Neutral Citation Number: [2021] EWHC 481 (Ch)

Case No: PT-2020-000319

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
PROPERTY, TRUST & PROBATE LIST (Ch D)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 04/03/2021

Before :

MR JUSTICE MILES

- -

Between :

PER BENDIK ROKKAN **Claimant**

- and –

(1) SIRIOL KJERSTI ROKKAN
(2) LLYWELA VERNON HARRIS
(as personal representatives of the estate of Elizabeth Gwenllian Clough Rokkan Deceased) **Defendants**

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Aidan Briggs (instructed by **Hugh James**) for the **Claimant**
Richard Dew (instructed by **Hutchinson Thomas**) for the **Defendants**

Hearing date: 23 February 2021

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JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:30 am on 4 March 2021.

Mr Justice Miles :

Introduction

1. In 1950 Elizabeth Rokkan, who had grown up in Wales, married Stein Rokkan, a Norwegian national. They moved to Norway in 1952 and lived there together for their whole married life. They had two children, Siriol Rokkan (the first defendant) and Per Rokkan (the claimant).

2. Stein Rokkan died domiciled in Norway on 22 July 1979. Elizabeth Rokkan was also domiciled there at that time. Under Norwegian statutory inheritance law there is process known as "*uskifte*" or "deferred probate" by which, in very broad terms, the surviving spouse may apply to the court for an order by which the surviving spouse is allowed to possess the whole of the joint estate of the deceased spouse and the surviving spouse and becomes subject to various obligations. The law provides that when the surviving spouse dies the joint estate is divided in two and each half passes to the heirs of the deceased spouse and the surviving spouse respectively (who may be the same).

3. Elizabeth Rokkan applied for deferred probate to the Probate Court of Bergen on 1 August 1979. Approval was given on the same day.

4. In about 1987 Elizabeth Rokkan moved permanently to Wales and stayed there until her death. She made her last will on 11 September 2012. She died, domiciled in England and Wales, on 17 January 2016. Apart from a small amount of land in Norway her assets consisted of real property in England and Wales and personal property of various forms.

5. In the will Elizabeth Rokkan made various specific legacies and bequests, including at clause 5, "absolutely to my son Per Bendik Rokkan … the balance of my bank accounts in Den norske [*sic*] Bank NOR Torgalmenningen 2 5000 Bergen Norway and Norges Postsparebank Oslo Norway and all my share in Den norske [*sic*] Bank ASA Bergen Norway".

6. In May 2014 she transferred the whole of the balances from the Den Norske accounts in Norway to accounts in her own name Lloyds Bank in the UK.

7. The defendants are the executors of Elizabeth Rokkan's will.

8. The claimant claims an entitlement to part of the estate on two bases: first, that by reason of the events giving rise to the order of deferred probate (or the consequences of that order) the claimant is entitled to a share of Elizabeth Rokkan's net estate; and, secondly, that the executors should give be required to give effect to the gift in clause 5 of the will on the basis that Elizabeth Rokkan lacked mental capacity at the time of the transfers from the Den Norske accounts in May 2014.

9. The defendants applied to strike out the claims. Rather than doing that, on 2 September 2020 Deputy Master Collaco Moraes ordered the trial of two preliminary issues.

10. The first is this:

> "Whether the Defendants are subject to any obligation, enforceable in England and Wales, to distribute the estate of Mrs Elizabeth Rokkan ("the Deceased") pursuant to the principles of the Norwegian law of deferred probate. Such issue includes:
>
> > (i) Whether the grant of deferred probate of Stein Rokkan's estate gave rise to an obligation pursuant to Norwegian Law enforceable against the estate of Deceased at her death ("the Norwegian Law Issue").
> >
> > (ii) Whether such obligation is enforceable by the Courts of England and Wales against the Defendants."

11. The second is:

> "Whether, on the assumption that the Deceased lacked capacity to manage her property and affairs at the relevant time, the transfers from the Den Norske Bank in Bergen to the Lloyds Bank in England caused the specific legacy at clause 5 of the Deceased's will, executed on 11 September 2012, to fail."

