha such that they ought to have pleaded reliance upon or referred to the same in the 2016 claim?

Relevant statutory provisions

13 The claimant relies on s.152(2) of the Companies Act 2014 which gives the company the right to register as a shareholder any person to whom the right to any shares in the company has been transmitted by operation of law.

14 The claimant also relies on s.51(1)(b)(iv) of the Trustees Act 1895 which gives the court the power, *inter alia*, to make a vesting order for the transfer of stock where a request has been made as has been refused by the trustee.

Previous related proceedings

15 As can be seen, the defendants allege that the claimant is debarred from bringing the claim and the claimant alleges that the defendants are debarred from defending the claim based on the effect of the 2018 judgment. The scope of the 2016 claim and the effect of the 2018

judgment and the 2018 order are therefore central to the issues which fall for determination in this claim.

16 The 2016 claim was commenced by the second and third defendants against the claimant herein. Haslaha is therefore the only party in this claim that was not joined as a party in the 2016 claim. The claim concerned transfers made to the claimant between 2005 and 2010 in the sum of £1,109,148.03 or thereabouts and the brief details of claim sought a declaration that those transfers made by Marrache & Co. (in liquidation) and/or Isaac Marrache and/or Benjamin Marrache and/or Solomon Marrache were void, that they be set aside and that Raphael Marrache pay that sum or such other sum as the court might determine by way of restitution or damages. Following a re-amendment to that claim on May 9th, 2016 a claim was made in the alternative, seeking (1) a declaration that the sum of £1,109,148.03 was the consideration paid by Marrache & Co. (in liquidation) from its client account for the sale by the claimant "of his part or share in the Estate of Samuel Abraham Marrache and in the Estate of Reina Marrache ('the 1/7th Share'); (2) An order vesting the 1/7th Share in the First and Second Claimants . . ."

17 The particulars of claim dated October 25th, 2016 pleads as follows:

> "18. The Defendant, the Bankrupts and their two other siblings, Joshua Marrache and Rebecca Marrache are [*sic*] were equal beneficiaries of the estate of Samuel Abraham Marrache and Reina Marrache ('the Estate'), each being entitled to a 1/7th share of the Estate which included the following properties: 5 Cannon Lane, 197/199 Main Street, 201 Main Street, 206 Main Street, 220 Main Street, *9 Cathedral Square*, 6–10 Cannon Lane ('the Properties')." [Emphasis added.]

18 Paragraph 19 goes on to plead that between 2005 and 2008 the claimant negotiated with the bankrupt brothers or just Isaac and Benjamin Marrache for the sale of his interest in "the estate" including "the properties" for a price equivalent to a one-seventh share in the estate.

19 The claimant, who acted in person in the 2016 claim, filed a defence in which he alleged that the evidence supporting the sale was largely falsified and conceived by his brothers to minimize their own wrongdoing. The trial in the 2016 claim took place on November 6th, 2017. On the first day of the trial the judge made various orders following applications made by the claimant including an order that the claimants in that claim (the defendants herein) provide a list of the properties owned by the estates of Abraham Samuel Marrache and Reina Marrache which they were aware of. On November 7th, 2017, and in compliance with that order, the lawyers for the claimants in those proceedings wrote to the claimant herein and provided the list of assets which they were aware of came under the estates of Abraham Samuel Marrache and Reina Marrache. This

list refers to Fortress House forming part of the estate of Reina Marrache and that it was charged to Jyske Bank.

20 Paragraph 5 of the 2018 judgment refers to the 2016 claim arising from an agreement between Isaac and Benjamin Marrache on the one part and the claimant on the other by which the claimant sold his entitlement in the respective estates of his grandfather and mother. The judge then referred to the fact that the claimant denied the alleged agreement and asserted that any moneys that he received arose from the course of his employment with the firm and that insofar as two specific payments were concerned, that these formed part of the payment of a deposit for the purchase of a house in Jerusalem arising from an agreement with his brother Benjamin which was never completed. As regards the estates in question, the judge explained that the estate of the siblings' grandfather, Abraham Samuel Marrache who died in 1968, devolved to his son, Samuel Abraham on trust for life and thereafter to his six grandsons. Samuel Abraham Marrache died in 1993 and his estate devolved to his wife Reina Marrache, the siblings' mother, who died intestate in 2008, and her estate then devolved to all her seven children equally. The judge went on to say that the estates owned a number of properties and as regards Fortress House he stated (2018 Gib LR 24, at para. 8):

> "There is evidence that Fortress House devolved under the estate of Reina Marrache. The claimants are proceeding on the basis that the other properties form part of the estate of Abraham Samuel Marrache."

21 The judge then considered the evidence relied on in support of that claim which included ledgers, a balance sheet, email correspondence and other relevant material which had been recovered from the records of Marrache & Co. and which were presented at the trial by Mr. Hyde. The claimants in that claim also relied on the evidence of Solomon Marrache, Marrache & Co.'s former finance director, who said that the ledgers accurately showed payments made to Raphael Marrache as part of an agreement to purchase the claimant's shares in the family properties, including Fortress House. Raphael Marrache gave evidence in opposition to the claim and he called witnesses to support his case, who included his brothers Isaac and Benjamin and his sister Rebecca. The judge concluded that the ledger was accurate and that the claimant was paid a total of £1,097,428.12 by Marrache & Co. He also went on to consider the claimant's status within Marrache & Co. and he concluded that whilst he was not an employee of the firm, the sum of £205,000 paid to him related to remuneration for services he had provided to the firm.

22 The judge further found that the claimants in the 2016 claim had proved on balance that the funds received by the claimant related to an agreement concerning the sale by him of his interests in all the family

property interests. In reaching this conclusion, the judge took various items of evidence into account, including the balance sheet referred to above which attributed a total value to Fortress House of £4,320,000 and each one-seventh share at £617,142.86. He also had regard to a draft agreement dated 2008 which referred to the sale by the claimant of his interest in his mother's estate but which did not expressly refer to Fortress House, Benjamin Marrache's evidence (who had taken a lead on those negotiations) saying that Fortress House was not included in the sale, and an audio recording taken by Rebecca Marrache close in time to the events where Benjamin Marrache excluded the claimant from having an interest in Fortress House.

