Neutral Citation Number: [2015] EWHC 87 (Ch)

Case No: HC-2014-000167

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/01/2015

Before :

SIR WILLIAM BLACKBURNE

- -

Between :

SAMUEL JOHN FIELDEN

Claimant

- and –

(1) STEPHEN CHRISTIE-MILLER
(2) THE REVEREND CANON COLIN HILL OBE
(3) JOHN MORCOM
(4) CAROLINE AYLMER CANNON-BROOKES
(5) MARK SHEARDOWN
(6) PIERS MARMION
(7) TIMOTHY MICHAEL ROBINSON
(8) ANTHONY DAVID WHITEOAK ROBINSON

Defendants

- and -

STEPHEN CHRISTIE-MILLER

Part 20 Claimant

- and -

(1) SAMUEL JOHN FIELDEN
(2) THE REVEREND CANON COLIN HILL OBE
(3) JOHN MORCOM
(4) CAROLINE AYLMER CANNON-BROOKES
(5) MARK SHEARDOWN
(6) PIERS MARMION
(7) TIMOTHY MICHAEL ROBINSON
(8) ANTHONY DAVID WHITEOAK ROBINSON
(9) MICHAEL FRANCIS MOSTYN OWEN JODRELL
(10) DEREK ROBIN PEPPIATT

Part 20 Defendants

- -
- -

Giles Goodfellow QC and Mark West (instructed by **Wilsons LLP**) for the first defendant/Part 20 claimant and tenth Part 20 Defendants
Richard Wilson and Harry Martin (instructed by **Boodle Hatfield LLP**) for the third, fourth, ninth and tenth Part 20 defendants

Hearing dates: 9, 10 and 11 December 2014

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

SIR WILLIAM BLACKBURNE

Sir William Blackburne :

Introduction

1. These proceedings relate to two separate trusts. The first in time is a settlement created by Charles Wakefield Christie-Miller on 18 February 1967. That settlement ("the 1967 Settlement") is of land and other assets at Swyncombe ("the Settlement Fund") in Oxfordshire. By clause 2(i) the trustees are to hold the Settlement Fund in such manner and form in all respects as they shall from time to time during the trust period by any deed or deeds appoint. The class of objects in whose favour the trustees are empowered to exercise such power of appointment includes Stephen Christie-Miller ("Stephen") and Samuel Fielden ("Sam")

2. On 5 January 2005 the trustees of the 1967 Settlement ("the Settlement trustees") resolved to grant Sam a life interest in the Settlement Fund and, subject to this, to hold the Fund primarily for his issue. One of the assets of the Settlement Fund is a property which has been referred to as Home Farmhouse. Home Farmhouse has been occupied by Stephen and his family since Easter 1996. As will later appear Stephen claims to be entitled to an interest in it. The Settlement trustees also resolved to grant to Stephen without delay an assured tenancy of Home Farmhouse. It was to be on a full repairing basis and at a market rent, but with the amount of rent payable taking into account his contribution to certain renovation costs. In 2007 and 2008 the Settlement trustees gave effect to these resolutions by executing deeds of appointment conferring on Sam interests in parts of the Settlement Fund. There has been no appointment by them of Home Farmhouse.

3. Adjoining the lands within the Settlement Fund are other lands which (with other assets) are subject to the trusts established by the will dated 15 March 1998 of William John Christie-Miller ("John") who died on 3 May 1999. John was the son of Charles Wakefield Christie-Miller. Under the terms of that will ("the Will") John conferred a life interest in those other lands and assets ("the Will Fund") upon his widow, Kathleen, who died on 20 December 2004. From the expiry of three months from Kathleen's death, Stephen has been entitled to an interest in possession of the Will Fund, subject to any appointment by the trustees. By a deed of appointment dated 20 March 2007 ("the 20 March deed of appointment") the Will trustees purported to exercise the power of appointment such that, subject to the trusts declared by the Will in favour of Stephen, they should henceforth hold the Will Fund and its income for Sam absolutely.

4. Disputes having arisen over the meaning and effect of the 20 March deed of appointment, Sam issued proceedings on 9 August 2013 against Stephen and former and current trustees of the Will trusts. By those proceedings Sam seeks declaratory relief concerning the true construction of the deed, alternatively rectification of it. The relief is designed to establish that the deed was effective to provide, or should be rectified so as to provide, that the income of the appointed fund is to be held for Stephen for life and that subject thereto capital and income are to be held for Sam absolutely. On one view of the deed – and Stephen contends that it is its correct and intended effect – the appointment does not cut down the absolute interest which, in the events that have happened, is given to him by another provision in the Will. The proceedings are brought against Stephen who is the first defendant, the former Will trustees (i.e. those in office when the 20 March deed of appointment was executed)

who are the second to fourth defendants and the current Will trustees who are the fifth to eighth defendants.

5. Stephen defends Sam's claim and counterclaims for declarations, variously expressed, that he became and remains entitled to an absolute interest in the Will Fund and that it was not open to the then Will trustees (the second to fourth defendants to his Part 20 claim) or to their successors, the current Will trustees (the fifth to eighth defendants to his claim), to reduce or cut down that interest. He goes further. He contends that he is entitled to a freehold interest in Home Farmhouse, alternatively to the right to live there rent free until the death of the survivor of himself and his wife. The basis for this is a claim in proprietary estoppel. It is founded on events which occurred between late October 1994 and subsequently (but chiefly in the period up to John's death in 1999) such that those who were the Settlement trustees at the time and those who are the current trustees were and are estopped from exercising any power of appointment conferred on them by the 1967 Settlement so as to reduce or cut down that entitlement. He counterclaims for relief accordingly, including repayment of the rent he says that he mistakenly paid for living in Home Farmhouse between the death of Kathleen in December 2004 and October 2011 when he stopped paying. Stephen has appeared before me by Giles Goodfellow QC and Mark West.

