Neutral Citation Number: [2017] EWCA Civ 137

Case No: A3/2015/3573

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
Edward Murray (sitting as a Deputy Judge of the Chancery Division)
HC13E04392

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/03/2017

Before:

LORD JUSTICE KITCHIN
LORD JUSTICE FLOYD

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Between:

(1) Amanda Stephanie Clutterbuck **(2) Ian Scranton Paton**	**Claimants/ Appellants**
- and -	
William Cleghorn (as judicial factor to the estate of Elliot Nichol deceased)	**Defendant/ Respondent**

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The Claimants/Appellants appeared in person
Jonathan Seitler QC and Ms Emer Murphy (instructed by Squire Patton Boggs (UK) LLP) appeared for the Defendant/Respondent

Hearing date: 18 January 2017

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Approved Judgment

Lord Justice Kitchin:

Introduction

1. This is an appeal by the claimants, Ms Amanda Clutterbuck and Mr Ian Paton, against the decision of Mr Edward Murray, sitting as a deputy judge of the Chancery Division, dated 11 September 2015 and his consequential order dated 9 October 2015 striking out their claim against the defendant, Mr William Cleghorn, as the judicial factor to the estate of Mr Elliott Nichol, entering judgment for Mr Cleghorn and ordering the claimants to pay to Mr Cleghorn his costs of the action. The claimants now appeal with permission granted by Sir Timothy Lloyd by order dated 13 January 2016.

2. There is also before the court an application by the claimants for permission to adduce new evidence upon this appeal. That application was refused upon the papers by Lewison LJ by order dated 19 December 2016. The claimants requested that this decision be reconsidered at an oral hearing and so it is that it has come before the court with the substantive appeal.

Background

3. The claimants were at all relevant times property developers of residential properties in central London and, at least until the commencement of these proceedings in August 2013, lived together as man and wife. Their claim related to various agreements which they contended they entered into with Mr Nichol, a Scottish businessman who died on 29 December 2009. Mr Cleghorn was appointed as judicial factor of Mr Nichol's estate ("the Estate") on 30 September 2011 by the Court of Session in Edinburgh. He is required to administer the Estate under the Scottish procedure of judicial factory and subject to the supervision of a court appointed officer known as the Accountant of Court.

4. The claim had three elements which I shall refer to as the "Pont Street Claim", the "Oriel Claim" and the "Cliveden Claim".

The Pont Street Claim

5. The claimants contended that in about July 2004 they, Mr Nichol and Ms Sarah Al Amoudi, whom Mr Nichol had represented to be a potential investor, agreed they would enter into a joint venture agreement ("the Pont Street JVA") to purchase and develop a property at 66 Pont Street, SW1. They also contended that the parties had, in addition, agreed to purchase and develop the neighbouring properties at 62 and 64 Pont Street. The profits made from the joint venture were, they said, to be divided equally between the claimants, on the one hand, and Mr Nichol and Ms Al Amoudi, on the other hand.

6. The claimants complained that the development did not take place as agreed as a result of breaches of the Pont Street JVA by Mr Nichol and that they had, in consequence, suffered losses in excess of £1 million.

The Oriel Claim

7. The claimants alleged that in about September 2005 they met Mr Nichol at the Oriel restaurant in Sloane Square and made an oral agreement as to the terms upon which they would undertake future joint ventures together ("the Oriel Agreement"). They contended the terms of the agreement were, inter alia as follows. The claimants would use their expertise to find properties suitable for development; the claimants would offer these properties to Mr Nichol and a consortium of investors, including Ms Al Amoudi, represented by Mr Nichol; that Mr Nichol, on his own behalf and on behalf of the members of the consortium, would be given a right to accept or reject the claimants' proposal to enter into a joint venture in respect of that property; and that if Mr Nichol accepted the offer, then a joint venture would be entered into pursuant to which Mr Nichol would ensure the provision of the necessary funds, the claimants and Mr Nichol would develop the property and the profits derived from the development would be split equally between the claimants, on the one hand, and Mr Nichol and the members of the consortium, on the other hand.

8. The claimants asserted that, pursuant to the Oriel Agreement, the parties entered into joint ventures for the development of six properties, only one of which, that in respect of 9 Cliveden Place, was the subject of a written agreement. The properties were:

   i) Herbert Crescent, SW1;

   ii) 19 Basil Street, SW3;

   iii) 50 Cadogan Square, SW1;

   iv) 8 Walton Place, SW3;

   v) 36 Drayton Court, SW1; and

   vi) 9 Cliveden Place, SW1.

9. The claimants contended that Mr Nichol acted in breach of the Oriel Agreement in relation to each of the six properties and that they had, as a result, suffered losses in excess of £40 million (excluding the losses in respect of 9 Cliveden Place).

The Cliveden Claim

10. On 3 August 2006 and allegedly pursuant to the Oriel Agreement, the claimants, Westbrooke Properties Limited ("Westbrooke"), an Isle of Man company beneficially owned by Mr Nichol, and Mr Nichol, as guarantor, entered into a written joint venture agreement ("the Cliveden JVA") concerning the development of 9 Cliveden Place. The claimants contended (i) that Mr Nichol fraudulently or negligently misrepresented the value attributed to the property by the Bank of Ireland, one of the funders of the development, and that this misrepresentation reduced the sums payable to the claimants under the agreement; (ii) that Westbrooke acted in breach of the agreement in various ways; (iii) that various sums were due and owing to them under the agreement in any event; and (iv) that they had, as a result, suffered losses and were owed sums amounting to in excess

of £2.5 million for which Mr Nichol was liable as a result of his misrepresentations or as guarantor.

11. Mr Cleghorn defended the whole claim. He denied that Mr Nichol entered into any binding contractual agreement with the claimants, save in relation to 9 Cliveden Place. He therefore denied the whole of the Pont Street Claim and the whole of the Oriel Agreement Claim.

12. More particularly in relation to the Cliveden Claim, Mr Cleghorn denied that Mr Nichol misrepresented the value attributed to 9 Cliveden Place by the Bank of Ireland and maintained that the valuation of the property in the Cliveden JVA reflected the parties' understanding of the value of the property as it then stood. Mr Cleghorn also denied that Westbrooke had been in any way in breach of its obligations under the Cliveden JVA or that any sums were due and owing to the claimants.

13. Finally and importantly, Mr Cleghorn asserted that the whole claim was liable to be struck out as an abuse of process in that it amounted to a "shorn-down" repetition of the claims unsuccessfully brought by the claimants against Ms Al Amoudi in action number HC12A02469 ("the Al Amoudi proceedings") and that this claim ought to have been brought in the context of those proceedings. It is this final aspect of the defence which gave rise to the strike out application.

The Al Amoudi proceedings

14. In these proceedings, issued in January 2010, the claimants contended, inter alia, as follows.

15. On various occasions from around 2003, the claimants entered into a series of joint venture agreements with Ms Al Amoudi and Mr Nichol or one or other of them for the development of properties in central London. Under the terms of these joint venture agreements, the claimants would provide the know-how, experience and contacts necessary to locate and acquire the suitable properties and carry out any necessary refurbishment; Ms Al Amoudi, Mr Nichol and the claimants would secure the necessary finance; and upon realisation of a joint venture, the profits derived from it would be divided equally between, on the one hand, the claimants and, on the other hand, Ms Al Amoudi and Mr Nichol.