12. The Master also gave permission for the Particulars of Claim to be amended (inter alia) to particularise the claim that the application for deferred probate gave rise to a contractual obligation. The Claimant has taken that opportunity and amended its pleading.

13. For convenience only and without any lack of respect I shall refer to Elizabeth and Stein Rokkan below as "Elizabeth" and "Stein," and the claimant and first defendant as "Per" and "Siriol".

14. Per was represented by Mr Briggs, and the defendants by Mr Dew. I thank them for their helpful and interesting submissions.

The first preliminary issue

15. The only source of Norwegian law relied on by the parties was the Act of 3 March 1972 relating to inheritance, etc. ("the Inheritance Act" or "the Act"). There is an official translation in English published by the Norwegian Ministry of Foreign Affairs. The parties each served expert reports. The claimant's expert is Mr Max Gudmundsen and the defendants' is Ms Sicilie Tveøy. There was no cross-examination of the experts. They provided a joint statement to which I shall return below.

16. Part One, Chapter 1, of the Act provides for inheritance based on kinship. By §1 the general rule is that the offspring of the deceased inherit in equal proportions. If the deceased leaves a surviving spouse the rules of Chapters II and III apply.

17. By Chapter II, §6, the surviving spouse is entitled to one-fourth of the inheritance where the deceased spouse had offspring. If there are no other heirs the surviving spouse takes the entire inheritance. The surviving spouse has the right to retain undivided possession of the joint estate according to the rules of Chapter III (see below).

18. By §7 the rights of the surviving spouse under §6 can be restricted only by testament of which the surviving spouse is informed before the deceased spouse's death.

19. Chapter III is headed "Possession of the undivided estate." It runs from §9 to §28. The material provisions are these.

    (a) The surviving spouse has the right to retain possession of the joint estate (i.e. the global estates of both spouses) without dividing it with the deceased spouse's heirs: §9.

    (b) A surviving spouse opting to exercise the right to retain possession of the joint estate shall as soon as possible after the death of the deceased spouse notify the probate court thereof stating the name, age and address of the heirs and furnish a summary statement of their and the deceased spouse's assets and debts: §14.

    (c) If the probate court finds that conditions for retaining possession of the undivided estate have been met, it shall notify the surviving spouse that he or she has taken undivided possession of the estate: §16.

    (d) Everything that thereafter becomes the property of the surviving spouse forms part of the undivided estate unless it is property which pursuant to a marriage contract the surviving spouse owns separately. However, any gift or inheritance received by the surviving spouse will not form part of the undivided estate if division thereof is demanded within three months from receipt by the surviving spouse: §17.

    (e) The surviving spouse has for the duration of their life an owner's control of all the property forming part of the undivided estate. The surviving spouse may by testament dispose of such part of the estate as will pass to that spouse's heirs when they die insofar as such disposal does not conflict with the rules of obligatory inheritance in Chapter IV: §18.

    (f) The surviving spouse must not without the consent of the heirs donate any real property or donate any gift (which includes any sale or transaction which includes an element of gift) which is disproportionate to the resources of the estate. If the surviving spouse makes such a donation without consent, each heir may obtain a court order cancelling the gift if the recipient thereof understood or ought to have understood that the surviving spouse was not entitled to donate it: §19.

    (g) The surviving spouse is personally liable for the debts of the deceased spouse: §20.

    (h) An heir may require the estate to be divided when the surviving spouse acts improperly so that the estate is unnecessarily reduced or exposed to the risk of considerable reduction: §24.

    (i) Upon the death of the surviving spouse the undivided estate shall be apportioned equally to the heirs of the deceased spouse and the surviving spouse. If part of the inheritance from the first deceased spouse has passed to

the heirs, such part shall be taken into account for the purpose of that apportionment: §26.

(j) If the undivided estate has been considerably reduced in value because the surviving spouse has mismanaged his or her financial affairs, made improper use of the right to retain possession of the undivided estate or been guilty of any other improper conduct, the heirs may claim compensation from the estate, or from any separate property of the surviving spouse not required to pay debts: §27.

(k) All the property available to the surviving spouse belongs to the undivided estate when the time comes to divide it, unless it is proved that the resources are owned by the surviving spouse outside the undivided estate: §28.