6. The current Settlement trustees are the third, fourth, ninth and tenth defendants to Stephen's Part 20 claim. Of those, the ninth defendant, Michael Jodrell, and the third defendant, John Morcom, were trustees in October 1994. So also, at that time, was Stephen's father, David. David Christie-Miller was replaced as a trustee in February 1995 by the tenth Part 20 defendant, Robin Peppiatt, and later died. Mr Jodrell (who had been a trustee since 1985), Mr Morcom (who had been a trustee since 1992) and Mr Peppiatt were later joined by the fourth Part 20 defendant, Caroline Cannon-Brookes. She was appointed a trustee in 2001. Those four persons remain the trustees. They have raised a number of defences to Stephen's Part 20 claim. They have appeared before me by Richard Wilson and Harry Martin.

7. It is the sufficiency of the pleaded claim in estoppel against those four persons that is in issue on this hearing. They contend that the pleaded case is defective and must fail and have issued one of the two applications which are before me. That is an application, first, that the Part 20 claim should be struck out against them pursuant to CPR 3.4(2)(a) on the ground that the statement of case discloses no reasonable cause for bringing the claim and, second, that the court should order summary judgment under CPR 24.2 because Stephen has no real prospect of succeeding on it and there is no other compelling reason why the case should be disposed of at a trial. They advance two separate reasons, each based on a proposition of law. The first is that under trust law, unless provided to the contrary in the trust instrument (and there is no contrary provision in the 1967 Settlement), trustees must act unanimously. This was referred to as the "unanimity" principle. Therefore, it is said, if a representation by them is to found an estoppel, it must have been made by or on behalf of all of them. They contend that the statement of case, even when read together with Stephen's reply to their defence, does not sufficiently allege that any representation or assurance was made by or on behalf of all of them. The pleading, it is said, ignores the unanimity principle. The second is that under trust law trustees cannot fetter the exercise at a future date of a discretion possessed by them as trustees so that any covenants, undertakings, policies or premature or irrevocable views entered into or

expressed by them concerning the future exercise by them of their fiduciary powers are void and unenforceable as a fetter on their discretion. This was referred to as the "non-fettering" principle. Accordingly, no estoppel based on representation or promise concerning the Settlement trustees' intention as to the future exercise of their dispositive powers, whether under clause 2(i) of the 1967 Settlement or otherwise, can arise.

8. Stephen resists the application. For good measure, he applies to amend his statement of case in case I should find that his existing pleading is defective in either of the respects alleged and can be cured by suitable amendment. That is the other application which is before me.

9. I note in passing that the trustees resist Stephen's estoppel claim on grounds additional to those raised by their application. They dispute that the representations were made on which Stephen relies; they say that even if the representations were made Stephen did not rely on them or, if he did, he was unreasonable to do so and, in any event, did not act to his detriment in reliance on them. For the purposes of this application I assume that the representations were made and that the other necessary ingredients of the estoppel, save only those in issue before me, are established.

10. There was at one stage a disagreement between the parties over the timing of their respective applications. It was resolved by Norris J who, at a hearing on 14 November 2014, ordered that the two applications should be listed together but on the basis that, subject to the views of the court hearing them, the trustees' application should be heard first. I adhered to that order of events although, as it happened, the hearing of the application to amend was deferred to a later date.

The Part 20 statement of case

11. So far as relevant to the present issue the pleaded claim against the trustees is contained in Stephen's defence to Sam's claim (concerned with the Will trusts) which is then repeated in Stephen's Part 20 claim against the Settlement trustees. It is as follows (with references to the First Defendant being to himself, references to the Deceased being to John and references to the Third Defendant being to Mr Morcom):

> "2.6 In late October 1994 the First Defendant was informed by the Deceased and Kathleen, and separately by Michael Jodrell ("Mr Jodrell"), the then senior trustee of the Swyncombe Settlement (in the sense of the trustee who commonly took responsibility for ensuring that estate matters were addressed and taken forward in a timely manner) that he and his family would be the beneficiaries of the two estates after the Deceased and Kathleen had died. With that in mind the First Defendant was invited by the Deceased and Kathleen in or about early 1995 to move with his wife and young family to live on the Swyncombe Estate so that by living on the Estate he would gain the detailed understanding of its intricacies which would be important preparation for the time when he would have a direct financial interest in the successful management of the Estate.

2.7.1 On 8th November 1994 the First Defendant wrote to the Deceased and Kathleen to the effect that

> "I am writing to you both from the bottom of my heart for the most wonderful future you have given Elizabeth and I and the children, by naming me as your successor at Swyncombe. Your action has changed our lives in the most incredible way and when they are older the children will realise what a marvellous way of life you have given them. Thank you once more for such a tremendous gift, unfortunately words seem so inadequate on such an occasion but I can only describe our feelings as euphoric, thanks to you our situation of insecurity of where to live, how to educate the children properly and the many other worries we have had for some years now are potentially over, that is an enormous weight off my shoulders.
>
> From now on please feel free to let me know if I can ever be of help with any problems that arise in the complexities of your running the estate. I don't mean to be interfering but it would be a great pleasure and may even help me to understand some of the intricacies of running Swyncombe…
>
> …
>
> Very many thanks again, we will be forever deeply grateful to you both for such a splendid legacy and hope we can humbly justify such a privileged position with our true dedication".