23 The claimants in the 2016 claim made it clear to the judge that they were primarily seeking the alternative remedy sought when the claim form was amended, namely a declaration that the claimant was paid for his shares in the estates and that these vested in them. In his judgment, the judge stated as follows (2018 Gib LR 24, at para. 116): "I observe at this point that my determinations relate to interests only in the properties devolved by the estates." The judge then went on to grant the declaration sought in the following terms (at para. 118(vi)): "Raphael [Marrache] sold his one seventh contingent interest in the properties devolved by the estate of Reina Marrache to the firm."

24 The 2018 judgment was handed down at a hearing which took place on February 7th, 2018 when an application was made by the claimants in the 2016 claim for a late amendment to the claim form and particulars of claim. This application was made in response to an invitation by the judge who had noticed an error in the claim form and particulars of claim, namely the reference to the estates of Samuel Abraham Marrache (the siblings' father) and Reina Marrache (the siblings' mother), whereas at trial it had appeared to the judge that the relevant properties belonged to the estates of Abraham Samuel Marrache (the siblings' grandfather) and Reina Marrache. The application was opposed by the claimant and led to the judge handing down a supplementary judgment also dated February 7th, 2018 (reported at 2018 Gib LR 19, "the supplementary 2018 judgment") in which he stated (at para. 9) as follows: "Mr. [Raphael] Marrache then went further and submitted that he had understood that the only property in issue in the claim was the family home, Fortress House." The judge dismissed the objection to the application and stated that the parties had proceeded on the basis that the claim involved all of the claimant's interests in the family's properties and referred to para. 18 of the particulars of claim, which listed various properties including 9 Cathedral Square which, as stated above, is the address of Fortress House. He granted permission to the claimants in that claim to amend their claim form and particulars of claim to reflect the fact that their claim was against the properties devolved by the estates of Abraham Samuel Marrache and

Reina Marrache. In the course of that hearing, Mr. Cruz asked for liberty to apply and submitted as follows:

> ". . . as a matter of practical enforcement of the process the properties are owned by companies. Those companies have several things. In the case of one company the owner of Fortress House clearly has a piece of real estate, that piece of real estate is mortgaged at the moment at a 'mortgaged' [*sic*] to Jyske bank."

25 The minute of order which was drawn up following the 2018 judgment provides, insofar as is material, as follows:

> "IT IS DECLARED THAT:
>
> The 2nd Claimant in his capacity as Official Trustee of the Estates of Isaac and Benjamin Marrache is the absolute legal and beneficial owner of any interest the Defendant has in the properties devolved by the Estates of Abraham Samuel Marrache and Reina Marrache.
>
> AND IT IS HEREBY ORDERED that:
>
> Any interest the Defendant has in the properties devolved by the Estates of Abraham Samuel Marrache and Reina Marrache be vested in the 2nd Claimant in his capacity as Trustee of the Estates of Isaac and Benjamin Marrache."

26 The claimant filed notices of appeal against the 2018 judgment and the order granting permission to amend. Further, he made various applications to the Court of Appeal pending the hearing of his appeal including a stay of the vesting order made. The outcome of these applications is not relevant but, in a judgment dated March 22nd, 2018, Smith, J.A. rehearsed the facts of the case and stated as follows (2018 Gib LR 171, at para. 5):

> "On the death of [the Marrache siblings'] mother, all seven children inherited equal shares in the family home in Gibraltar called Fortress House and possibly some land in Spain."

The stay application was based on the claimant's contention that if the order was not stayed, the respondents to the appeal would have the ability to dispose of whatever was left of his inheritances immediately. Further, in the course of his submissions to the Court of Appeal, the claimant said that he wished to prevent the respondents from selling Fortress House which he feared would be sold at an undervalue. He also said that he and his innocent siblings had plans for the redevelopment of the site on which Fortress House stands which would produce far more than the sale contemplated by the respondents to that appeal (*ibid.*, at para. 10).

27 The claimant did not proceed to prosecute his appeal as required by the rules. The Court of Appeal in a further judgment by Smith, J.A. dated December 14th, 2018, refused an extension of time and ordered that the

appeal should be deemed to be withdrawn. In the course of her judgment, Smith, J.A. recorded the fact that the family home, Fortress House, was left to Reina Marrache's six sons and only daughter Rebecca (para. 2). Further, she referred to the fact that the claimant's wife had submitted to the Court of Appeal that the claimant had at all times believed that the 2016 claim related only to Fortress House and that it had been grossly unfair that the respondents should have been allowed to amend the whole basis of their claim after the evidence had closed (para. 61). This submission was rejected and Smith, J.A. stated as follows (para. 62):

> "In my judgment, Mrs. Marrache's submission is wholly unfounded. The particulars of claim list the properties against which the claim was brought, identifying them by their addresses. That they were said to have devolved under the will of the father rather than the grandfather was plainly a slip which no one noticed until the judge was writing his judgment."

28 In rejecting the application, Smith, J.A. concluded that the prospects of success on the appeal were virtually nil (para. 72). For the sake of completeness, I should add that the Court of Appeal delivered a further judgment dated February 22nd, 2019 which dealt with the costs of the appeal.

29 An application for special leave to appeal the Court of Appeal's judgments was refused by the Judicial Committee of the Privy Council on March 11th, 2020.

New material

30 After the 2016 claim had concluded, new evidence has come to light, notably a letter of wishes dated September 9th, 1983 ("the letter of wishes"), which shows that, contrary to what everyone believed, Fortress House did not form part of Reina Marrache's estate. This arose in the following way: following the 2018 judgment and the subsequent dismissal of the claimant's appeals, possession proceedings in respect of Fortress House were commenced. The defendants to the possession proceedings (which included the claimant) relied on alleged rights of occupation in the course of their defence to that claim and said that this was supported by a letter of wishes signed by their father. This was first raised by Mr. Seruya, counsel for the defendants in the possession proceedings at a hearing before Butler, J. on August 7th, 2019, although at that stage the letter of wishes was not produced. This led to the third defendant asking a member of his team, Ms. Joanne Wild, to conduct a search of their records and that same day she located it.

31 The letter of wishes provides that following an agreement on the date the letter was executed, Samuel Marrache will give Isaac Marrache Fortress House, 201 Main Street and 197/199 Main Street upon the terms

and conditions set out in therein. The terms and conditions which follow provide that ten years from the date of that letter, Isaac Marrache's interest in those properties is to be passed and transferred to single property owning companies. As regards Fortress House, this provides for a division of 1,000 shares into seven parts with each of the Marrache siblings holding 142 shares, their mother Reina Marrache holding "one gold share" (which it appeared gave her control over her lifetime only) and the remaining five shares to be held jointly by the Marrache siblings.