20. Chapter IV is headed "Obligatory Inheritance". §29 provides (as amended) that two thirds of the property of the deceased pass as obligatory inheritance to his off-spring; but the obligatory inheritance shall in no case exceed 1000,000 kroner to each child of the deceased or to each child's line. A testator may not dispose of an obligatory inheritance by testament unless otherwise specifically authorised.

The deferred probate application and the subsequent advancements

21. Elizabeth applied for deferred probate by a written application dated 1 August 1979. The application (which is made on a standard court form) specifically referred to the statutory rules of deferred probate under the Act. Elizabeth did not identify in the application form any assets which she owned separately from the joint marital assets. Those assets included land in Norway.

22. In the application form Elizabeth identified Per and Siriol as Stein's heirs. They were both minors under Norwegian law (being under 20) and the application form was consented to by a nominated guardian on their behalf.

23. Thereafter, Elizabeth in 1983 and 1985 made "advancements" to her children of their paternal inheritance, in each case signing a written acknowledgement of the deferred probate arrangement under the Act (only the 1983 document has been found, but both are believed to exist).

The claim advanced by Per

24. The claim form seeks a declaration "that the Defendants hold the net estate of Elizabeth Rokkan deceased on trust for the Claimant as set out in the Particulars of Claim and as to the balance on the terms of the will dated 11 September 2012, alternatively orders enforcing against her estate the obligations undertaken by the Deceased upon the death of Stein Rokkan pursuant to Norwegian law."

25. The Amended Particulars of Claim pleads the relevant provisions of the Inheritance Act. It then alleges that by exercising the right of deferred probate, on 1 August 1979 Elizabeth came under a series of obligations under Norwegian law (binding on her executors) as follows:

> "9.1. To hold all of the assets of herself and Stein Rokkan as an undivided estate;
>
> 9.2. To pay the debts of Stein Rokkan personally;
>
> 9.3. To exercise an owner's control over the undivided estate during her lifetime;
>
> 9.4. Not to make any gifts of real property without the consent of the Claimant and the First Defendant (together 'The Heirs');
>
> 9.5. Not to make any gifts (including sales or other transactions at undervalue) which were disproportionate to the resources of the undivided estate without the consent of the Heirs;
>
> 9.6. Not to act improperly so that the undivided estate is unnecessarily reduced or exposed to the risk of considerable reduction;
>
> 9.7. In the event of the undivided estate being considerably reduced in value because of mismanagement of financial affairs, improper use of the right to retain possession of the undivided estate or any other improper conduct, to compensate the Heirs for such reduction; and
>
> 9.8. To dispose of her estate upon death according to the rules of obligatory inheritance, such that:
>
> i. one half of the undivided estate pass to the Heirs in equal shares; and
>
> ii. the remaining half pass as to the lesser of two thirds (of that half share) or the value of NOK 1,000,000 to the Heirs in equal shares."

26. Paragraph 10 of the Amended Particulars of Claim alleges that such obligations were contractual and are governed by Norwegian law.

27. Paragraph 22 alleges in the alternative that the effect of Elizabeth applying for and being granted deferred probate was to give rise to a trust whereby she held the joint assets on trust for herself during her lifetime and subject thereto as to one half for the Heirs and as to the balance "as to the lesser of two thirds or the sum of NOK 1,000,000 for the Heirs in equal shares with the remainder to pass according to her will." It is alleged that the trust is governed by Norwegian law.

28. I make two preliminary comments about these claims. First, though the contract and trust claims both allege lifetime obligations, there is no allegation of any violation or infraction of them by Elizabeth. The obligations that matter are those said to arise on her death (whether by contract or trust), namely, to dispose on her estate on her death in accordance with the Norwegian laws of obligatory inheritance.

29. Secondly, the "estate" of Elizabeth referred to in the pleading is coterminous with the concept of the "joint estate" under the Norwegian law. It consists of her net assets at death, including anything that may have derived from the assets of Stein and anything that may have been acquired by her after Stein's death. There is no suggestion that the

estate can or should be segregated into some assets deriving from Stein and others of her own.