16. One such joint venture agreement concerned a large development in Hans Place ("the Hans Place JVA"). Another concerned the development at 66 Pont Street, that is to say, the Pont Street JVA.

17. Yet others concerned the developments to which I have referred at:

    i) Herbert Crescent, SW1;

    ii) 19 Basil Street, SW3;

    iii) 50 Cadogan Square, SW1; and

    iv) 8 Walton Place, SW3.

18. Moreover, in their further information dated 20 May 2011, the claimants asserted that the joint ventures the subject of the claim incorporated the terms agreed between the claimants and Mr Nichol at the Oriel restaurant in September 2005, that is to say the Oriel Agreement.

19. The claimants continued that, pursuant to one or more of these joint venture agreements, they transferred to Ms Al Amoudi in 2007 various sums of money amounting to around £2.3 million by way of funding for various properties and a sum of around £800,000 for the purpose of refurbishing various properties. The claimants maintained that all of these monies or their proceeds were held on trust for the claimants and they were therefore entitled to the return of the monies or a declaration that they had a beneficial interest in any properties in relation to which they had been applied.

20. In addition, asserted the claimants, in order to give effect to the Hans Place JVA and in reliance upon various representations made by Ms Al Amoudi, the claimants transferred six properties ("the Security Properties") to Ms Al Amoudi at less than their true value. These representations were false and accordingly the claimants were entitled to rescind the Hans Place JVA and the transactions concerning the Security Properties. Moreover and as a result of breaches of the Hans Place JVA by Ms Al Amoudi, the agreement had not come fruition as planned and the claimants were therefore entitled to damages.

21. In April 2013 and shortly before the trial, the claimants amended their pleadings to assert that Ms Al Amoudi was introduced to the claimants by Mr Nichol as a potential joint-venturer and as a person who represented very substantial Saudi Arabian and other Middle Eastern investors. It was alleged, among other things, that Mr Nichol represented that Ms Al Amoudi was a Saudi Arabian Princess; that she was the daughter of Sheikh Mohammed Al Amoudi, a Saudi Arabian or Ethiopian billionaire; that she was a member of the Saudi Arabian royal family by marriage; that her mother was related to the Saudi Arabian royal family; and that she and her family were interested in investing in property in central London. It was said that the claimants relied upon these representations and were induced by them to enter into the joint venture agreements to which I have referred. The claimants also contended that the representations were false and were known to be so by Ms Al Amoudi who was guilty of fraud and deceit.

22. Ms Al Amoudi defended the claim. She denied that she was a party to any joint venture agreements or arrangements and contended that any involvement that Mr Paton may have had in her affairs and property dealings was as her trusted adviser in the context of a romantic relationship between them. She accepted that the sum of around £2.3 million was paid to her by Mr Paton and was used in the purchase of various properties but maintained that this was by way of repayment by Mr Paton of some of the monies he owed to her. She also contended that she had no knowledge of the Hans Place JVA and that the Security Properties were transferred to her at less than their full value as, once again, partial repayment of monies owed by Mr Paton to her and which she had lent to him. She counterclaimed against Mr Paton for, among other things, the balance.

23. The action came on for trial in July 2013. It lasted for over three weeks and the judge heard evidence from a large number of witnesses. They included Ms

Clutterbuck, Mr Paton, Mr Stephen Brook (a solicitor who acted for the claimants in relation to their property dealings), Mr Peter McCormick (who was responsible for managing Mr Nichol's property and business interests), Mr Peter Misselbrook (a solicitor with a wide property and business practice who acted for Mr Nichol at all relevant times) and Mr Francis Gonzalez (a surveyor who was engaged in relation to the development at Cliveden). Extensive written closing arguments were prepared and filed and closing submissions took two days in November 2013.

24. As I have mentioned, the judge handed down her judgment on 20 February 2014. She dismissed the claim and allowed part of the counterclaim. She made a large number of findings. Mr Jonathan Seitler QC, who has appeared on this appeal with Ms Emer Murphy, as he did below, has quite properly drawn attention to the following.

25. First, Mr Paton had a clandestine romantic relationship with Ms Al Amoudi; the suggestion that the Security Properties were transferred in reliance upon representations made by Ms Al Amoudi could not be sustained; and that Mr Paton did pay to Ms Al Amoudi the sum of around £2.3 million and the further sum of £800,000 to which I have referred at [19] but that he did so by way of repayment of sums loaned to Mr Paton by Ms Al Amoudi.

26. Second, there was never an Oriel Agreement giving Ms Al Amoudi and Mr Nichol a right of first refusal to develop properties sourced by Ms Clutterbuck and Mr Paton. Further and in any event, there was no evidence to connect Ms Al Amoudi to the Oriel Agreement and there was no evidence upon which to base a claim that Mr Nichol was acting as Ms Al Amoudi's agent.

27. Third, there were no joint ventures involving Ms Al Amoudi whether with or without Mr Nichol. Accordingly, there was never a Pont Street JVA to which Ms Al Amoudi was a party; nor was there a Hans Place JVA.

28. At this stage I should also say a little about the witnesses. Asplin J found Mr Paton to be a very unreliable and unsatisfactory witness. Indeed the judge found him to be so evasive that, unless his evidence was consistent with contemporaneous documents, she preferred the oral evidence of others where it differed from his account of events. As for Ms Clutterbuck, she said in evidence that she had no direct dealings with Ms Al Amoudi and that Mr Paton was the person dealing with all of the property joint ventures with which the claim was concerned. However, the judge continued, to the extent that Ms Clutterbuck had direct knowledge of the relevant events, her evidence was repetitious and guarded to such an extent that she too was an unsatisfactory witness. In addition, Ms Clutterbuck and Mr Paton relied upon documents which the judge found to be forgeries. Mr Brook, whose firm carried out the conveyancing work relating to Mr Paton's property dealings, was called on behalf of the claimants, but gave his evidence in an argumentative and aggressive style and the judge found him to be extremely evasive.

29. Ms Al Amoudi's evidence was not satisfactory either. The judge explained that most of it was given in a highly emotional manner which verged on the hysterical and barely made any sense and that she was generally evasive. Mr McCormick and Mr Misselbrook, on the other hand, who both gave evidence on behalf of Ms Al Amoudi, were careful witnesses and were clear and credible.

30. The claimants sought permission to appeal but this was refused by the judge and later by the Court of Appeal.

The history of these proceedings and the strike out application

31. In April 2011, that is to say over three years before the trial of the Al Amoudi proceedings, the executors of the Estate, Mr McCormick and Mr Misselbrook, received from solicitors then acting for Ms Clutterbuck and Mr Paton what purported to be a pre-action protocol letter of claim setting out the substance of the present claim and estimating the losses suffered by Ms Clutterbuck and Mr Paton at not less than £97 million.

32. The executors, through the solicitors acting on behalf of the Estate, sought further particulars of that the claim, and they also took advice as to their position. They were advised that, despite what was perceived to be a lack of merit in the claim, they should seek the appointment of a judicial factor to administer the Estate and that is what they proceeded to do. Mr Cleghorn was in due course appointed and, since his appointment, the Estate has had to be administered under the supervision of the Court of Session. This has fettered the normal administration and distribution of the assets of the Estate and has also resulted in substantial cost and expense.