32 In accordance with the terms of the letter of wishes, on December 14th, 1993, Fortress House was conveyed and granted to Haslaha by Samuel Marrache, Isaac Marrache and Reina Marrache. This transfer took place days before Samuel Marrache died on December 18th, 1993. Samuel Marrache is described in this deed of conveyance ("the 1993 deed of conveyance") as "the settlor" and Isaac Marrache and Reina Marrache are described in the deed of conveyance as "the trustees." The first recital to the deed of conveyance states as follows:

> "The Settlor is subject to the terms and conditions contained in a Trust dated 9th day of September 1983 and made between the Settlor of the one part and the Trustees of the second part (hereinafter called 'the Trust') but is otherwise seized in fee simple in possession free from encumbrances of all those the premises more particularly described in the Second Schedule [and which describes Fortress House]."

33 Whilst the letter of wishes was originally relied on to defend the possession proceedings it soon became clear that the claimant's one-seventh interest in Fortress House arose from his shareholding in Haslaha and had nothing to do with his being a beneficiary of the estate of his mother or grandfather. This was because Samuel Marrache had conveyed Fortress House prior to his death to Haslaha and the only interest which devolved to the estate of Reina Marrache was the single share she held in that company.

34 The discovery of the letter of wishes resulted in Massias & Partners acting for the claimant, Abraham Marrache, Joshua Marrache and Rebecca Marrache writing to the third defendant and Mr. Hyde on September 26th, 2019 and requesting that their clients' respective one-seventh beneficial shares in Haslaha be registered in their names forth-with. The request was complied with insofar as it related to the beneficial ownership of Abraham, Joshua and Rebecca Marrache and their shares were transferred to them on October 18th, 2019. The request, however, was refused insofar as it related to the claimant on the basis that he had no interest in the shares of Haslaha and that, irrespective of how he had obtained an interest in the family properties including Fortress House, he had sold them to Isaac and Benjamin Marrache for more than £1m.

35 On October 10th, 2019, Mr. Cruz of Cruzlaw LLP, instructed by the defendants, wrote to the Supreme Court registry stating that in the course of his preparation for the possession hearing (which was scheduled to commence on October 16th, 2019) and having considered the 2018 judgment, the 2018 order and the letter of wishes, his clients had concluded that the 2018 order was incomplete and defective as it did not "separately and clearly and specifically vest the 1/7th beneficial interest that Raphael Marrache sold to Benjamin and Isaac Marrache in Haslaha in the Trustees . . ." He further stated that this was because the judge and the parties (and all witnesses) all proceeded during trial on the basis that Fortress House and Haslaha devolved through the estate of Reina Marrache. In his view, this did not impact on the possession claim and he sought Raphael Marrache's consent to an order vesting his interest in Haslaha to his clients. Mr. Seruya, instructed by the claimant, replied to Mr. Cruz on October 11th, 2019 and stated that Fortress House did not form part of the estates which were the subject of the 2016 claim. Further, he said that the claimant remained the owner of the one-seventh beneficial interest in the shares in Haslaha and that he, Rebecca, Abraham and Joshua or their nominees had control of that company. They therefore maintained that this was an issue which needed to be resolved before the trial of the possession proceedings. In the event, the possession proceedings were adjourned to enable this claim to be determined.

36 Apart from the letter of wishes, a second draft of the agreement recording the release by Raphael Marrache of his interest in various properties has since emerged. The relevance of this is that whilst Fortress House had been omitted from the list of properties referred to in the first version of this draft document which had been before the judge in the 2016 claim, this draft includes it. Further, it refers to a release of shares in or claims under "the Estates" which is defined as the estates of Abraham Samuel Marrache, Samuel Abraham Marrache, Luna Benzacry and Reina Marrache. This document was discovered after the trial in the 2016 claim but before the judge handed down his judgment. An application was made on November 17th, 2017 seeking the trial to be re-opened to enable this second draft agreement to be adduced as evidence but the application was refused. Certain emails have also since come to light which are referred to in detail below.

The claimant's case

37 The claimant submits that he is entitled to the relief which he is seeking because the defendants cannot show that he sold his shares in Haslaha to Isaac and Benjamin Marrache as that would be contrary or inconsistent to the claim which they advanced in the 2016 claim which concerned the sale of his interest in "the Family Properties" as defined in the particulars of claim in the 2016 claim, *i.e.* his interest in the estates of

his grandfather and mother, for just over £800,000 with the balance of £205,000 representing the remuneration paid to him by Marrache & Co. Although the list of "the Family Properties" includes Fortress House, the claimant contends that this does not encompass the sale of any legal or beneficial interest in Haslaha and that the declarations which the judge made reflect this. Further, he submits that this is not a mere pleading point but is a point of substance. The claimant submits that the subject matter of that agreement has been clearly spelt out by reference only to the sale of the claimant's interests in his grandfather's and mother's estates and to say otherwise renders that agreement invalid due to uncertainty of its subject matter.

38 The claimant also submits that the court should guard against looking too carefully for estoppels based on matters which were not in issue, namely ownership of the shares in Haslaha. In this regard, Mr. Young for the claimant refers to *Spens* v. *Inland Rev. Commrs.* (6), where Megarry, J. said as follows ([1970] 1 W.L.R. at 1184):

> ". . . [O]ne must inquire 'with unrelenting severity' whether the determination on which it is sought to found the estoppel is 'so fundamental to the substantive decision that the latter cannot stand without the former. Nothing less than this will do.'"

39 Whilst the claimant did not assert that Haslaha owned Fortress House in the 2016 claim, Mr. Young submits on his behalf that he did not need to do so and that this was unsurprising given that he was unrepresented in those proceedings and was wrong-footed by the way the claim was advanced against him. Further, the 1993 deed of conveyance which the defendants had in their possession refers to a "Trust dated 9 September 1983" and the claimant submits that this should have alerted the defendants to the true position or at least should have put them on inquiry which would have enabled them, as officers of the court and with all the resources at their disposal, to make their claim correctly.