The position of the parties on the Norwegian law issue

30. Counsel for the defendants says that the issue in the case is one of succession and that the law governing the devolution of Elizabeth's estate falls to be determined by the law of her domicile at death, that of England and Wales. Her estate therefore falls to be distributed under the terms of her will, to which there is no challenge. Had Elizabeth died domiciled in Norway, under English private international law, the devolution of her estate would have been governed by the Inheritance Act (specifically, §26). But that is not this case as she died domiciled here.

31. The defendants say that the contentions that Elizabeth fell under contractual or trust obligations by reason of applying for deferred inheritance should be rejected.

32. Counsel for Per submits that the real issue in the case is whether Elizabeth (and therefore the defendants as her executors) was under contractual or trust obligations under Norwegian law. He says that, properly characterised, the issues in the case concern those obligations rather than a question of succession. He says that any such obligations are governed by Norwegian law (as the law most closely connected with the contract or trust).

Characterisation: principles

33. Counsel referred to the well-known case of *Macmillan v Bishopsgate* [1996] 1 WLR 387. At pp.391-2 Staughton LJ said this:

> "In any case which involves a foreign element it may prove necessary to decide what system of law is to be applied, either to the case as a whole or to a particular issue or issues. Mr. Oliver, for Macmillan Inc., has referred to that as the proper law; but I would reserve that expression for other purposes, such as the proper law of a contract, or of an obligation. Conflict lawyers speak of the lex causae when referring to the system of law to be applied. For those who spurn Latin in favour of English, one could call it the law applicable to the suit (or issue) or, simply, the applicable law.
>
> In finding the lex causae there are three stages. First, it is necessary to characterise the issue that is before the court. Is it for example about the formal validity of a marriage? Or intestate succession to moveable property? Or interpretation of a contract?
>
> The second stage is to select the rule of conflict of laws which lays down a connecting factor for the issue in question. Thus the formal validity of a marriage is to be determined, for the most part, by the law of the place where it is celebrated; intestate succession to moveables, by the law of the place where the deceased was domiciled when he died; and the interpretation of a contract, by what is described as its proper law.
>
> Thirdly, it is necessary to identify the system of law which is tied by the connecting factor found in stage two to the issue characterised in stage

> one. Sometimes this will present little difficulty, though I suppose that even a marriage may now be celebrated on an international video link. B The choice of the proper law of a contract, on the other hand, may be controversial."

34. He went on at p.392 to cite a passage from Dicey & Morris (12th ed):

> "The way the court should proceed is to consider the rationale of the English conflict rule and the purpose of the rule of substantive law to be characterised. On this basis, it can decide whether the conflict rule should be regarded as covering the rule of substantive law. In some cases, the court might conclude that the rule of substantive law should not be regarded as falling within either of the two potentially applicable conflict rules. In this situation, a new conflict rule should be created."

35. At p. 407 Auld LJ said this:

> "Subject to what I shall say in a moment, characterisation or classification is governed by the lex fori. But characterisation or classification of what? It follows from what I have said that the proper approach is to look beyond the formulation of the claim and to identify according to the lex fori the true issue or issues thrown up by the claim and defence. This requires a parallel exercise in classification of the relevant rule of law. However, classification of an issue and rule of law for this purpose, the underlying principle of which is to strive for comity between competing legal systems, should not be constrained by particular notions or distinctions of the domestic law of the lex fori, or that of the competing system of law, which may have no counterpart in the other's system. Nor should the issue be defined too narrowly so that it attracts a particular domestic rule under the lex fori which may not be applicable under the other system: see Cheshire & North's Private International Law, 12th ed., pp. 45-46, and Dicey & Morris, vol. 1, pp. 38-43, 45-48."

36. I was also taken to a well-known passage in *Raffeisen Zentralbank Osterreich AG v Five Star Trading LLC* [2001] EWCA Civ 68 at [27] where Mance LJ said:

> "While it is convenient to identify this three-stage process, it does not follow that courts, at the first stage, can or should ignore the effect at the second stage of characterising an issue in a particular way. The overall aim is to identify the most appropriate law to govern a particular issue. The classes or categories of issue which the law recognises at the first stage are man-made, not natural. They have no inherent value, beyond their purpose in assisting to select the most appropriate law. A mechanistic application, without regard to the consequences, would conflict with the purpose for which they were conceived. They may require redefinition or modification, or new categories may have to be recognised accompanied by new rules at stage 2, if this is necessary to achieve the overall aim of identifying the most appropriate law (cf also Dicey & Morris, The Conflict of Laws, 13th ed (2000), vol 1, p 34, para 2-005)."