2.7.2 On the same day the First Defendant wrote to Mr Jodrell to the effect that

> "Elizabeth and I had a most enjoyable supper with John and Kath last Thursday, they were on extremely good form and we had lengthy discussions regarding our potential move to Home Farm. They also stated their wishes as to the succession which was very moving, and difficult to respond to as words seem so inadequate on such an occasion.
>
> This coming about is an enormous surprise and we do so appreciate the fact that you brought it about and thank you most warmly. I can only describe our feelings as euphoric, this has changed our lives considerably and when they are older the children will realise how very fortunate they are to grow up and belong in such a wonderful place".

2.8 In reliance upon the representations of the Deceased and Kathleen and of Michael Jodrell in or about Easter 1996 the First Defendant moved from Highclere Park to Home Farmhouse (which is on Swyncombe rather than on

> Swyncombe Downs) with his wife and young family to live on the Swyncombe Estate after that property had been refurbished by the Swyncombe Trustees to make it suitable as a family home. Further additions were required over and above those budgeted for by the Swyncombe Trustees and it was suggested to the First Defendant by Mr Jodrell and the Third Defendant (in the presence and to the knowledge of each other) shortly before the trustees meeting in October 1995 that he should pay for them himself (as in fact he did) on the basis that he would be the next beneficiary of the Estate in any event.
>
> 2.9 On 25th June 1997 the Third Defendant wrote to the Deceased to the effect that
>
> > "Looking at the longer term, we do need to be thinking further about the future of the Swyncombe Estate. As I understand it, matters are proceeding on the basis that you would like Stephen to inherit this in due course but I should be grateful if you would let me know if this is still your desired objective or whether ideas have changed over the past year".
>
> The Deceased did not suggest to the Third Defendant that that desired objective had changed over the past year.
>
> 2.10 In further reliance upon those representations and on the strength of them, for the remainder of the Deceased's life the First Defendant attended each meeting of the Swyncombe Trustees and changed his life significantly to accommodate his anticipated role and responsibilities as the next heir and he and his family significantly altered the structure and potential future of their lives to that end, as more particularly set forth hereafter."

12. Stephen then lists eight separate matters: (1) he moved from near Newbury to Home Farmhouse at Easter 1996, (2) he "put his energies" into the Swyncombe Estate and helped to look after John and Kathleen in their last years, (3) he made attention to the Estate and to the care of John and Kathleen his "primary focus" and did so "with the inevitable dilution of his career ambitions", (4) he found a replacement keeper for the Estate, raised funds for the development of a cricket pavilion on the Estate and arranged farewell parties for retiring Estate staff, (5) he joined a three-man committee after John's death to run the Estate's Shoot, worked closely with the keeper, helped with improvements to the Shoot and from 2005 took a leading role in running it, thereby making the Shoot into a valuable estate amenity, (6) he became closely involved in the local church, served on its PCC and became a churchwarden, (7) he abandoned well-advanced career plans which would have involved the purchase of a property business in the Newbury area and, instead, took up paid employment with a firm local to Swyncombe and (8) he invested his own resources for the benefit of the Estate by (a) contributing to the cost of the refurbishment of Home Farmhouse and (b) purchasing a rectory at Swyncombe from the Diocese of Oxford "in order to complete the ownership of all the property at Swyncombe within himself and the two estates

which he expected to inherit." (Subsequently, there is reference in the pleadings to the amount of around £40,000 expended by him towards refurbishing Home Farmhouse, and to the purchase of the rectory at a cost to him of £422,000 which he financed largely by borrowings.)

13. The pleading continues:

> "2.11 In so acting as set out in Paragraph 2.10 herein, by changing his life significantly to accommodate his anticipated role and responsibilities as the next heir and by significantly altering the structure and potential future of the lives of himself and his family to that end, the First Defendant acted to his detriment.
>
> 2.12 In summary, the First Defendant and his wife devoted the best years of their lives to putting their energies into Swyncombe Downs and Swyncombe, loyally arnd devotedly caring for the Deceased and Kathleen for the duration of their lives and Kathleen when she was a widow following the Deceased's death in May 1999, including procuring carers for her after the Deceased's death and always being available to help her in her widowhood, and significantly altering the structure and potential future of their lives on the strength of clear assurances that the First Defendant would inherit the two estates after their deaths.
>
> 2.13 On 18th February 1998 Michael Jodrell wrote to the Deceased and added
>
> > "I have given a lot of effort and time over the years to Swyncombe as I not only love the place but I am very fond of both of you and, although Stephen is not your son, I feel that we must take him into our bosom and treat him as such in the current circumstances"."

14. In his Part 20 claim, after repeating all of his defence, Stephen pleads that:

> "10. … the former Swyncombe Trustees were estopped from asserting that the First Defendant was not entitled to the freehold interest in the property at Home Farmhouse on Swyncombe.
>
> 11. Further, the present Trustees of Swyncombe are estopped from exercising any power of appointment conferred on them by the Swyncombe Settlement to reduce or cut down the First Defendant's entitlement to the freehold interest in the property at Home Farmhouse on Swyncombe."