40 The claimant submits that he is not estopped from bringing this claim nor is it abusive as the defendants allege because the cause of action or issue in the present claim concerns his beneficial ownership of 142 shares in Haslaha and not whether the claimant had sold his interest in the properties devolving from his grandfather and mother's estates to Isaac and Benjamin Marrache. The claimant further submits that any estoppel or abuse arguments should operate against the second and third defendants because this was something that they could and should have got right. As regards the abuse complaint levelled against him, the claimant says that he is not misusing the process of the court but simply asking for the declarations of the judge in the 2016 claim to be worked out having proper regard to the factual reality as to the ownership of the shares in Haslaha. Alternatively, he says that there are special circumstances which

justify the disapplication of the rule, namely the fact that he was plainly unaware of the true ownership of Fortress House and that there were many good reasons why he could not have been expected to investigate and establish the true position especially given the calamitous downfall of Marrache & Co. and his brothers Isaac, Benjamin and Solomon Marrache. On the other hand, the second and third defendants could and should have raised this.

41 The claimant gave evidence in support of his claim and said that since the 2016 claim it had become clear that Fortress House was not part of the estate of his late mother and that the Haslaha shares should therefore be transferred to him. When cross-examined, the claimant accepted that the judge in the 2016 claim and then the Court of Appeal had considered ownership of Fortress House. Further, he accepted that at all times he had believed that his interest in Fortress House had devolved through the estate of his late father to his late mother although he explained that he knew nothing about the letter of wishes and did not appreciate the property owning structure employed.

42 The claimant also explained that when he was first notified about a claim to the Marrache family properties in 2014 he had discussed the matter with some of his siblings but not others given the strained relationship with some of his siblings. The claimant explained that in around 2015/2016 he instructed Anthony Julius of Mishcon de Reya who put a case together against Jyske Bank which previously held a mortgage over Fortress House. He said that Mishcon de Reya had received some £150,000 in legal fees but that they stopped acting for him when he could no longer afford their fees.

43 When the claimant was asked when he first came to learn about the letter of wishes, he explained that a copy was found in the Fortress House safe in the summer of 2019. He further explained that this safe had to be opened by a locksmith as the key to the safe had been lost. He said that he did not ask about this document before as he was unaware of its existence. When asked why he had not approached his brothers or Massias & Partners about this before, he explained that he was really only speaking to Abraham and Rebecca and was not close to Isaac, Benjamin or to Massias & Partners at the time. The claimant's view was that he too was the victim of a fraud as he never sold his share in Fortress House to Isaac and Benjamin or their firm. Indeed, he said that he had been warned at the time by Isaac and Abraham not to sign anything Benjamin sent him as he was intending to defraud him.

44 Isaac Marrache gave evidence in support of the claimant's claim although it was very limited in its scope. He referred to the fact that he had drafted the letter of wishes following a request by his father that he advise him as how best to protect his assets. He also referred to the fact that his

father had wanted Reina Marrache to have a "gold" share which gave her control during her lifetime. The letter of wishes was signed by his father shortly before he died in 1983, and in 1993 Isaac Marrache arranged a deed of conveyance to be drafted, as referred to the recital to the letter of wishes. This was then executed and registered at the Land Registry. Isaac Marrache explained that the Fortress House safe was opened in early July 2019 by a locksmith and that to the best of his knowledge his mother had had the key to the safe but that the key had been lost.

45 In cross-examination, Isaac Marrache said that he had not referred to the letter of wishes in earlier proceedings because he had forgotten about it as he could not remember all the documents he had drafted in the last forty years. Isaac Marrache said that he expected that he would have kept the original letter of wishes in the offices of Marrache & Co. with a copy in the Fortress House safe although he did not see the document until it emerged from the Fortress House safe in July 2019. He also said that Mr. Lavarello and Mr. Hyde would have seen this document if they had carried out a proper search for documents.

46 Isaac Marrache said that he could not recall whether he had spoken to the claimant in late December 2009/January 2010 but what he did recall in connection with Fortress House (although he could not say when) was having a conversation with the claimant when it came to his attention that the claimant was considering entering into an agreement with Benjamin Marrache concerning the sale of his share in Fortress House. Isaac Marrache said that he was shocked and went "ballistic" when he heard about this and that he was not prepared to get involved in any such sale as he feared that his nephews and nieces would hold it against him in the future.

47 Benjamin Marrache also gave evidence in support of this claim and he recalled the evidence he gave in the 2016 claim which was to the effect that some payments were made to the claimant in respect of his share in some of the family properties but that the matter had never been completed due to lack of funds. He had also said that he had been leading on those negotiations and that Fortress House had not been included as part of that deal. When he gave evidence in the 2016 claim on November 9th, 2017, Benjamin Marrache had recalled that there was an email to Gibland which corroborated his evidence but at that stage he could only give evidence from memory as he had been brought down from prison to give his evidence as he was then still serving his sentence and had no access to his documents.

48 On November 17th, 2017 and shortly after giving his evidence, Benjamin Marrache was released on parole and he found many documents at his home including the email which he had recalled when giving his evidence some days before. The relevant thread of emails starts with an

email dated November 16th, 2009 and timed 7.37 p.m. from Leanne Turnbull, an employee of Marrache & Co. to Hayley Canepa who was the head of Marrache & Co.'s corporate arm, Gibland, and Gardenia McMahon, one of Gibland's corporate directors. This states that Ms. Turnbull had received instructions from the four trustees in the estate of the late Samuel Marrache, namely Isaac, Benjamin, Solomon and Abraham Marrache to make the necessary alterations to the shareholding in various companies including Haslaha. It further states:

> "In the case of Haslaha—this is to be divided equally between Isaac, Benji, Solly, Abe, Joshua, Raphie and Rebecca . . . With regards [*sic*] to Raphie's share, please pick a shelf company, the owner of which will not be Raphie but I believe Isaac and Benji although please take direct confirmation from the four Trustees on this . . ."

49 Although this suggests that the owner of the claimant's share is Isaac or Benjamin Marrache, in cross-examination Benjamin Marrache said that this just represented an incorrect belief by Ms. Turnbull which was later cleared up by him if one reads the email chain to the end. The next mail in the thread is dated November 16th, 2009 and timed 10.19 p.m. from Abraham (Abe) Marrache and addressed to Leanne, Hayley and Gardenia, and states insofar as is material as follows:

> "As regards Raphie's interest, I have not been privy to any negotiations with him and so, would suggest you contact Raphie and which Trustee(s) was/were in negotiations with him, in order to secure a definitive picture of what is to be done. I, as a Trustee, cannot sanction any registration of his beneficial interest until that position is clear."