37. As I have already explained, counsel for Per submits that the issue is whether there was an obligation personally binding on Elizabeth (and therefore her personal representatives). Counsel for the defendants says that the issue is one of succession.

38. It seems to me that before answering the question of characterisation at an abstract level it is more helpful to address Per's case that Elizabeth was under a personal obligation (arising under a Norwegian contract or trust) concerning what would happen to her estate on death. Addressing the rival contentions in this order seems to me to assist in reaching the right characterisation of the matters in issue.

The contract claim

39. Counsel for Per submits that a contract was created by Elizabeth's application for deferred probate in 1979. He submits that Elizabeth's application was voluntary and that Per and Siriol consented (through the assent of the guardian). He says that this created a contract, with the duties being spelt out by the terms of the Inheritance Act.

40. The defendants submit (in summary) that the suggestion that there was a contract is a contrivance. The obligations and rights of the parties are spelt out in the Inheritance Act. By making the application Elizabeth no doubt submitted herself to the obligations under the Act, but she did not enter any contract to do so.

41. I prefer the submissions of the defendants for a number of reasons.

42. First, the relations of the parties arise under the Act itself and do not appear to me to arise from anything resembling a contract. The Act gives a surviving spouse the power to apply for an order for deferred inherence. Where it is ordered by the court the surviving spouse is placed (by the statute) under a series of rights and duties in respect of the joint property. The statute also gives the heirs locus standi to apply for court remedies where needed. Ms Tveøy says (without contradiction) that the obligations and rights of the parties are exhaustively spelt out by the statute. The surviving spouse cannot pick and choose his or her obligations. Where an heir complains about the conduct of the surviving spouse, the complaint is not that the surviving spouse has failed to keep a promise; it is that he or she failed to comply with the statutory obligations. It seems to me that the superaddition of a contract to comply with the statute is an unnecessary fiction.

43. Secondly, though counsel for Per emphasised the consent of the guardian for the heirs in the present case, the Act allows the Court to make an order for deferred inheritance absent the heirs' consent. It is hard to see that the one case (with the heirs' consent) creates a contract but the other (no consent) does not. The obligations of the surviving spouse and the remedies of the heirs would be precisely the same in both cases.

44. Thirdly, the reason for the guardian's involvement appears to be specifically to provide a layer of protection in the court proceedings (by, for example objecting to the list of the assets or opposing the order sought), not to enter a contract on behalf of minor heirs. Counsel for Per did not suggest that the guardian had any other authority to enter a contract for the heirs.

45. Fourthly, as Ms Tveøy explains, the obligations arising under the deferred probate provisions of the Inheritance Act are seen as being part of the law of succession (or

possibly economic family law), but she is unaware of any suggestion anywhere in Norwegian law that they are contractual. That may not be conclusive, but to my mind it is both relevant and instructive. It also seems to me from a simple reading of relevant parts of the Act that there is no suggestion of a contractual element to the obligations of the surviving spouse.

46. Fifthly, I do not see any force in the Claimant's point that the surviving spouse falls under lifetime obligations concerning, e.g., the management of the joint estate and prohibited dispositions. That is fully consonant with the obligations being exclusively statutory in source and content. It does not support the idea that the surviving spouse falls under contractual obligations.

47. Sixthly, the key provisions of the Act for present purposes concern what on the death of the surviving spouse, and there is no reason to dress these up in the clothes of contract. The relevant provisions say (to paraphrase) that on the death of the surviving spouse the estate shall be divided into equal parts (§26) and that the surviving spouse's part shall pass by testament, subject to the rules on obligatory inheritance (§18). These are mandatory rules of inheritance under the Norwegian statutory code. It is to my mind a mere fiction to suggest that they derive from a contractual undertaking of the surviving spouse at the time he or she applies for deferred probate. They are mandatory rules of heirship imposed by law.