33. Anticipating this expenditure, the Estate, through its solicitors, sought to bring pressure to bear upon the claimants either to issue proceedings or to withdraw their claim. A number of letters to this effect were written on behalf of the Estate to the claimants from December 2011 but it was not until 4 October 2013, that is to say after the close of oral evidence in the Al Amoudi litigation but before closing arguments, that this claim was finally issued.

34. On 19 February 2014 the claimants issued an application for summary judgment on part of the Cliveden Claim. On 24 March 2014 Mr Cleghorn issued his cross application to strike out the proceedings as an abuse of process, alternatively for summary judgment against the claimants in relation to the Pont Street Claim and the Oriel Claim.

35. All of these applications came on for hearing before the deputy judge in May 2015. During the course of that hearing and with the agreement of the parties, the deputy judge decided to hear the strike out application first on the basis that, if he acceded to it, the claimants' application for summary judgement would fall away and Mr Cleghorn's responsive application for summary judgement would no longer be necessary.

36. As the deputy judge explained in his judgment, Mr Cleghorn sought the striking out of the claim as an abuse of process on two interrelated grounds. First, the claimants should have sought directions during the course of their action against Ms Al Amoudi as to whether, and if so, how and to what extent, their claim against Mr Cleghorn should be combined with the claim against Ms Al Amoudi. The failure to do so was, so it was said, contrary to the guidelines and principles laid down by the Court of Appeal in *Aldi Stores Ltd v WSP Group plc* [2007] EWCA Civ 1260, [2008] 1 WLR 748. Secondly, the Pont Street Claim and the Oriel Claim amounted to an abusive collateral attack upon the decision of Asplin J.

The judgment

37. After setting out the background, the deputy judge approached the critical issues in the case by addressing first, the arguments based upon the *Aldi Stores* guidelines and secondly, the contention that the Pont Street Claim and the Oriel Claim amounted to an abusive collateral attack upon the decision of Asplin J.

The Aldi Stores guidelines

38. The deputy judge began his consideration of the first ground of the application by directing himself as to the principles of law applicable to an allegation of what has been called *Henderson v Henderson* abuse of process and in that regard cited the well-known passages from the speeches of Lord Bingham and Lord Millett in the House of Lords in *Johnson v Gore Wood & Co* [2002] 2 AC 1 at, respectively, page 31 A-F and page 59 D-G. He also referred to and cited passages from the decisions of the Court of Appeal in *Aldi Stores, Stuart v Goldberg Linde* [2008] EWCA Civ 2, [2008] 1 WLR 823 and *Gladman Commercial Properties v Fisher Hargreaves Proctor* [2013] EWCA Civ 1466, [2014] PNLR 11.

39. The deputy judge was clearly conscious that he had to be jealous to ensure that a genuine claim could be brought and that it would only be appropriate to strike out the claim as a *Henderson v Henderson* abuse in a rare or exceptional case. He recognised too that the burden of proof in making any such application lies upon the applicant and that, while the lack of identity of the defendants was a powerful factor against finding abuse, it was not a bar.

40. There followed a detailed consideration by the deputy judge of the application of these principles in the context of the present case. His essential findings may, I think, be summarised as follows.

41. First, it was abundantly clear that the *Aldi Stores* guidelines applied to each of the claims in this case. As for the Pont Street Claim, the essential facts of this claim were pleaded in the Al Amoudi case and the evidence adduced in relation to the development at Pont Street was substantially the same in both actions. In any event, the issue of whether there was an oral joint venture agreement between the claimants, Mr Nichol and Ms Al Amoudi was squarely before Asplin J and she reached a clear conclusion in relation to it, namely that there was no such agreement.

42. Turning to the Oriel Claim, this claim, as pleaded in relation to the five alleged joint ventures which were never reduced to writing, stood or fell with the existence of the Oriel Agreement. This was fully pleaded in the Al Amoudi case and it was pleaded in substantially the same terms in this case. Moreover, the witnesses and other evidence needed to establish the existence of the Oriel Agreement appeared to be substantially the same in both cases.

43. As for the Cliveden Claim, the claimants acknowledged that, although it did not involve Ms Al Amoudi, the essence of this claim was pleaded as part of the factual background of the claims against Ms Al Amoudi and that questions were asked of, in particular, Mr McCormick raising the issue of Mr Nichol's honesty and integrity in his dealings.

44. Secondly, the claimants had failed to give anything close to an acceptable excuse for not raising the question of their claims against Mr Nichol with the court for directions in accordance with the *Aldi Stores* guidelines during the course of the Al Amoudi case.

45. Thirdly, an inexcusable failure to follow the *Aldi Stores* guidelines was a heavyweight factor in the overall broad merits based judgment that the court must exercise in deciding an application of this type, but it was not, without more, dispositive.

46. Fourthly, it was necessary to consider all of the relevant factors and the case in the round. In that regard the following matters were material:

    i) Those acting for the Estate had sought, over a significant period, to get the claimants either to drop or to issue their claims (and it could not be said that the Estate had an equal responsibility to seek directions from the court because, although it had a natural interest in the progress of the Al Amoudi litigation, it was not a party).

    ii) Mr Gonzalez's professional integrity and competence were vigorously challenged in the Al Amoudi trial and Mr Nichol's personal integrity and honesty were put into question. It would be oppressive and harassing for issues concerning Mr Nichol's integrity and honesty to be raised again in in this case and for Mr Cleghorn, as the representative of the Estate, to have to address them.

    iii) The claimant had attempted to establish the liability of an alleged co-venturer in relation to the Pont Street Agreement and it had been decided that this agreement did not exist. The claimants had also had the benefit of a rehearsal of their evidence and arguments in relation to the Oriel Claim and the Cliveden Claim. It was hard to resist the conclusion that the claimants had used the Al Amoudi litigation as an opportunity to conduct a trial run of their claims against the Estate.

    iv) It was not possible to say what directions a judge would have given had the claimants complied with the *Aldi Stores* guidelines and sought directions. Nevertheless, the essential elements and evidence supporting the Cliveden Claim were for the most part known and directions could have been given to ensure that the claim was trial-ready.

    v) The original executors of the Estate, Mr McCormick and Mr Misselbrook, sought the appointment of a judicial factor to administer the Estate solely because of the intimation by the claimants, in their pre-action protocol letter, that they had a claim against the Estate in excess of £97 million. A claim of that size, if established, would have rendered the Estate insolvent. Moreover, the judicial factory is an expensive process incurring an annual premium in excess of £60,000 and the costs of the Accountant of Court. Further, insurance costs amounted to over £225,000 as of 31 July 2014.

    vi) The Estate had effectively been mothballed since 2011 as a result of the claimants' threatened action against it. Further, Mr Nichol's heirs had been

kept out of their inheritance for a lengthy period because Mr Cleghorn had not felt able to make any distributions pending the resolution of the claim.

47. The deputy judge concluded that having regard to all of these matters, the action was an abuse of process and to allow it to proceed would amount to unjust harassment of Mr Cleghorn as the representative of the Estate.