15. He goes on to plead some legal advice received by the Settlement trustees in June 2003 to the effect that it was to be expected that they would ensure that Stephen and

his family were provided with a secure home, either on the basis of a continuing life interest or by an outright appointment of the Home Farmhouse. He then pleads:

> "14.2 The Swyncombe Trustees did not follow that advice because on 5th January 2005 they resolved instead
>
> "1 The Trustees will grant as soon as possible to Stephen Christie-Miller an Assured Tenancy of Swyncombe Farm House on a full repairing basis, at a market rent, but taking into account his contribution to the initial costs of renovation to replace his existing Assured Shorthold Tenancy of the property, and with the intention of providing security of tenure for him and his wife but not enfranchisement rights".
>
> 15 Since the death of Kathleen and until October 2011, the First Defendant paid a rent of £1,085 per calendar month for his occupation of Home Farmhouse in the mistaken belief that he was not entitled to the freehold interest therein, alternatively the right to live at Home Farmhouse on Swyncombe rent free until the death of the survivor of him and his wife. In the premises the First Defendant is entitled to the repayment of the said sums from the current Swyncombe Trustees as money had and received."

The correct approach to summary judgment and strike-out applications

16. My attention was drawn to what was said in *Three Rivers District Council v Bank of England (No 3)* [2003] 2AC 1, [2001] UKHL 16, by Lord Hope at [87]-[100] and by Lord Hobhouse at [158]-[160] about the correct approach to be adopted to the exercise of the jurisdiction under CPR 24.2 and, as regards the jurisdiction under CPR 3.4, what is set out in the current edition of the White Book, Volume 1, particularly Note 3.4.2. I do not need to rehearse those matters. The correct approach to the exercise of those separate jurisdictions is well known and I have had it fully in mind.

Proprietary estoppel

17. Nor was there any dispute over the essential ingredients of proprietary estoppel. In *Thorner v Major* [2009] UKHL 18; [2009] 1 WLR 776, at [29] Lord Walker cited an academic authority to the effect that there was no definition of proprietary estoppel that was both comprehensive and uncontroversial but then went on to state that:

> "Nevertheless most scholars agree that the doctrine is based on three main elements, although they express them in slightly different terms: a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his [reasonable] reliance."

That case was concerned principally with the character or quality of the representation or assurance made to the claimant if such representation or assurance was to be capable of giving rise to the claimed estoppel. Mr Goodfellow also referred me to what Robert Walker LJ (as he then was) said in *Gillett v Holt* [2001] Ch 210 at 225 to

the effect that the doctrine of proprietary estoppel could not be treated as sub-divided into three of four water-tight compartments, that the quality of the individual elements impacted upon one another and that "the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all elements of the doctrine" and that the court "must look at the matter in the round". He also referred me to what Oliver J (as he then was) had stated in *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd (Note) (1979)* [1982] QB 133 at 151-152 to the effect that the doctrine required "a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to enquiring whether the circumstances can be fitted within the confines of some pre-conceived formula serving as a universal yardstick for every form of unconscionable behaviour".

18. With those references to the correct approach to the exercise of the summary jurisdiction which the trustees invoke and to the essential ingredients of proprietary estoppel in mind, I come to the two challenges. I start with the challenge based upon the principle that trustees must act unanimously except and to the extent that the trust instrument makes other provision.

The challenge based upon the unanimity principle

19. The unanimity principle, which is conveniently set out in *Lewin on Trusts*, 19th Edition, at 29-069 (with the reasons for it summarised in 29-068) and is also to be found in Underhill and Hayton, *Law Relating to Trusts and Trustees*, 18th Edition, at 52.1, especially at 52.4, was not in dispute. The question rather was how it operated in a case where, as here, the estoppel is alleged to arise as a consequence of representations made by just one of several trustees. For that is how the matter is pleaded in the key paragraphs of Stephen's statements of case, namely paragraph 2.6 of his defence (setting out what was said by Mr Jodrell in late October 1994) and paragraph 2.8 of his defence (setting out what was said to him by Mr Jodrell and Mr Morcom in October 1995), and again in paragraphs 4.10.1 and 4.10.2 of his reply (in amplification of paragraph 2.8). On the earlier pleaded occasion, neither of the other two trustees, Mr Morcom and David Christie-Miller, was present although it is alleged in paragraph 4.5.3 of the reply that Stephen discussed Mr Jodrell's representations with David (his father) "to whom they came as no surprise and who did not dissent from them." From this, acquiescence in what Mr Jodrell had said might fairly be inferred. On the later pleaded occasion Mr Morcom was present and is alleged not to have dissented from what Mr Jodrell stated. But the third trustee, Mr Peppiatt, who by then had replaced David Christie-Miller, was not present. (The fourth trustee, Caroline Cannon-Brookes, had not yet been appointed.) Implicit in the pleading is, I think, that, when making his representations, Mr Jodrell was speaking on behalf of his co-trustees as well as for himself, and that he had the authority to do so. But aside, perhaps, from the reference to him as "the senior trustee" the pleading does not state how this authority came about.

20. It is this failure that forms the basis of the trustees' complaint. Mr Wilson submitted that the pleading failed to set out how the other trustees became bound by what Mr Jodrell is supposed to have represented. In particular, he submitted, it was not sufficient to describe Mr Jodrell as "the senior trustee" (see paragraphs 2.6 of

Stephen's defence and paragraph 4.5.2 of his reply) as there is no such concept in trust law and there is nothing to suggest that the 1967 Settlement provided for such a position, much less conferred that status on Mr Jodrell. Moreover, he said, it was not enough in order to tie in those other trustees for Stephen to allege, as he does in paragraph 4.5.1 of his reply (in response to a plea in the trustees' defence that the expression "senior trustee" had no meaning or relevance in law), that "Mr Jodrell *appeared* to [Stephen] to be speaking for and making representations on behalf of the Swyncombe Trustees and it was therefore reasonable for him to rely upon those representations…" (emphasis added). Appearance alone was not enough.