48. I therefore accept the defendants' submission that the attempt to characterise the obligations imposed on the surviving spouse and the joint estate by the Act as contractual is unnecessary and contrived.

The trust claim

49. I turn to the allegation that Elizabeth's application for deferred probate under the Act gave rise to a trust. Counsel for Per advanced two arguments. He said, first, that the application for deferred probate created a trust falling within the Hague Convention on the law applicable to trust and on their recognition, and that this court was therefore required to recognise it. His second, fall-back, argument was that, even if the trust did not fall within the terms of the Convention in any event there was an arrangement in the nature or analogous to a trust and that this was sufficient for his purposes.

50. Counsel for the defendants said (in summary) that the Act created its own set of rights and obligations and that there was no need or basis for postulate a trust. He said that the arrangements did not create a trust within the Hague Convention or any trust at all. He said that it was another attempt to dress up the obligations under the Act as something else. He also pointed out that Norway does not recognise the institution of a trust.

51. I prefer the submissions of the defendants.

52. First, in my judgment the legal relations of the parties where deferred probate is granted under the Act do not fall under the definition of a trust within the Hague Convention.

53. The definition of a trust and the scope of the Convention is set out in Arts. 2 and 3 as follows:

> Article 2
>
> For the purposes of this Convention, the term "trust" refers to the legal relationships created – inter vivos or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.
>
> A trust has the following characteristics –
>
> a) the assets constitute a separate fund and are not a part of the trustee's own estate;
>
> b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;
>
> c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.
>
> The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.
>
> Article 3
>
> The Convention applies only to trusts created voluntarily and evidenced in writing.

54. The attempt to map the legal relations of deferred probate on to Arts. 2 and 3 of the Convention falters at several points:

(a) Art 2 starts by referring to the creation of a legal relationship by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose. The suggestion appears to be that there is a trust of the joint assets of Stein and Elizabeth. But Stein did nothing to place assets under the control of Elizabeth. He cannot be regarded as the settlor. There may be a question whether, on the wording of Art 2, the settlor and the trustee can be the same person. But even if they can Elizabeth did not purport to settle a trust or assume the role of trustee. All she did was to apply for deferred probate under a statutory scheme.

(b) Art. 2(a) says that one of the characteristics of a trust is that the assets constitute a separate fund and are not part of the trustee's own estate. That characteristic is not found here. The Inheritance Act uses the concept of a joint estate. That estate includes the joint assets of both spouses and also embraces (with some exceptions) all the property acquired by the surviving spouse after the making of the deferred probate order. The joint estate is answerable to the creditors of the surviving spouse (and the creditors of the deceased spouse

since the survivor becomes personally liable for those debts). There is therefore no separate fund which is not part of the surviving spouse's estate. Rather, there are statutory provisions for the creation of the joint estate and its division and distribution in certain events (including the death of the surviving spouse).

(c) By Art. 2(c) another characteristic of a trust is that the trustee has the power and the duty, in respect of which he is accountable, to manage employ and dispose of the assets in accordance with the terms of the trust and the special duties imposed on him by law. The Act does include various requirements concerning the management of the joint estate and restrictions on disposal etc. However as I see it these are not duties arising under the terms of any trust. They are the requirements of the Act itself, no more and no less. It is also far from clear that the Act renders the surviving spouse accountable in the sense meant by Art 2(c), which must mean accountable as a trustee.

(d) Counsel for Per referred to the proviso to Art. 2 and said that the fact that the trustee may have rights as a beneficiary is not necessarily inconsistent with a trust. But that proviso applies where the legal relationship is otherwise in the nature of a trust. One cannot conjure a trust from the proviso alone.

(e) By Art. 3, the Convention applies only to trusts created voluntarily and evidenced in writing. I agree with counsel for the defendants that the obligations on Elizabeth under the Act arose by operation of law (as incidents of the grant of deferred probate by the court) and cannot properly be regarded as arising voluntarily and in writing for the purposes of Art 3.