50 The matter was picked up again on January 13th, 2010 in an email from Gardenia McMahon to Isaac, Benjamin, Solomon and Abraham Marrache states the following in relation to Haslaha:

> "In respect to Raphie, I have assigned a shelf company to hold the shares but I need confirmation of the following:
>
> In the case of Haslaha Limited I have been informed that with regards to Raphie's shares the owner will not be him but will be Isaac and Benjy. Can this be confirmed by the four trustees in writing. If this is the case will this apply to the other companies, if not I will have to then assign another shelf company to hold the other shares of the other companies in Trust for Raphie."

51 On January 18th, 2010 at 12.46 p.m., Benjamin Marrache replied to Gardenia and all the other recipients of the previous email as follows:

"Dear Gardenia,

Raphaels Shares [*sic*] in Fortress House should either be in his name or in a company selected by him.

Regards,

Benji"

52 On January 18th, 2010 at 5.10 p.m., the claimant replied to Abraham Marrache and copied Isaac Marrache and states as follows:

"Abe Ike, Just received this from Benjie [sic] after speaking to him this morning where he reassures me that my shares in Fh are not sold.

Tried calling several times today.

Sara sent me a message this morning asking me to call her, I did but also no reply.

Much love.

Raphael"

53 In his cross-examination, Benjamin Marrache said that he was the person leading on these negotiations and that his email dated January 18th, 2010 confirmed the true position. In cross-examination, Benjamin Marrache was referred to what has come to be known as "the Rebecca tapes," a covert recording of conversations between Benjamin, Solomon, Rebecca and Rebecca's husband recorded at, or near to, the time of the collapse of Marrache & Co. In this recording (which is dealt with at 2018 Gib LR 24, at para. 89), Benjamin Marrache excluded the claimant from having a share in Fortress House. Benjamin Marrache stated that the conversation recorded in the Rebecca tapes was emotional and unclear and that he made an assumption which was later corrected. He also said that at that time members of the family were feuding and much was being said but nothing concrete could be drawn from this.

The defendants' case

54 The defendants submit that under the principle of *res judicata* and, more specifically, cause of action estoppel and, alternatively, issue estoppel, the claimant is estopped from proceeding with this claim. They say that at the time of the 2016 claim everyone believed that the claimant's interest in Fortress Houses devolved through Reina Marrache's estate but that it was now plain that was incorrect and that each of the siblings held equal beneficial ownership in the shares in Haslaha. In the defendants' submission, this mistaken belief which found its way into the 2016 claim does not detract from the fact that the judge specifically decided that the claimant sold his contingent interest in Fortress House by whichever

means that arose, along with his interest in other Marrache family properties. Further, they submit that the 2016 claim involved the same parties as the parties to this claim except for Haslaha which they say is a privy of the third defendant's who, as trustee in bankruptcy, owns and controls it through EMDir Ltd.

55 As such, the defendants submit that cause of action or alternatively issue estoppel debars the claimant from raising the same claim again in these proceedings. Further, they say that there are no grounds to reopen an issue estoppel (which is less absolute than cause of action estoppel) on the grounds that the letter of wishes (or indeed any other document) has since come to light. They contend that these documents, in particular the letter of wishes, could have been obtained by the claimant using reasonable diligence and does not undermine the decision made by the judge in the 2016 claim. The defendants' view, therefore, is that this is nothing more than an opportunistic attempt by the claimant to have a second bite at the cherry on a matter on which the court has already adjudicated upon.

56 Alternatively, the defendants submit that the claim amounts to an abuse of process under the well-known rule in *Henderson* v. *Henderson* (3) which requires litigants to bring their whole case before the courts, and that there are no special circumstances which allow the claimant to make this claim.

57 As regards the error regarding ownership of Fortress House, the defendants say that they relied on information provided by the Marrache siblings. Further, regardless of where the fault lies in the mistake that was made, it was abundantly clear that the claimant's full contingent interest in Fortress House, amongst other properties, was the subject of the 2016 claim and that he has suffered no prejudice. The defendants refer to the various judgments which make reference to the claimant's interest in Fortress House to illustrate this and say that the error is analogous to a mistaken address or location or description of a property whose ownership has been adjudicated on and which would not undermine the effect of any such decision.

58 The defendants relied on the evidence of the third defendant who is a chartered accountant by profession and who has been a partner at PricewaterhouseCoopers Ltd. in Gibraltar for eighteen years. He is also an insolvency practitioner in Gibraltar. The third defendant explained that it had not been easy to get to the bottom of the Marrache family affairs. For a start, when he first attended the offices of Marrache & Co. following his appointment, the police had taken all the firm's records and there were practically no documents left. Further, most assets were held by nominee companies. This, coupled with the unhelpful attitude of the bankrupt brothers, if not all of the Marrache siblings, meant that it had not been an easy task for him and Mr. Hyde to identify who owned which asset. The

third defendant explained that he had found no file on Fortress House which meant that he had to constitute a file which included copies of the title deeds that he had obtained from the Land Registry. He had also made inquiries from the Marrache siblings about this property including raising it in private examinations in court.

59 As regards the letter of wishes, the third defendant confirmed that when this was referred to by Mr. Seruya at a hearing on August 7th, 2019, Ms. Joanne Wild, who is an experienced lawyer and a member of his team, was asked to conduct a search of their records to try and find it, and located it that same day. Whilst the third defendant said that it was regrettable that this was not discovered before, he noted that this document had not responded to the disclosure search terms employed for the purposes of the 2016 claim. He also explained that he had received a considerable amount of documentation from the Royal Gibraltar Police on May 9th, 2019, after the 2016 claim had been determined, and his view was that the most plausible explanation for the letter of wishes not having surfaced before was because this had only come into his possession on May 9th, 2019 but he accepted that he could not be sure about this. The third defendant also made the point that a copy of the letter of wishes had been in the safe at Fortress House and could have been retrieved by the Marrache family much earlier.