Collateral attack

48. The deputy judge began by directing himself as to the principles explained by the House of Lords in *Hunter v The Chief Constable of the West Midlands Police* [1982] AC 529 (HL). In that regard he cited two passages from the speech of Lord Diplock. In the first, at page 536C, Lord Diplock said this:

> "My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people."

49. Then, at page 541B, Lord Diplock continued:

> "The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made."

50. The deputy judge also referred to the decision of the Court of Appeal in *Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321, [2004] CH 1. There, Sir Andrew Morritt V-C reviewed a number of authorities before expressing his conclusions in these terms at [38]:

> "In my view these cases establish the following propositions. (a) A collateral attack on an earlier decision of a court of competent jurisdiction may be but is not necessarily an abuse of the process of the court. …. (c) If the earlier decision is that of a court exercising a civil jurisdiction then it is binding on the parties to that action and their privies in any later civil proceedings. (d) If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such

> relitigation would bring the administration of justice into disrepute."

51. There followed a consideration by the deputy judge of the circumstances of the Pont Street Claim and the Oriel Claim and he reasoned as follows. As for the Pont Street Claim, he considered that the only significant difference between this claim and that in the Al Amoudi proceedings was that the defendant was different. The issues and evidence were, however, broadly the same. Asplin J had reviewed all of this evidence in the Al Amoudi proceedings and concluded, at [417], not only that there was no joint venture between the claimants, Ms Al Amoudi and Mr Nichol, but also that there was no documentary evidence of Mr Nichol's involvement as a joint venturer at all.

52. As for the Oriel Claim, the deputy judge considered that this too had been pleaded in essentially the same terms in both sets of proceedings. Asplin J had again reviewed all of the evidence and found that the Oriel Agreement was not entered into between the claimants and Mr Nichol. In other words there was no such agreement.

53. In the circumstances, to allow the claimants to re-argue the Pont Street Claim and the existence of the Oriel Agreement on the basis of the same evidence as was or could have been before the court in the Al Amoudi procedings would, in the view of the deputy judge, bring the administration of justice into disrepute. In this context it was relevant that the claimants would have a second opportunity to challenge the credibility of witnesses whose credibility was unsuccessfully challenged in the Al Amoudi case, such as Mr Gonzales. For two different courts on different occasions to reach inconsistent conclusions on the credibility of a witness in relation to the same issue would bring the administration of justice into disrepute.

54. Moreover, the deputy judge continued, it would be manifestly unfair and oppressive to allow the claimants to pursue the Pont Street Claim and the Oriel Claim, and that was so largely for the reasons he had given in considering whether the breach of the *Aldi Stores* guidelines amounted to an abuse.

55. The deputy judge also noted that counsel then appearing for the claimants, Mr Cakebread, broadly accepted Mr Cleghorn's case. His resistance to the application was founded upon the possibility at that time of there being a successful appeal against the judgment of Asplin J. I should mention at this point that the possibility of an appeal has long since fallen away, however. Permission to appeal was finally refused by the Court of Appeal at an oral hearing on 28 October 2015.

56. For all of these reasons the deputy judge found that the Pont Street Claim, the Oriel Claim and the Cliveden Claim should be struck out as an abuse of process.

The application to adduce further evidence upon the appeal

57. It is convenient to deal with this application at the outset. The application is supported by witness statements of Mr Oliver Dykes, a solicitor acting for the claimants, dated 20 November 2016 and 20 December 2016. The application is

opposed by Mr Cleghorn and he relies upon a witness statement of Ms Laura Crawford, a solicitor acting for him, dated 13 December 2016.

58. The evidence which the claimants seek to introduce comprises two documents purporting to be contracts dated 25 August 2006 and entered into between Ms Clutterbuck or Mr Paton, on the one hand, and Westbrooke, on the other hand, for the sale of flats within 9 Cliveden Place; and an email dated 5 October 2006 sent by Mr Stephen Brook of Brook Martin & Co (who was at that time acting for both the claimants and Mr Nichol) to the claimants and, say the claimants, to Mr Nichol. In addition, the claimants seek to adduce evidence as to the completion statement submitted by Brook Martin to the Bank of Ireland who were providing finance in connection with the Cliveden development.

59. The claimants submit that this evidence only came into their possession between May and July 2016. They also submit, supported by the evidence of Mr Dykes, that each of the three documents to which I have referred is a forgery and that they show that Mr Nichol deceived the claimants into believing that they were all working together pursuant to the Cliveden JVA when in truth Mr Nichol had decided no later than April 2006 to acquire the whole of 9 Cliveden Place for himself, at the claimants' expense. They continue that Mr Nichol in some way fraudulently induced them to transfer to Westbrooke their interests in the flats the subject of the contracts for sale to which I have referred.

60. In my judgment this application must be dismissed. I have come to that conclusion for the following reasons. First, the allegation of fraud which these documents are said to support appears to go considerably wider than the Cliveden Claim as presently pleaded but has been presented in such general terms that it is not possible to determine its scope with any degree of precision. That is so despite the fact that the evidence is said to have come into the claimants' possession no later than July 2016.

61. Secondly, I am not persuaded upon the materials before me that this evidence supports a case of fraud (whether as originally pleaded or as now asserted) in any event. As for the sale contracts, these are, so it seems to me, entirely consistent with the Cliveden JVA, the terms of which required the claimants to transfer their flats to Westbrooke. Moreover, I am presently unable to see how the email of 5 October 2006 is supportive of a case of any kind of fraud. It refers to a decision by all parties to revert to the Cliveden JVA, subject to an advance by the claimants of £50,000 to the Grosvenor Estate.

62. Thirdly, I do not accept that these documents were not available to the claimants before the hearing before the deputy judge. The email of 5 October 2006 was exhibited to a witness statement made by Ms Crawford in opposition to the claimants' summary judgment application in relation to the Cliveden Claim and there were many references to the sale contracts in the documents disclosed in the Al Amoudi proceedings and in the evidence of Ms Crawford to which I have referred.

63. Finally and as Lewison LJ pointed out in refusing the application upon the papers, the strike out application was founded upon procedural grounds and I do not accept that these documents would probably have had an important influence upon the

underlying application or that they would probably have an important influence upon the outcome of this appeal.

The appeal

64. Although the claimants were represented by solicitors and counsel throughout the Al Amoudi proceedings and, until recently, in these proceedings (with their grounds of appeal and skeleton argument settled by counsel), they appeared in person at the hearing of their appeal to this court. As I have mentioned, Mr Jonathan Seitler QC and Ms Emer Murphy have appeared throughout on behalf of Mr Cleghorn. After the hearing of the appeal our attention was drawn to the recent decision of the Court of Appeal in *Michael Wilson & Partners Limited v Thomas Ian Sinclair and others* [2017] EWCA Civ 3. It appeared to us that this decision and the authorities cited in it might have a bearing upon the issues arising in this appeal and accordingly we drew it to the attention of the parties and invited them to file further short submissions in writing, if so advised. We have since received further written submissions settled by Mr Cakebread on behalf of the claimants and by Mr Seitler and Ms Murphy on behalf of Mr Cleghorn. I am grateful for those submissions and the speed with which they were provided.

65. The claimants pursue their appeal on the following grounds. They argue (i) that the *Aldi Stores* guidelines were never engaged; (ii) that if the guidelines were engaged, the deputy judge failed to apply the correct test or applied it incorrectly; and (iii) that the decision to dismiss their claim was wrong in principle and disproportionate.