21. Mr Wilson referred in this regard to *Pleming v Hampton and Anor* [2004] EWCA Civ 446. In that case the defendants relied on a letter written to them by the claimant's mother in support of their claim, based on proprietary estoppel, to ownership of a strip of land. Their claim failed because the requirements of the letter (itself unenforceable as a binding contract) had not been fulfilled by them and, thus, the basis of their estoppel was not established by them. Quite separately from that, it was pointed out (at [33]) by Chadwick LJ (with whom Maurice Kay LJ, the only other member of the court, agreed) that the promise made to the defendants in the letter "was not made by the owner of the land [the claimant] nor by anyone shown to have been acting at the time with her authority but by her mother." Relevant to this was that the claimant was unaware that her mother had written the letter and had had no part in it.

22. Mr Goodfellow sought to persuade me that in the field of estoppel some lesser test is in play when determining whether a representation can be said to bind another and that the "narrow terms of agency" (as he described them) do not have to be satisfied. Instead, he submitted, the court is concerned with the effect on the claimant/representee of the conduct relied upon and what (viewed objectively) the claimant could reasonably understand that conduct to mean and whether it was reasonable for the claimant to rely on that understanding. The touchstone was indeed whether the person making the representation had a sufficient appearance of authority to act on behalf of the legal owner; it did not matter whether by the ordinary standards of the law of agency the former had authority to bind the owner. In the case of trustees, he submitted, representations or assurances made by one trustee will bind the others if it was reasonable in the circumstances for the person to whom they were made to rely upon them in the belief that they were made by or on behalf of all of them. He submitted, therefore, that if the effect of Mr Jodrell's actions was to cause Stephen reasonably to understand that the trustees were assuring him that he would inherit after the deaths of John and Kathleen it was not necessary that that was what all of the trustees actually intended. Nor was it necessary, he said, that all of the trustees should have acted unanimously in making their representations or assurances to Stephen. It was sufficient if it reasonably appeared to Stephen that they had collectively decided that he was to be the next heir (and he had reasonably relied on the representation). Moreover, he said, this involved a fact-sensitive enquiry which it was inappropriate to determine on a strike out or summary judgment application. As for *Pleming*, he pointed out that the statement in paragraph [33] of Chadwick LJ's judgment was obiter. He speculated that it might well not have been the subject of argument as it had not featured in the judgment in the court below.

23. Mr Goodfellow said that support for his approach was to be found in observations in *Crabb v Arun District Council* [1976] 1 Ch 179. The claim there was to an access

from the claimant's land to a road. The claimant relied on estoppel. An issue arose as to the authority of the representative of the defendant council to agree the access. Lord Denning MR, with whom Lawton and Scarman LJJ agreed, considered that as the council had entrusted their representative with authority to agree the line of a fence and certain gates along the line of the boundary between the claimant's land and the road they must be taken to have authorised the representative to agree that the claimant should have the access in question. "They [the council]" Lord Denning (at 189) stated "entrusted him with the task of setting out the line of the fence and the gates, and they must be answerable for his conduct in the course of it." Lord Denning went on to say that the council could not avoid responsibility by saying that their representative had no authority to agree the new access.

24. However, it was not in Lord Denning's remarks that Mr Goodfellow claimed to find support for his submission. Instead, it was in reliance upon what Scarman LJ went on (at 193) to say:

> "Nor do I think it necessary in a case such as this to inquire too minutely into the law of agency. These defendants could, of course, only act through agents; but, as I have already made clear, from the very nature of the case, there would be no question of grant, no question of legally enforceable contract. We are in the realm of equity; and within that realm we find that equity, to its eternal credit, has developed an immensely flexible, yet perfectly clear, doctrine: see *E.R Ives Investment Ltd v High* [1967] 2 QB 379, *per* Danckwerts LJ at p. 389. The approach of equity, when there is a question of agency in a field such as this, must I think be a very simple one. It will merely be that, within reasonable limits, those to whom the defendant entrusts the conduct of negotiations must be treated as having the authority, which, within the course of the negotiations, they purported to exercise. I put it that way in the light of the comments of Lord Denning MR in *Moorgate Mercantile Co Ltd v Twitchings* [1976] QB 225, 243 – comments which were themselves made upon a judgment to the same effect in *Attorney-General to the Prince of Wales v Collom* [1916] 2 KB 193, 203. I would add only one reservation to this broad proposition. The defendant, if he thinks that an agent has exceeded his instructions, can always so inform the plaintiff before the plaintiff acts to his detriment in reliance upon what the agent has said or done. If a defendant has done so, the plaintiff cannot then establish the equity: for the defendant will have intervened to prevent him from acting to his detriment. Nothing of the sort happened in this case. "