60 The third defendant stated that at the time of the 2016 claim there was clear unchallenged evidence that ownership of Fortress House devolved under the estate of Reina Marrache and that the purpose of the 2016 claim was to obtain confirmation that the claimant's interests in the estate of his late mother, which everyone believed included Fortress House, vested in him as trustee in bankruptcy. He accepted that the 2018 order may not have the confirmatory effect intended as it had become clear the claimant's beneficial interest in Haslaha did not derive from the estates of his parents. In his view, however, this did not detract from the findings made in the 2018 judgment including the judge's conclusion that the ledger and balance sheet represented genuine records concerning the sale by the claimant of his interest in the Marrache family properties which included Fortress House and that payments in excess of £1m. had been made to the claimant in that regard. He referred to the fact that Fortress House was listed on a balance sheet which attributed a value of £617,142.86 for the claimant's one-seventh share. Whilst the judge only had the benefit of the first version of the draft agreement, which did not expressly refer to Fortress House, the second draft of the agreement has since emerged which, the third defendant said, reinforced the judge's findings as it specifically lists Fortress House as a property which the claimant had an interest in, and which he agreed to release in consideration of a payment of a sum which is not specified in the draft. The third defendant relied on the judge's findings that the claimant had sold his

interest in the Marrache family properties and said that the error concerning the means by which the claimant came to own his contingent interest in Fortress House did not affect his ownership of the claimant's share.

61 In cross-examination, it was put to Mr. Lavarello that there were various leads which pointed to the true ownership of Fortress House which he could have discovered with reasonable diligence. This line of cross-examination was directed mainly at the 1993 deed of conveyance which confirmed that Fortress House was owned by Haslaha and subject to the terms of a trust dated September 9th, 1983 and to a statutory declaration to the effect that the estate of Samuel Marrache did not exceed £20,000. As regards the former, Mr. Lavarello said that he had probably scanned the 1993 deed of conveyance prior to the commencement of the 2016 claim but had probably not read it in detail. His recollection was that inquiries had been made of a trust but that all that came up was "The Marrache Settlement" and "The Fortress House Settlement," neither of which referred to Fortress House and which turned out to be irrelevant. Mr. Lavarello went on to say that he presumed that the reference to a trust in the 1993 deed of conveyance was to a trust that had not been executed.

62 Further, Mr. Lavarello referred to numerous occasions and different contexts when the Marrache siblings had indicated that Fortress House had devolved under the estates of their father and mother, and he provided various examples such as the statement of affairs provided in February 2010 by Benjamin and Solomon which refers to Fortress House forming part of their "late parents' estates." In response to investigations carried out by Mr. Lavarello, Rebecca Marrache had confirmed on May 31st, 2012 that she owned a one-seventh share in her parents' estates which included Fortress House.

63 In an examination of Benjamin Marrache which took place before Jack, J. on June 29th, 2016, Benjamin Marrache said that ownership of Fortress House was transferred to a company as part of the estate planning before his father died. This company is referred to as "Hazler" in the transcript of the examination, which it was accepted was an incorrect reference to Haslaha. When asked whether his mother took the beneficial interest of a hundred per cent of that company, Benjamin Marrache then said that she would have done and it was then put to him that when she passed away her interest would have devolved to her children in equal shares. This appears to represent what the parties understood the position to be in 2016. At the hearing which took place on January 26th, 2018, the claimant stated that Fortress House was inherited by his mother on his father's death and thereafter by him and his six siblings.

64 Mr. Young on behalf of the claimant put it to the third defendant that he would have known that this was wrong because the 1993 deed of conveyance transferred Fortress House to Haslaha shortly before Samuel

Marrache's death and that he would have had a healthy scepticism regarding anything said by the bankrupt brothers. In particular, he put it to the third defendant that that healthy scepticism would have led him to test the assertions made in the statement of affairs regarding Fortress House. The third defendant said that he was aware that Fortress House had been the Marrache family home and he assumed that Haslaha, which he came to learn about in around 2010, was owned by Samuel and Reina Marrache, and was a vehicle of convenience. In the end, he did not feel that this would have made any difference as he had assumed the shares in Haslaha would have been held by a Gibland nominee company.

65 Quite apart from the clear signpost contained in the 1993 deed of conveyance, it was put to the third defendants that there was a further lead on the ownership of Fortress House contained in an estate duty declaration dated December 18th, 2001 where Abraham, Isaac, Solomon and Benjamin Marrache, as executors of the estate of their late father, Samuel Marrache, confirmed that their late father's estate did not exceed £20,000 and which showed that Fortress House did not fall within it. The third defendant explained that he would have seen this document when preparing the 2016 claim but would not have attached much importance to it. Ultimately, the third defendant's view was that whether the claimant's interest passed to him as a beneficiary of his mother's estate or as the beneficial owner of shares in Haslaha made no difference to the finding in the previous proceedings that the claimant's interest had been sold and that he now owned those shares.

Analysis

66 In *Virgin Atlantic Airways Ltd.* v. *Zodiac Seats UK Ltd.* (7), Lord Sumption restated the modern law on *res judicata* which he described as a portmanteau term used to describe a number of different legal principles with different juridical origins, such as traditional *res judicata* estoppels including cause of action estoppel and issue estoppel, and the wider doctrine including *Henderson* v. *Henderson* abuse of process. Further, he cited with approval *Arnold* v. *National Westminster Bank plc.* (1) which deals with cause of action estoppel and issue estoppel and *Johnson* v. *Gore Wood & Co.* (4), which deals with the principle in *Henderson* v. *Henderson* (3). In *Arnold* v. *National Westminster Bank plc*, Lord Keith of Kinkel defined cause of action and issue estoppels as follows ([1991] 2 A.C. at 104–105):

> "Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of

new factual matter which could not have been found out by reasonable diligence for us in earlier proceedings does not, according to the law of England, permit the matter to be re-opened.

. . .

Issue estoppel may arise when a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to re-open that issue."

67 In his judgment in *Virgin Atlantic* (7) ([2013] UKSC 46, at para. 21), Lord Sumption referred to the fact that in the case of issue estoppel, unlike cause of action estoppel, it was in principle possible to challenge the previous decision on the relevant issue not just by taking a new point which could not reasonably have been taken on the earlier occasion but by re-arguing in materially altered circumstances an old point which had previously been rejected. Those altered circumstances include further material becoming available which was relevant to the correct determination of a point involved in the earlier proceedings but which could not, by reasonable diligence, have been brought forward in those proceedings.