66. I will deal with these grounds in turn but must begin with some general points. The first is this. It is necessary to have well in mind at the outset that, as Lord Kilbrandon said in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581 at page 590 and Lord Bingham reiterated in *Johnson v Gore Wood* [2002] 2 AC 1 at page 22C-E, litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court.

67. Secondly, it is clear that this right is not unlimited and that the court has an inherent power to protect its process from abuse. The principles applicable to an application to strike out a claim on the basis that it is an abuse of process to bring a claim that could and should have been brought in earlier proceedings were explained by Lord Bingham in *Johnson v Gore Wood* at 31A-F:

> "But *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 earlier 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. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

68. In assessing whether the conduct of a party is or is not an abuse, the court must therefore carry out a broad merits-based judgment which takes account of the public and private interests involved and also takes close account of the facts of the case. This exercise was described by Buxton LJ in these terms in *Taylor Walton (a firm) v Laing* [2007] EWCA Civ 1146, [2008] PNLR 11 at [12]:

> "The court… has to consider, by an intense focus on the facts of the particular case, whether in broad terms the proceedings that it is sought to strike out can be characterised as falling under one or other, or both, of the broad rubrics of unfairness or the bringing of the administration of justice into disrepute. Attempts to draw narrower rules applicable to particular categories of case (in the present instance, negligence claims against solicitors where an original action has been lost) are not likely to be helpful."

69. Clarke LJ also gave helpful general guidance as to how the issue of abuse of process is to be approached in *Dexter Ltd v Vlieland-Boddy* [2003] EWCA Civ 14 at [49] to [53]:

> "49. … (i) Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process. (ii) A later action against B is much more likely to be held to be an abuse of process than a later action against C. (iii) The burden of establishing abuse of process is on B or C or as the case may be. (iv) It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. (v) The question in every case is whether, applying a broad merits based approach, A's conduct is in all the circumstances an abuse of process. (vi) The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C.
>
> 50. Proposition (ii) above seems to me to be of importance because it is one thing to say that A should bring all his claims against B in one action, whereas it is quite another thing to say that he should bring all his claims against B and C (let alone against B, C, D, E, F and G) in one action. There may be many entirely legitimate reasons for a claimant deciding to bring an action against B first and, only later (and if necessary) against others.
>
> 51. Those reasons include, for example, the cost of proceeding against more than one defendant, especially where B is apparently solvent and the case against B seems stronger than against others. More defendants mean more lawyers, more time and more expense. This is especially so in large commercial disputes. It by no means follows that either the public interest in efficiency and economy in litigation or the interests of the parties, including in particular the interests of C, D and E, is or are best served by one action against them all.
>
> 52. It seems to me that the courts should be astute to ensure that it is only in a case where C can establish oppression or an abuse of process that a later action against C should be struck out. I could not help wondering whether the defendants in this case would have given their lawyers the same instructions on the question whether they should have been sued in the first action if they had been asked before that action began as they have given now that a later action has been begun.
>
> 53. It is clear from the speeches of both Lord Bingham and Lord Millett that all depends upon the circumstances of the particular case and that the court should adopt a broad merits based approach, but it is likely that the most important question

> in any case will be whether C, D, E or any other new defendant in a later action can persuade the court that the action against him is oppressive. It seems to me to be likely to be a rare case in which he will succeed in doing so."

70. Thirdly and as I have explained, it was contended on behalf of Mr Cleghorn that the proceedings against him constituted an abuse on two grounds, namely that there had been a failure by the claimants to comply with the *Aldi Stores* guidelines and that these proceedings constituted an abusive collateral attack upon the earlier judgment of Asplin J in the Al Amoudi proceedings. The deputy judge dealt with them separately. Nevertheless, they are both founded upon the same procedural rule that the court will intervene where necessary to protect the interests of justice and to prevent its procedure from being used in a way which would be manifestly unfair to a party to litigation before it or which would bring the administration of justice into disrepute. I shall return to the principles underpinning the *Aldi Stores* guidelines a little later in this judgment. The considerations of particular relevance to an allegation of abusive collateral attack upon an earlier judgment are set out in the passages from the speech of Lord Diplock in *Hunter* and the judgment of Sir Andrew Morritt V-C in the *Bairstow* cited by the deputy judge and which I have set out at [48] to [50] above.

71. Fourthly, the question whether an action is an abuse of process is one to which there is only one answer and does not involve the exercise of discretion. Nevertheless, it is one which calls for an evaluation of various factors and accordingly an appeal court will be reluctant to interfere with the decision of the judge, as Thomas LJ explained in *Aldi Stores* at [16]:

> "In considering the approach to be taken by this court to the decision of the judge, it was rightly accepted by Aspinwall that the decision to be made is not the exercise of a discretion; WSP were wrong in contending otherwise. It was a decision involving the assessment of a large number of factors to which there can, in such a case, only be one correct answer to whether there is or is not an abuse of process. None the less an appellate court will be reluctant to interfere with the decision of the judge where the decision rests upon balancing such a number of factors; see the discussion in *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2002] EWCA Civ 1642, [2003] 1 WLR 577 and the cases cited in that decision and *Mersey Care NHS Trust v Ackroyd (No 2)* [2007] EWCA Civ 101 at [35]. The types of case where a judge has to balance factors are very varied and the judgments of the courts as to the tests to be applied are expressed in different terms. However, it is sufficient for the purposes of this appeal to state that an appellate court will be reluctant to interfere with the decision of the judge in the judgment he reaches on abuse of process by the balance of the factors; it will generally only interfere where the judge has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion that was impermissible or not open to him."

No appeal against finding of abusive collateral attack

72. It is to be noted at the outset that there has been no appeal against the finding of the deputy judge that the Pont Street Claim and the Oriel Claim constituted an abusive collateral attack upon a final decision against the claimants in the Al Amoudi proceedings. Indeed, as I have explained, in relation to the question of collateral attack, counsel for the claimants broadly accepted Mr Cleghorn's case. The only substantive point taken was that the Al Amoudi proceedings had not at that stage come to a final conclusion. That point is, however, no longer open to the claimants. Moreover, although the question whether these two claims constituted an abusive collateral attack and the question whether there had been an abusive failure to comply with the *Aldi Stores* guidelines were interrelated and were both kinds of *Henderson v Henderson* abuse, the deputy judge treated them separately, apparently with the agreement of the parties, and answered them both in favour of Mr Cleghorn.

73. It seems to me that these matters present the claimants with an insuperable difficulty in relation to the Pont Street Claim and the Oriel Claim. There being no appeal against the finding of the deputy judge that these claims constitute an abusive collateral attack upon the judgment of Asplin J irrespective of any breach of the *Aldi Stores* guidelines, there is no basis upon which this court can interfere with it. Nevertheless, since we heard a good deal of argument concerning the correctness of the deputy judge's finding that these claims also constituted an abusive breach of the *Aldi Stores* guidelines and since, as I have said, the issues raised by both allegations of abuse are closely related, it seems to me to be right that I should deal with them. In so doing I shall consider first, whether there was a breach of the *Aldi Stores* guidelines and secondly, whether in light of any such breach and all of the other circumstances, including the extent of any attack upon the decision of Asplin J, the proceedings constitute an abuse of process.