25. I do not consider that any of the authority Mr Goodfellow cited to me justifies the approach for which he contended. The question in *Crabb* was not whether the representative was the council's duly authorised agent – he clearly was - but the scope of his agency. That was also true of another of the cases to which Mr Goodfellow referred me (and to which reference was made by Scarman LJ in *Crabb*), namely *Attorney-General for the Prince of Wales v Collom* [1916] 2 KB 193. These

decisions and other like authority (for example, *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1986] AC 717) were concerned with the situation where the principal has put someone in a position where he appears to be authorised by the principal to make the representation in question. In the case before me the question is whether it is sufficiently pleaded that Mr Jodrell was the agent at all of his two co-trustees, in the sense either that they had authorised him to make the representations in question on their behalf (specifying how that authority arose), or they stood by knowing that he had made the representations but acquiesced in them (specifying the circumstances in which they stood by and acquiesced), or by their actions (specifying what those actions were) they put Mr Jodrell in a position in which he appeared to be authorised to make the representations on their joint behalves. That requires a pleading setting out the facts and matters which, if proved at the trial, will entitle the court to conclude that he did have that authority. Coming to *Pleming*, the statement in paragraph [33] of Chadwick LJ's judgment seems, with respect, to be unanswerable as one of principle and in any event, given its provenance, is one which I should certainly follow even if I had thought, which I do not, that it was mistaken in some way. The fact that the mother had been owner of the land until only very shortly before making the promise and had conducted all of the discussions with the defendants, and that her daughter had throughout been in occupation of the land (it was where she lived), made no difference. This was because, as the court below had found, the daughter did not know that she had become the owner of the land and was unaware of the promise that her mother had made. In short, she was not bound by it.

26. Mr Goodfellow's fundamental proposition that where estoppel is in issue it is sufficient merely that the claimant asserting the estoppel believes that the person with whom he is dealing has the authority needed and that it is sufficient that the agent has the appearance of authority with nothing to suggest to the claimant that he does not is not one with which I am able to agree. Elementary fairness requires that before a person can be bound by the acts of another purporting to act on his behalf, that other must have his authority to bind him in the matter. Whether he has will depend on the usual principles of agency. This applies, in my judgment, as much in the field of estoppel as it does in other contexts. In the language of estoppel, there is nothing unconscionable in a person denying what another has come to believe and acted upon to his detriment if that person has not, either himself or through his agents, allowed the other to reach that belief. It is not therefore sufficient simply to plead that Mr Jodrell "appeared" to be speaking on behalf of all three trustees. The pleading must go further. It must set out, in respect of each trustee at the time of the representation which is said to ground the estoppel, what facts and matters are relied upon (whether at the time the representation was made or subsequently) for saying that that trustee was bound by the representation in question. Stephen's pleadings, through which I was carefully taken, fail to do so in the case of Mr Morcom in respect of the October 1994 representation. They do so, but only just, in the case of David Christie-Miller as regards that representation and then only in his reply. They fail to do so at all in the case of Mr Peppiatt, whether in respect of the representation alleged to have been made before the trustee meeting in October 1995 or otherwise. It is nothing to the point that Mr Jodrell, assuming he made the representations alleged of him (which, for the purpose of this application, I must assume he did) would be unlikely to have done so unless he had the authority of his co-trustees. The question is whether the pleaded claim sets out how Mr Jodrell had the authority of his co-trustees. I do not

consider that it does. Unless therefore an appropriate amendment is made to the pleaded case, the claim will fail.

The challenge based upon the non-fettering principle

27. As with the unanimity principle the existence of the non-fettering principle was not in dispute. A convenient statement of the principle is to be found in *Lewin on Trusts*, 19th edition, at 29-227:

> "When the power is fiduciary, the donee must exercise his judgment according to the circumstances as they exist at the time: he cannot anticipate the arrival of the proper time by affecting to release it or not to exercise it or by pledging himself beforehand as to the mode in which the power shall be exercised in the future. Any form of undertaking as to the way in which the power will be exercised in future is ineffective."

28. The trustees submit that the principle applies no less where the claim to give effect to the promise or expectation relied upon is grounded in an estoppel. They therefore contend that the pleaded expectation upon which Stephen's estoppel claim is based, namely that subject to the existing life interests of John and Kathleen the trustees would exercise their power of appointment under the 1967 Settlement in his favour, runs counter to the principle as being in effect a fetter on their dispositive freedom when at some future date they come to exercise the power. They submit therefore that they could not, and cannot, be estopped from freely exercising it and, accordingly, Stephen's claim must fail.

29. As this too is a challenge based on the way in which Stephen has pleaded his claim it is first necessary to examine his pleading. Paragraph 2.6 of his defence to Sam's claim (set out above) refers simply to the representation (by Mr Jodrell) in October 1994 that "he and his family would be the beneficiaries of the two estates" after the deaths of John and Kathleen. To similar effect is the plea in paragraph 2.8 (also set out above), made with reference to the cost of certain additions to Home Farmhouse, that Mr Jodrell and Mr Morcom suggested to Stephen shortly before a trustees meeting the following October "that he should pay for them himself…on the basis that he would be the next beneficiary of the Estate in any event." These pleas do not make clear whether the representations in question (if made) assumed, or were taken by Stephen to mean, that the trustees had already exercised their powers under the Settlement in Stephen's favour or whether they assumed, or were taken by Stephen to mean, that the trustees would at some future date exercise in his favour their power of appointment under the Settlement. Rather, it is in response to points made in the trustees' defence to his Part 20 claim that Stephen's position on this is made clear. Thus, in paragraph 4.30.9 of his reply Stephen pleads that he:

> "…sent his proposals to [Mr Morcom] on 28th April 2003 setting out his 'appraisal of how I would manage the Swyncombe Estate in the event that the beneficial interest was passed to me'."