68 The principle in *Henderson* v. *Henderson* (3) was expressed by Lord Bingham in *Johnson* v. *Gore Wood & Co*. (4) as follows ([2002] 2 A.C. at 31):

". . . *Henderson v. Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to

> what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

69 The claimant says the cause of action in the 2016 claim was confined to an alleged sale of the claimant's interest in "the Family Properties" as defined in the particulars of claim which referred to seven listed properties which it was said devolved under the estates of Abraham and Reina Marrache and not to the sale of shares in Haslaha which form the subject to the present claim. The defendants say that despite the incorrect way in which the claimant's contingent interest in Fortress House was pleaded in the 2016 claim, that claim was clearly concerned with the sale of the claimant's entire contingent interest in Fortress House amongst other things, by whatever legal means that had arisen.

70 A cause of action was described by Lord Diplock in *Letang* v. *Cooper* (5) ([1965] 1 Q.B. at 242–243) as a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. Further, in determining the nature of a cause of action in a claim, a broad inquiry should be undertaken including full consideration of the facts established, the reasons given by the judge for his decision, the statements of case and the evidence. Whilst an error was clearly made concerning the ownership structure of Fortress House and how the claimant came to acquire a contingent interest in that property, the fact is that all the parties to the 2016 claim, including the claimant herein, proceeded on the basis that the claimant's alleged sale of his entire contingent interest in Fortress House (as well as other interests) represented the gravamen of that action. Whilst it is regrettable that an error found its way into the 2016 claim concerning the basis on which the claimant held his contingent interest in Fortress House, a full review of the judge's reasoning in the 2018 judgment and the 2018 supplementary judgment bears out the fact that the factual situation which the court was concerned with in the 2016 claim was whether the alleged sale of the claimant's contingent interest in Fortress House (and other properties) had taken place. This is reinforced by the Court of Appeal's judgments. The judge's references to the claimant's interest in the estates of his grandfather and mother came about because that was the basis on which all parties (wrongly) understood the claimant's contingent interest in Fortress House arose. It is true that there were other properties which formed part of the sale by the claimant which may or may not come under the estates of Abraham and Reina Marrache but this does not mean that the sale of the claimant's contingent interest in Fortress House was not a core aspect of the 2016 claim which it clearly was.

71 The judge in the 2016 claim paid particular attention to whether Fortress House was excluded from the agreement, he took account of the fact that the one-seventh share in the value of Fortress House was given as £617,142.86 in the balance sheet which was a document which he held he should have regard to (2018 Gib LR 24, at para. 102), and he rejected Benjamin Marrache's evidence that Fortress House was excluded from the sale and observed that this was at odds with what he had said in the "Rebecca tapes" (at para. 104). Finally, he came to the conclusion that it was more probable than not that the agreement "covered [the claimant's] potential future interest in the properties owned by his mother, including Fortress House" (at para. 105). The judge also said in the 2018 supplementary judgment (2018 Gib LR 19, at para. 9) that "the parties were clearly proceeding on the basis that the claim involved all of [the claimant's] interests in the family's properties." When this is all viewed in context, and taking into account the mistake everyone had made, the judge was clearly including the claimant's full stake in Fortress House as part of the sale.

72 The claimant's contingent interest in Fortress House played so prominent a part in the proceedings that when the matter came before the Court of Appeal, the claimant's wife, acting as his *McKenzie* friend, said that the claimant had at all times believed that the 2016 claim related only to Fortress House (para. 61 of the judgment of Smith, J.A. dated September 27th, 2018). Smith, J.A. also referred in her judgment to the fact that the properties which were the subject of the claim had been said to devolve under the wrong estate was "plainly a slip" (para. 62). There had been a slip, although it has since become clear that this was not the only error which had been made, but there had also been an error in the failure to refer to the fact that the claimant's interest in Fortress House arose through his beneficial shareholding in 142 shares in Haslaha because of the arrangements which were made shortly before his father died and which was not known by the parties at the time of the 2016 claim and the subsequent appeals. Despite this mistake, however, the question of whether the claimant sold that contingent interest in Fortress House (together with other interests) was clearly what the 2016 claim was about.

73 If the narrow approach commended by the claimant is adopted, it would mean that because we now know that the claimant's interest in Fortress House did not come within the estate of Abraham Marrache or Reina Marrache (other than Reina Marrache's single share in Haslaha's shareholding) the conclusion to be drawn is that the 2016 claim was not concerned at all with the claimant's contingent interest in Fortress House. In my judgment, such a conclusion can only be drawn by carrying out a selective and decontextualized assessment of what the 2016 claim was about rather than a broad and pragmatic inquiry into the 2016 claim.

74 Whilst Mr. Young emphasizes the danger of looking too carefully for estoppels based on matters which were not in issue (which in this case he says means the ownership of shares in Haslaha) and the need for the inquiry to be carried out "with unrelenting severity," this does not mean approaching the matter in an artificial or abstract way by reference to definitions which were clearly wrong, and without regard to the substance of what the 2016 claim was truly about. Whilst we now know that the claimant's stake in Fortress House arose indirectly as a beneficial owner of 142 shares in Haslaha and not as a beneficiary of his mother's (or indeed grandfather's) estate it was the sale of that contingent interest which all the parties and the court directed their minds to, even though they were mistaken as to how it arose. Further, estoppels must be applied to work justice and not injustice and it would not be just to reopen an issue which was determined by the judge in previous proceedings following a trial because an error found its way into the proceedings. The claimant says that any potential injustice could have been mitigated by Mr. Lavarello and Mr. Hyde by making an application under the liberty to apply the provision contained in the 2018 order as they had indicated that they would in an email dated October 10th, 2019. Whether or not that course could have resolved the matter, it does not in my view lessen the injustice which would flow if the claimant were allowed to reopen an issue which has already been determined.

75 I also reject the claimant's submission that the failure to correctly plead the nature of the interest which was being sold means that the contractual claim fails due to uncertainty of subject matter, as the claimant alleges. Whether the claimant's one-seventh interest arose as the beneficial ownership of 142 shares in Haslaha or as the beneficiary of Reina Marrache's estate which it was understood was the shareholder in Haslaha, all parties understood what was being sold and therefore there was no uncertainty so as to render the contract unenforceable or to affect the operation of the estoppel.

76 Whether or not the claimant's sale of his entire contingent interest in Fortress House represents the cause of action which was determined in the 2016 claim, it is in my judgment, and for the reasons given above, at least an issue which was raised and determined in the 2016 claim even though there was a mistake in the way that the claimant's interest was referred to. This means that in the alternative, issue estoppel applies as against the claimant. Are there special circumstances which prevent the operation of issue estoppel against the claimant? In my view there are no such special circumstances. The late discovery of the letter of wishes showed that there had been an inaccuracy concerning the legal basis on which the claimant's contingent interest in Fortress House was founded but it did not make any difference to the determination as to whether or not the claimant had sold that interest.