Were the Aldi Stores guidelines engaged?

74. The claimants contend first, that the Al Amoudi proceedings and the present proceedings do not constitute complex multi-party litigation of the kind that Thomas LJ had in mind in the *Aldi Stores*; and secondly, that the *Aldi Stores* guidelines were not applicable in any event given the minimal factual overlap between the proceedings.

75. In assessing this submission it is important to have in mind the relevant passage of the judgment of Thomas LJ in *Aldi Stores*. He said this at [29]-[30]:

> "30. Parties are sometimes faced with the issue of wishing to pursue other proceedings whilst reserving a right in existing proceedings. Often, no problem arises; in this case, Aldi, WSP and Aspinwall each in truth knew at one time or another between August 2003 and the settlement of the original action in January 2004 that there was a potential problem, but it was never raised with the court. I have already expressed the view that it should have been. The court would, at the very least, have been able to express its view as to the proper use of its resources and on the efficient and economical conduct of the

> litigation. It may have seen if a way could have been found to determine the issues applicable to Aldi in a manner proportionate to the size of Aldi's claim and without the very large expenditure that would have been necessary if Aldi had to participate in the trial of the actions. It may be that the court would have said that it was for Aldi to elect whether it wished to pursue its claim in the proceedings, but if it did not, that would be the end of the matter. It might have inquired whether the action against excess underwriters could have been expedited. Whatever might have happened in this case is a matter of speculation.
>
> 31. However, for the future, if a similar issue arises in complex commercial multi-party litigation, it must be referred to the court seised of the proceedings. It is plainly not only in the interest of the parties, but also in the public interest and in the interest of the efficient use of court resources that this is done. There can be no excuse for failure to do so in the future."

76. It is clear that Thomas LJ was concerned to ensure that, in future, a party to commercial litigation who wishes to pursue a claim at a later date against the same or other parties in relation to the same commercial matter should put his cards on the table in the first claim so as to give the court an opportunity to consider whether and, if so, how, by appropriate case management directions, the resources of the court may utilised in the most cost effective and efficient way.

77. The importance of parties putting their cards on the table was emphasised by the Court of Appeal in *Stuart v Goldberg Linde*, a case in which the claimants sought to pursue a second claim against the same defendant, albeit raising issues which differed from those raised in the first claim. There Sedley LJ said this at [77]:

> "Secondly, as the *Aldi Stores Ltd* case again makes clear and as Sir Anthony Clarke MR stresses, a claimant who keeps a second claim against the same defendant up his sleeve while prosecuting the first is at high risk of being held to have abused the court's process. Moreover, putting his cards on the table does not simply mean warning the defendant that another action is or may be in the pipeline. It means making it possible for the court to manage the issues so as to be fair to both sides."

78. Sir Anthony Clarke MR put it this way at [96]:

> "For my part, I do not think that parties should keep future claims secret merely because a second claim might involve other issues. The proper course is for parties to put their cards on the table so that no one is taken by surprise and the appropriate course in case management terms can be considered by the judge. In particular parties should not keep quiet in the hope of improving their position in respect of a claim arising out of similar facts or evidence in the future. Nor should they do so simply because a second claim may involve

> other complex issues. On the contrary they should come clean so that the court can decide whether one or more trials is required and when. The time for such a decision to be taken is before there is a trial of any of the issues. In this way the underlying approach of the CPR, namely that of co-operation between the parties, robust case management and disposing of cases, including particular issues, justly can be forwarded and not frustrated. "

79. He concluded his judgment in these terms at [101]:

> "I only add by way of postscript that litigants and their advisers should heed the points made by this court in the Aldi Stores Ltd case and underlined here that the approach of the CPR is to require cards to be put on the table in cases of this kind or run the risk of a second action being held to be an abuse of the process."

80. In the *Gladman* case the claimants sought to pursue a second claim in which they made essentially the same allegations as those they had made in an earlier claim which they had settled. The defendants to the two claims, though different, were joint tortfeasors. The second claim was struck out on three grounds, namely first, that there was no reservation of rights and consequently the settlement of the first claim released the defendants to the second; secondly, that the second claim constituted a *Henderson v Henderson* abuse of process; and thirdly, the claimants had failed to plead in the second claim an intelligible claim for a loss further to that for which they had been compensated in the first action. An appeal against each of these findings was dismissed. In addressing the second, Briggs LJ (with whom Ryder and Longmore LJJ agreed) said this:

> "64. He [Thomas LJ] plainly regarded the requirement to refer a contemplated future claim for case management directions in the earlier claim as mandatory, and as serving the public interest in the efficient use of court resources. He described a failure to do so as inexcusable. Furthermore, in the *Stuart* case, both Sedley L.J. and Sir Anthony Clarke MR spelt out in express terms that a failure to follow the Aldi guidelines involved the claimant running a risk that the pursuit of a second claim would constitute an abuse.
>
> 65. As has been repeatedly stated, the conduct of civil proceedings is a process in which the stakeholders include not merely the parties, but also other litigants waiting for their cases to be tried, and the public at large, who have an interest in the efficient and economic conduct of litigation. I consider that Arnold J was correct to treat a failure by the Appellant to follow guidelines laid down as mandatory future conduct in two successive reported decisions of this court as relevant matters pointing to a conclusion that the Second Claim constituted an abuse of the process of civil litigation.

> 66. The shocking consequence of permitting the Second Claim to continue would be that precisely the same issues would fall to be litigated at two successive trials involving the waste of between four and six working weeks of court time and, no doubt, millions of pounds of wasted costs and lost management time, quite apart from the double jeopardy faced by Mr Bishop and Mr Hargreaves to which I have referred. The judge's conclusion was that compliance with what were by then mandatory guidelines could have entirely avoided that wasteful duplication of time, money and effort. I agree that the failure was, as described in the Aldi case, inexcusable. An inexcusable failure to do something which would have contributed so substantially to the economy and efficiency with which this dispute might have been resolved seems to me to be a primary candidate for identification as an abuse."

81. In light of these statements of principle the deputy judge was, in my view, right to say that the *Aldi Stores* guidelines are mandatory and that an inexcusable failure to comply with them is a relevant factor to be taken into account in assessing whether, having regard to the relevant private and public rights and in light of all of the facts of the case, a party is abusing the process of the court by seeking to raise before the court an issue that it could have raised in prior proceedings.

82. Further, it seems to me to be plain that the *Aldi Stores* guidelines were and are indeed applicable to the proceedings with which this court is now concerned. They relate to complex dealings by the claimants with various parties over a number of years. All those dealings arose in relation to the claimants' property development business and are interrelated to some degree. In my judgment it would have made obvious good sense for the claims arising from them to be case managed by Asplin J or another judge in the course of the Al Amoudi proceedings.

83. I can deal with the Pont Street Claim quite shortly. I am satisfied that the deputy judge identified entirely correctly the degree to which it had been raised in the Al Amoudi proceedings. In summary, the two sets of proceedings involved the same claimants; defendants who were alleged co-venturers with the claimants, that is to say Ms Al Amoudi in the one case and Mr Nichol in the other; substantially the same pleaded claim as to the existence of a joint venture agreement; and substantially the same witnesses and other evidence. Moreover, and as I have already mentioned, Asplin J found that there was never any such agreement.