30. That is a reference to a document dated 22 April 2003 – it is pleaded in the trustees' defence - which Stephen had produced and sent to Mr Morcom in response to a letter

dated 31 January from Mr Morcom and which was addressed to him as "one of the potential beneficiaries of both sets of trusts", namely the 1967 Settlement and the Will trusts. In his letter Mr Morcom invited him to set out his thoughts as to how he might manage the Estate in the future while making it clear that "it will be up to the two sets of trustees [i.e. the Settlement trustees and the Will trustees] to take whatever decision they consider appropriate…" The defence then goes on to refer to a letter dated 26 February 2003 from Stephen's then solicitor, a Mr Farley, to Mr Morcom in which, among other matters, Mr Farley stated that he had advised Stephen that under both trusts "the trustees have a wide power of appointment amongst the specified class of beneficiaries." None of this was consistent with the notion that, at least as regards the 1967 Settlement, the trustees had already made a decision in Stephen's favour. So far from challenging any of that, Stephen's reply at paragraph 4.30.9 not only implied that the trustees had yet to exercise their power of appointment (and thus the discretion vested in them) but seemed instead to reinforce that view of the position. This is made explicit in a letter dated 8 July 2003 which Mr Farley wrote on Stephen's behalf to Mr Morcom (and which Stephen sets out at some length in his reply). In the course of that letter Mr Farley referred to the understanding which, he said, was reached between Stephen and John Christie-Miller and Mr Jodrell in 1994 "with regard to the future succession of the Estate as a whole" and then went on to state:

> "It is of course appreciated that neither the Swyncombe Trustees in general nor Mr Jodrell in particular were able in 1994 to bind (legally) their successor-trustees of the Swyncombe Estate how to act. On the other hand the present Trustees will be aware that in practice Stephen has based his and his family's life and indeed moved home then and incurred significant capital expenditure on so doing, on the basis of the understanding reached. Moreover, so far as Stephen is aware, nothing has happened, or been said to him, since 1994 to indicate that the understanding then reached might be reviewed or changed. "

31. Last, there is Stephen's pleaded comment on Mr Farley's letter of 8 July 2003 set out in paragraph 4.30.17 of his reply. This leaves no room for doubt as to whether he understood the trustees to have already exercised their discretion or whether his understanding was that the discretion was yet to be exercised:

> "It was implicit in Mr Farley's letter of 8th July 2003 the Swyncombe Trustees should give effect to and/or take account of the representations made to [Stephen] and his reliance upon them in deciding how to exercise their discretion…"

32. The question therefore is whether the non-fettering principle operates as a complete defence to a plea of estoppel founded on a representation by trustees that they would exercise their discretion in a particular way at some future date. At the heart of the challenge is that if, as authority shows, a contract entered into by trustees with a potential beneficiary as to the future exercise by them of their discretion under their trust is void and unenforceable, the position cannot be any different, and the beneficiary in question cannot be in any better position, if instead of seeking to enforce the contract he raises a claim to estoppel. Counsel did not refer me to any

authority which directly decided the point. Although I was referred to several authorities (among them *Oceanic Steamship Navigation Company v Sutherberry* (1880) 16 ChD 236; *Re Gibson's Settlement Trusts* [1981] Ch 179; *Niak v Macdonald* [2001] NZCA 122; and *Re The Y Trust* [2011] JRC 135) none was concerned with the issue that I am asked to decide and none, to my mind, assisted with the solution to it. I shall not therefore take up space examining them.

33. Mr Goodfellow placed considerable reliance on the decision in *LB of Bexley v Maison Maurice Ltd* [2006] EWHC 3192 (Ch). That case was concerned with the claimant council's construction of a new crossover point from the defendant company's premises to the public highway over a narrow strip of land which, as the court (Lewison J) held, was in the council's ownership and not a part of the public highway. The company paid the council's modest cost of constructing the new crossover and also incurred costs on its own account in making internal alterations to its site to accommodate the new access point. In the process it stopped up the former access. For a number of years it used the new crossover without further charge and without objection by the council. There came a time, however, when the council took the position that the company had no right to pass over the narrow strip of land. It offered to license such use in return for a small fee. It also contended that if the company were to redevelop its premises it would be required to make a much more substantial payment in return for a permanent right of access over the crossover. The company objected to this. It contended that the council was estopped from denying that it had a permanent means of access to the highway over the new crossover (and thus that it was entitled to a right of way over the narrow strip of land) in substitution for a previous access and that it was entitled to enjoy the right without being required to make any further payment. Reference was made to the communications between the council and the company at the time the new access was discussed and the actual crossover constructed. Those communications had been with the council's planning department and, after planning permission for the new crossover had been granted, with the council's works department. The council argued that the communications between itself and the company were all referable to the exercise by the council of its statutory powers (in connection with its functions as the local planning and local highway authority) and that it did nothing in its capacity as a landowner (in respect of the strip of land over which the crossover was constructed) to encourage a belief in the company that it would acquire a right of way over it. It also argued that estoppel cannot be used to fetter a statutory discretion entrusted to a local authority and cannot validate what would otherwise be an *ultra vires* act.

34. Lewison J held that the company established the estoppel for which it contended. He found that the council could have exercised other statutory powers at its disposal to provide a new means of access by way of the crossover over the narrow strip of land in its ownership in return for the stopping up of the old access. He found that where a plea of *ultra vires* was raised as a defence to a claim based on estoppel the question was not whether some other power had been exercised but whether it could have been. It was immaterial therefore whether in fact the council had resorted to those other powers. He held that the fact that the council corresponded with the company, built the crossover (which included laying tarmac over the narrow strip of land) and charged the company for its services made a difference. He found that the company had established its claim to a proprietary estoppel so that it enjoyed a permanent means of access to the highway from its premises over the new crossover.