77 For the sake of completeness, I should add that the other documents which have emerged since the 2016 claim was determined similarly do not prevent the estoppel from operating against the claimant. The second draft of the agreement if anything supports the judge's conclusion but given that it is a draft document which was never executed, it does not really take matters much further one way or another. Similarly, the emails provided by Benjamin Marrache cannot be accorded much weight and do not justify a challenge to the previous decision. Whilst Benjamin Marrache's email dated January 18th, 2010 supports the view that the claimant's stake in Fortress House did not form part of the agreement, it is at odds with Leanne Turnbull's email dated November 16th, 2009 where she states that she has received instructions from the four trustees of the estate of the late Samuel Marrache, namely Isaac, Benjamin, Solomon and Abraham Marrache, to alter the shareholding of various companies, and in the case of the claimant's share in Haslaha she believed the owners would be Isaac and Benjamin Marrache. It is true that Ms. Turnbull asked the recipients of her email to obtain direct confirmation on this but Leanne Turnbull formed her initial view that the claimant's share would be owned by Isaac and Benjamin from instructions received by Isaac, Benjamin, Solomon and Abraham Marrache. It is also significant that the email dated January 18th, 2010 was sent by Benjamin Marrache, a convicted fraudster and bankrupt, shortly before the collapse of Marrache & Co. which led to his downfall. Further, the contents of that email do not accord with what he said in the "Rebecca tapes" or indeed with the findings made by the judge in the previous proceedings who had regard to the payments which were made to the claimant, the balance sheet and the ledger.

78 As well as issue estoppel as a form of *res judicata* in the strict sense, the defendants rely in the alternative on issue estoppel in the wider sense under the rule in *Henderson* (3). As Lord Bingham said in *Johnson* v. *Gore-Wood* (4), when considering the rule in *Henderson*, in order to determine whether a subsequent claim is abusive, a broad merits-based approach is required which takes into account the public and private interests and the facts of the case focusing attention on whether in all the circumstances a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. This is not a true case of *res judicata* but rather based on the principle of public policy in preventing multiplicity of actions and that there should be an end to litigation.

79 The claimant submits that he is not misusing the process of the court and that this claim should be viewed as "working out" the declarations made in the 2016 claim which is consistent with those declarations. As I have said above, the fact is that all parties proceeded on the wrong footing as to the legal basis on which the claimant's contingent interest in Fortress House arose does not detract from the fact that the subject of the 2016

claim concerned the sale of that interest by whichever legal means that arose. Whilst it is indeed unfortunate that a mistake was made regarding the legal basis on which the claimant owned his contingent interest in Fortress House, there is no need for any such working out and to the extent that any such working out is required, it would only require a correction as to the legal basis on which the claimant's contingent interest in Fortress House arose.

80 Further, I do not consider that there are any special circumstances justifying the disapplication of the rule in *Henderson* (3) for the same reasons given above. Particular reliance was placed on the letter of wishes in this regard with the parties seeking to apportion the greater blame to the other for not having discovered it earlier. For the reasons which I have already given, I do not regard the discovery of this document would have made any difference to the outcome of the previous proceedings and such as to justify the disapplication of the rule in *Henderson*. The public interest behind this rule is to prevent a party being vexed twice in the same matter and promote efficiency and economy in the conduct of litigation. To allow this claim to proceed would run counter to that policy as it would represent the reopening of an issue based on an error which was not material to that decision and which has been conclusively determined. The claimant's submission that the relief which he is seeking in this claim is entirely consistent with the declarations made in the 2016 claim is only correct if one approaches the matter in a mechanical way by focusing on the error made and without proper regard being paid to the substance of what the judge decided in the 2016 claim. Similarly, the fact that the claimant was not legally represented in the earlier proceedings (although he had instructed Mishcon de Reya for some time) does not mean that the rule in *Henderson* should not apply in full measure: see *Divine-Bortey* v. *Brent LBC* (2) ([1998] I.C.R. at 895, *per* Simon Brown, L.J.). In my judgment therefore the rule in *Henderson* also means that the claimant is debarred from bringing this claim.

81 Finally, the defendants submit that even if they are wrong about the claimant being debarred from bringing these proceedings, the claimant's claim should nevertheless fail because he has failed to satisfy the court that he should be entitled to 142 shares in Haslaha. In particular, they refer to the fact that the claimant's case is largely based on the technical defects of the 2016 claim and not on his entitlement to the shares claimed.

82 The defendants rely on the evidence of Mr. Lavarello, an office holder who together with Mr. Hyde has conducted a thorough investigation into the affairs of Marrache & Co. and to the payments made to the claimant amounting to £1,109,138.02. As a result, Mr. Lavarello has explained that ownership over the shares in question has been transferred by the claimant and belongs to him. Further, he relies on the 2018 judgment which supports his assessment in this regard but he makes the

point that this was a conclusion that he had reached in any event and that the 2018 judgment only served to confirm it. The claimant says that the 2016 claim shows that payment of £1,109,138.02 relates to interests other than these shares and that it therefore falls on the defendants to show why they are entitled to the shares and that they have failed to do so.

83 I have already held that the claimant is debarred from proceeding with this claim but, if I am wrong about that, I agree with the defendants that the assessment carried out by Mr. Lavarello regarding the ownership of the shares is to be preferred to the assertion made by the claimant as to ownership of those shares. Mr. Lavarello and Mr. Hyde have concluded that the claimant has relinquished his rights over those shares and regardless of whether that decision of the judge in the previous proceedings estops the claimant from bringing his claim or not, it supports that conclusion because the judge was clearly concerned with the claimant's one-seventh interest in Fortress House which these shares represent, albeit indirectly.

Conclusion

84 For the reasons set out above, I dismiss the claimant's claim to 142 shares in Haslaha which are currently vested in Mr. Lavarello's nominee on the grounds that he is estopped from bringing this claim in the light of the findings of the judge in the 2016 claim, alternatively that the claim is an abuse of the process of the court, and alternatively that he has failed to make out his case. It follows, therefore, that the claimant's case against the defendants based on estoppel and abuse fails.

85 I will now consider submissions from the parties as to costs and as to the orders to be drawn up following the handing down of this judgment.

Claim dismissed.