84. Turning to the Oriel Claim, the claimants accept that there was some overlap between the two sets of proceedings in terms of the Oriel Agreement itself, but say there was no overlap in relation to the individual joint ventures that followed. They also say that the Oriel Agreement had no real relevance to the Al Amoudi proceedings and claim, save by way of background.

85. I cannot accept these submissions. In the Al Amoudi proceedings, the claimants provided further information dated 20 May 2011 in which, as the deputy judge correctly found, the claimants specifically asserted that at a lunch meeting in September 2005 at Oriel's restaurant in Sloane Square attended by the claimants and Mr Nichol, an agreement was reached between the three of them in

substantially the same terms as the Oriel Agreement. It was also asserted in the Al Amoudi proceedings that, pursuant to this agreement, the claimants and Ms Al Amoudi entered into joint venture agreements in respect of the properties in Herbert Crescent, Basil Street, Cadogan Square and Walton Place, to each of which Mr Nichol was, in the present proceedings, also alleged to have been a party. Asplin J rejected the claimants' case as to the existence of any agreement made in Oriel's restaurant and she also rejected the claimants' case as to the existence of the joint ventures which were said to have resulted from it. In short, the claimants alleged the existence of what was, in substance, the Oriel Agreement in the Al Amoudi proceedings and Asplin J rejected that allegation on the evidence before her.

86. That brings me to the Cliveden Claim. In my judgment, this is rather different from the Pont Street Claim and the Oriel Claim in that there was never any dispute as to the existence of the Cliveden JVA and it was the only agreement that was reduced to writing. Further, the claimants have never asserted that Ms Al Amoudi was a party to this agreement. Moreover, the claimants have not at any stage contended that Ms Al Amoudi has incurred any liability to the claimants arising from or in connection with this agreement.

87. Nevertheless, the deputy judge was in my view entitled to find as he did that the *Aldi Stores* guidelines were also engaged in relation to this claim, and that is so for the reasons the deputy judge himself gave. In summary, in the Al Amoudi proceedings, the Cliveden JVA was pleaded as part of the factual background; questions were asked of, in particular, Mr McCormick concerning Mr Nichol's honesty and integrity in connection with the Cliveden JVA; and the Cliveden Place development was referred to extensively in the judgment of Asplin J (indeed over 200 times). Moreover and more generally, Mr Nichol was frequently referred to in the claimants' further information and in such a way as to suggest that he was to some, if not to a considerable, extent complicit in the dishonest and deceitful behaviour alleged against Ms Al Amoudi; and there were, in addition, clear references to dishonest or discreditable behaviour by Mr Nichol in his own right.

Do these proceedings constitute an abuse of process?

88. In addressing the question whether these proceedings constituted an abuse in light of the breach of the *Aldi Stores* guidelines and all of the other circumstances, the deputy judge dealt with the three claims in very large part together. I have set out his essential reasoning at [38] to [47] above.

89. The claimants submit that the deputy judge fell into error in relation to each of the claims for a series of reasons. They say and I agree that the deputy judge was still bound to adopt a broad merits-based judgment which took account of the public and private interests involved and also took account of the facts of the case, focusing on the crucial question whether, in all the circumstances, the claimants were misusing or abusing the process of the court by pursuing these proceedings against Mr Cleghorn.

90. In that connection, the claimants continue, the deputy judge failed to take proper account of the fact that they did not intend to gain any unfair advantage by splitting their claims, or the fact that neither the Estate nor Mr Cleghorn as its representative

has suffered any prejudice as a result of the course the litigation has taken, or the fact that Mr Cleghorn could himself have applied for directions but failed to do so. Further, so the claimants submit, the deputy judge was wrong to characterise their conduct as harassment and gave disproportionate weight to their failure to comply with the *Aldi Stores* guidelines.

91. I am not persuaded by any of these points in relation to the Pont Street Claim or the Oriel Claim. The deputy judge did not regard the failure to comply with the *Aldi Stores* guidelines as dispositive but rather as a factor in the broad merits-based approach that Lord Bingham described. In the circumstances of these two claims, I have no doubt that the deputy judge was entirely right to do so. There are, to my mind, striking similarities between these claims and the claim in *Gladman*. Just as in that case, the consequence of permitting the Pont Street Claim and the Oriel Claim to continue would be that the very same issues would fall to be litigated again in two successive trials involving a very great deal of court time and huge expense in terms of both management time and litigation costs. A further, closely related and highly important factor in the present case is that the claimants are, by these claims, seeking what would amount to a reversal of the adverse findings of Asplin J. In other words, the deputy judge was right to find that these claims amounted to a collateral attack upon her judgment.

92. I am prepared to accept that the claimants did not intend to gain any unfair advantage by splitting their claims. However, the deputy judge did find that, given the strong overlap of issues and evidence, it was hard to resist the conclusion that the claimants used the Al Amoudi litigation as an opportunity to conduct a trial run of their claims against Mr Nichol.

93. Moreover, the way the claimants have chosen to conduct these proceeding has plainly been prejudicial to the Estate. The deputy judge found that it was the intimation of the claimants, by their pre-action protocol letter, of their claim for in excess of £97 million against the Estate that led the executors, Mr McCormick and Mr Misselbrook to seek the appointment of a judicial factor to administer the Estate not least because the claim, if proved at that level, would have rendered the Estate insolvent. After Mr Cleghorn's appointment as judicial factor, Mr McCormick and Mr Misselbrook resigned as executors but both have remained involved in different capacities in the affairs of the Estate. The consequence of all of this has been that the Estate has effectively been mothballed and has incurred and is continuing to incur very substantial costs and expense.

94. As for the claimants' other points, I accept that Mr Cleghorn could himself have applied for directions but it must be recalled he was far from inactive and made efforts, through his legal advisers, over a considerable period of time to get the claimants either to drop or bring their claims against the Estate. I accept too that the deputy judge said that it was not possible to say what directions Asplin J or another judge would have made had the claimants complied with the *Aldi Stores* guidelines, but I am satisfied that it would have given the court a proper opportunity to consider how to manage these two claims in a proportionate and effective way. As it is, the integrity of Mr Nichol was impugned in the Al Amoudi proceedings and Mr McCormick, Mr Misselbrook and Mr Gonzalez were subjected to extensive cross examination. No doubt much of the ground they covered will have to be explored all over again.

95. Having regard to all of the matters to which I have referred at [83] to [85] and [89] to [94] above, I am satisfied that the deputy judge was entitled to find that the Pont Street Claim and the Oriel Claim constituted unjust harassment of the Estate and an abuse of process. No basis has been shown upon which this court could interfere with the conclusions to which he came.

96. That brings me to the Cliveden Claim. As I have said, the deputy judge treated each of the three claims in much the same way. However, this claim is different from the Pont Street Claim and the Oriel Claim in the following highly material respect. The existence of the Cliveden JVA was not in issue in the Al Amoudi proceedings and it was not asserted that Ms Al Amoudi had incurred any liability arising from it. It is, in essence, a claim against a different party in respect of different subject matter, although I of course recognise that it arises against the wider background I have outlined.