35. Mr Goodfellow submitted that just as the council in *Maison Maurice* could have done, by recourse to other powers at its disposal, what it gave the company to believe it had done or would do even though it had not in fact done so, so also with the Settlement trustees: they could have exercised their power of appointment in Stephen's favour by appointing the estate to him, or at least an interest in Home Farmhouse, upon the death of the survivor of John and Kathleen even though, in the event, no such appointment was executed. Given the representations made to him and his detrimental reliance on them, it would be unconscionable of the trustees, he submitted, to deny such entitlement on the ground that they had not in fact exercised their power of appointment and could not be compelled to exercise it in his favour because of the existence of the non-fettering principle.

36. I do not think that, properly understood, *Maison Maurice* assists Stephen. The issue there was whether, given what had happened (the construction by the council of the new crossover, the payment for it by the company, the other expenditure incurred by it and, not least, the use by it of the new crossover and the stopping up of the old), it was open to the council to deny the legality of what it had permitted the company to assume. Its defence based on the inability of an estoppel either to fetter the exercise by it of a statutory discretion or to validate what would otherwise be an *ultra vires* act were of no assistance in the light of what it had actually done and permitted and the availability of other, sufficient, statutory powers to give validity to its actions. Here by contrast the estoppel, as pleaded, is based upon an expectation in Stephen, brought about by the representations made to him by or on behalf of the Settlement trustees, of how, they (the trustees) will act in the future. There is no question of seeking a legal justification for what has already apparently happened.

37. So where does that leave the issue? Mr Wilson's short submission was that to give effect to the pleaded estoppel would be to require the trustees to exercise their discretion in a particular way when they come in due course to exercise it and this, he submitted, was the very thing that trustees cannot do and which the courts will not compel them to do. Estoppel, he said, cannot authorise that which is unauthorisable. He submitted that the non-fettering principle prevents an estoppel from arising by preventing any assurance that may be made from being even capable of having a binding effect. (He also submitted that the principle prevents any estoppel from arising by making it unreasonable for the person to whom the representation was made to rely on it but that is concerned with reasonable reliance which is an issue I am not concerned with on this application.)

38. The difficulty I feel about the submission is that it leaves without apparent remedy a person who in all good faith has conducted his affairs, for example by making personal or financial sacrifices, on the faith of a representation that he would one day inherit or acquire some interest in an estate or area of land, simply because the persons with whom he has dealt are trustees of that land, holding the land for the benefit of others, and are not themselves the outright beneficial owners. In the latter case (assuming the other estoppel requirements are present) he would be able to establish the estoppel and, let it be assumed, establish his right to an interest in the land equivalent to what he was given to understand would be given to him, whereas in the former case, if Mr Wilson is correct, he would not. This strikes me as unfair, not least when the claimant might have no idea, and no means of knowing, that the persons he has dealt with are trustees holding for the benefit of others and are not

themselves the beneficial owners. The fact that he might have some kind of personal remedy against the persons who made the representation in question – Mr Wilson raised the possibility but made no concession and the matter was not in any event explored in argument – or might have a right to recover any payments made in reliance upon the representation would at best be poor recompense for the disappointed claimant and might well provide no real recompense at all.

39. I have come to the view that, as baldly stated by Mr Wilson, the non-fettering principle does not operate to defeat Stephen's equity if the ingredients of the estoppel which he asserts are otherwise established. As *Lewin* points out in the passage at 29-205 to which my attention was drawn, the principle is confined to invalidating what would otherwise be a commitment on the part of the donee to exercise (or not to exercise) the power in question in a given way in the future. I do not see why this should prevent the court from granting relief to a person claiming an estoppel (if he has otherwise established the necessary ingredients). The relief in such a case might either be to accord to him an interest in the land in question commensurate with the expectation which the representation made to him has engendered or, as a minimum, be such as to ensure that he suffers no detriment as a consequence of having reasonably relied on the representation. The effect of so doing will not be (or need not be) to compel the trustees to exercise their power in some given way in the future but merely to disable them from exercising their power in respect of the asset in question and then only to the extent that the court has declared that the asset is to be applied in satisfaction of the equity which the claimant has established. If, in the instant case, the court were to hold that Stephen establishes a right to live rent-free in Home Farmhouse until the death of the survivor of himself and his wife (which is one of the alternative declarations which he seeks), the trustees would not be prevented from exercising their power of appointment over that asset. Instead, the appointment would be without prejudice to the rent-free right of occupation so declared. In short, the estoppel, if established, operates as a disposal of that asset only to the extent that the court permits and no more.

40. In the result I am not willing to strike out the Part 20 claim, or give the trustees summary judgment in respect of it, on the challenge founded upon the non-fettering principle. Mr Goodfellow reminded me that in an area of developing jurisprudence the court should be slow to strike out a claim since, in such cases, decisions on novel points of law should be based on actual findings and not assumptions of fact. He drew my attention to the note at 3.4.2 of the current edition of the White Book. To my mind this is indeed an area of jurisprudence where the relevant principles are still very much in course of development. (There is a very useful discussion to be found in para 12-036 of *Snell's Equity*, 33rd edition.) So the warning has force in the particular circumstances of Stephen's Part 20 claim. I consider therefore that it is better that this issue, and the extent to which it is affected by the developing jurisprudence in the area of proprietary estoppel, be fully argued in the light of the facts found at the trial.