97. All of this was clearly apparent to Asplin J. She summarised the nature of the Cliveden JVA in these terms:

> "112. In any event, as I have already mentioned, the only joint venture which was documented in any way related to 9 Cliveden Place in which it is not alleged that Ms Al Amoudi was involved. It was a venture between Mr Nichol and the Claimants and a corporate vehicle named Westbrooke Properties Limited and was governed by a written joint venture agreement drawn up by Brook Martin, Mr Paton's solicitors. Mr McCormick had a copy of the document and had dealings in relation to the venture under Mr Nichol's power of attorney. In fact, Mr McCormick wrote to Simone Mason at Brook Martin on 3 May 2006 on Elliot Nichol Trading notepaper and confirmed instructions. He stated that it had been agreed on behalf of Westbrook Limited to purchase the ground/basement and first floor flats including planning permission and to return the building to a house. The joint venture agreement was signed by all the parties and dated 3 August 2006."

98. Then after referring to some of the evidence of Mr Nichol, Mr Gonzalez and Mr Pickstock, who worked on the refurbishment of Cliveden Place, to which I must return, she continued:

> "118. It seems to me that I am not in a position to make any findings with regard to these matters and that in any event, such findings are not necessary for the purposes of the issues which are before the court in this matter. Furthermore, it seems to me that the relevance of the 9 Cliveden Place venture is only as a contrast to the joint ventures in which it is actually alleged that Ms Al Amoudi took part. In this case there was a detailed, written agreement, signed by all of the parties and drawn up on their behalf by solicitors, something which is patently absent in relation to the alleged ventures with which I am concerned."

99. Asplin J was therefore fully conscious that any claim based upon the Cliveden JVA was not in issue before her; that she was not required to make any finding about the possible merits of any such claim; and that the relevance of the Cliveden JVA was simply the contrast it provided to the alleged oral agreements upon which the claims proceeding before her were, at least in part, founded. Asplin J returned to this theme later in her judgment in setting out her conclusions:

> "414. That brings me to the contrast between the way in which the Cliveden Place project was documented and the alleged joint ventures or business arrangements alleged by the Claimants to have existed in relation to Ms Al Amoudi. It is stark. Quite clearly, when business arrangements were in place, the Claimants were used to documenting them in a highly sophisticated way. Not only was there a written agreement in relation to Cliveden Place but in other circumstances in which there was a consortium of investors involved there was a shareholders' agreement, memoranda and notes of investors' meetings. Furthermore, the Claimants made use of special vehicle companies and, for example, where an agreement existed, having purchased a property Mr Nichol transferred it to the special corporate vehicle in accordance with the agreement."

100. What is more, there was never any doubt that the claimants wished in due course to pursue the Cliveden Claim for such had been clearly intimated in the correspondence. There was therefore never any question of the claimants trying to keep anything up their sleeves.

101. These were all matters which, so it seems to me, were highly material to the broad merits-based judgment which the deputy judge was required to carry out. So also, I consider they were highly relevant to any consideration of whether the Cliveden Claim constituted unjust harassment of the Estate or Mr Cleghorn or whether, by pursuing this claim, having failed to comply with the *Aldi Stores* guidelines, the claimants were misusing or abusing the process of the court in any other way. Yet the deputy judge made no explicit reference to them in carrying out his assessment. In my judgment, this was a material error and this court must therefore consider the matter for itself.

102. The matters to which I have referred at [96] to [100] above do not, in my view, provide a very promising foundation for a contention that the Cliveden Claim constitutes an abuse of process. But I must also consider all the matters to which the deputy judge had regard and I begin with the *Aldi Stores* guidelines.

103. I have found that that the *Aldi Stores* guidelines were engaged. I also agree with the deputy judge that it is not possible to say what directions Asplin J or another judge would have given had they been followed. The judge might have directed that the claimants should be put to an election: either bring the Cliveden claim along with all other claims against the Estate together with the Al Amoudi claims or abandon them. Alternatively, the judge might have permitted the claimants to divide their claims and directed that the Pont Street Claim and the Oriel Claim must be brought in the Al Amoudi proceedings, if at all, but that the Cliveden

Claim could be pursued separately. Nor is it possible to say what election the claimants would have made in response to any such direction. However, it is, in my judgment, possible to say with a reasonable degree of certainty that the Cliveden Claim does not raise issues such as those in the *Gladman* case. For the reasons I have given, there is no question here that the consequence of permitting the Cliveden Claim to continue would be that precisely the same issues would fall to be litigated at two successive trials involving the waste of a great deal of court time, costs and management time. The clarity with which Asplin J addressed the issues in the Al Amoudi litigation has had the consequence that the Cliveden Claim would not lead to the kind of wasteful duplication of time, money and effort that Briggs LJ envisaged in the *Gladman* case.

104. What then of the other matters to which the deputy judge had regard? I am conscious that Mr McCormick, Mr Gonzalez and Mr Pickstock were cross-examined in the Al Amoudi proceedings about the Cliveden Place project. I am also conscious that Mr McCormick was cross-examined by reference to a file of documents of which he had little or no notice and that Mr Cakebread, as counsel for the claimants, sought to suggest to him that Mr Nichol had been dishonest in his dealings with regard to 9 Cliveden Place. I also accept that Mr Gonzalez's professional integrity and competence were vigorously questioned. It was these among other matters which led the deputy judge to observe that it was hard to resist the conclusion that the claimants had used the Al Amoudi litigation as an opportunity to conduct a trial run of their claims against Mr Nichol.

105. I have to say that I have found this a troubling aspect of this part of the appeal. As the deputy judge observed, the Court of Appeal in *Stuart v Goldberg Linde* deprecated this type of behaviour. On the other hand, Asplin J has made no findings in relation to the Cliveden Claim and so there is no risk of inconsistent conclusions. Further, the deputy judge accepted that the treatment of Mr McCormick, Mr Misselbrook and Mr Gonzalez was a long way from the treatment of one of the key witnesses, Mr Bishop, in the *Gladman* case.

106. The deputy judge was also properly conscious of the efforts of the representatives of the Estate to get the claimants either to drop or to issue their claims against it. I accept too that it was the intimation of the claim against the Estate which led to the appointment of the judicial factor and that, in turn, this has led to the Estate being mothballed and has caused it to incur substantial expense. However, it seems to me that it is important also to take into account that I am at this point only concerned with the Cliveden Claim and that this claim, although far from insignificant, constitutes a relatively small part of the overall claim of in excess of £97 million then being asserted and, indeed, of the overall claim as ultimately formulated. Furthermore, going forward and in light of my conclusions in relation to the Pont Street and Oriel Claims, there is nothing before me to indicate that the whole Estate needs to remain frozen.

107. Stepping back and considering, as I must, all of the circumstances and all of the matters which led the deputy judge to come to the conclusion he did, I have come to the conclusion that the conduct of the claimants has not been such that they should be denied the right to bring the Cliveden Claim before the court. In light of all the matters to which I have referred, I do not accept that the pursuit of the

Cliveden Claim would be manifestly unfair to the Estate or would otherwise bring the administration of justice into disrepute.

Conclusion

108. For all of the reasons I have given I would:

i) refuse the application for permission to adduce further evidence;

ii) dismiss the appeal in relation to the Pont Street Claim and the Oriel Claim;

iii) allow the appeal in relation to the Cliveden Claim.

Lord Justice Floyd:

109. I agree.