55. Secondly and more generally, I do not think that the legal relationship under deferred probate falls within the legal conception of a trust. I repeat the points made in the previous paragraph: though they were directed there to the autonomous definition contained in the Hague Convention, they are also useful pointers to the conclusion that there was no trust here. Though some of the obligations imposed on the surviving spouse may also apply to a trust (e.g. as to duties of management or preventing certain disposals) it does not begin to follow that they served to create a trust. The matrix of rights and obligations under the Act is a specific code, which is not analogous to a trust. The assets are fully commingled in a single estate. The joint estate includes the property of the surviving spouse and, importantly, (with some exceptions) the property acquired by the survivor after the death of the first deceased spouse. There is no segregation of the deceased's assets from those of the survivor. There is one joint fund. There is (it must follow) no obligation to invest or protect any separate trust assets. Moreover, there are other features of the statutory regime which have no counterpart under the trust concept. For instance, the survivor assumes a personal liability for all of the debts of the deceased spouse (even if these exceed the assets contributed by him or her).

56. Thirdly, as a related point, in Norwegian law the Inheritance Act exclusively and exhaustively stipulates the obligations of the surviving spouse and the ability of the heirs to apply to the court for judicial supervision of the surviving spouse's conduct. Ms Tveøy confirms that the Norwegian courts do not, when considering the Act, resort to ancillary principles outside the statute itself. So the attempt to engraft an

extra-statutory legal institution of the trust is both unneeded and alien under the very law said to be applicable.

57. Fourthly, it is common ground that there is no law of trusts in Norway. This may not be conclusive, but it firmly supports the conclusion that the Inheritance Act is a comprehensive statement of the relations of the parties. The only events alleged in the pleadings to have created the alleged trust obligations is Elizabeth's application for deferred probate under the auspices of Norwegian law. I find it very hard to see how that can have given rise to a trust where the conceptual categories of Norwegian domestic law do not include the trust. What one finds instead is a comprehensive code of inheritance law. No doubt Elizabeth considered herself bound to comply with it, but that is because the statute itself imposed them, not because of the assumption of some non-statutory or extra-statutory obligations.

58. Counsel for Per submitted that it was possible for there to be a trust of assets in a jurisdiction which does not recognise the concept of a trust. He referred to a decision of the FTT in *Schechter v HMRC* [2017] FTT 189. The case is not authority in this court and the judge said that he had been given no assistance on the legal issues, so it has no real persuasive weight. But in any case the passage cited seems to me to be concerned with the question whether there can be a trust over property sited in a jurisdiction which does not recognise the concept of a trust, which is not controversial (cf. *Akers v Samba* [2017] UKSC 6). That is not the present issue. I do not in any case think that the question raised by Per requires a final answer in the present case. What is material, when seeking to characterise the rights and obligations of the parties under or by reference to the Norwegian succession statute as a trust, is that the law of Norway does not itself know of trusts. As I say this may not be decisive, but taken together with the other points raised above, it strongly points against the proposed trust description.

59. Counsel for Per also sought to draw an analogy with the English law principles concerning mutual wills. I do not find the analogy persuasive. The doctrine arises where there is a contract between two people to make wills. But there was no such contract between Elizabeth and Stein. For the reasons given above nor was there a relevant contract between Elizabeth and her children that could give rise to a trust of the kind found in the mutual wills cases.

Characterisation revisited

60. For these various reasons I am unable to accept Per's arguments that there was a contact or trust obligation binding on Elizabeth (and therefore her estate on her death). I consider that the obligations she was under concerning the joint estate arose exclusively under the Inheritance Act. This means that Per fails on each of the two pleaded basis for the claim. This conclusion is sufficient to resolve the first preliminary issue.

61. But, having taken this analytical journey, I also return to the question of characterisation: what is the issue in the case for the purposes of private international law? In my judgment, it is how the joint estate is to devolve on the death of Elizabeth. This is a question of succession to Elizabeth's estate.

62. As explained above, none of the life-time obligations enumerated in the Inheritance Act is sought to be enforced. Per alleges that Elizabeth was obliged (under a contract or a trust) on her death to leave the estate in accordance with the rules of obligatory inheritance (see paras 9.8 and 11.1 of the Amended Particulars of Claim). The relevant provisions of the Inheritance Act provide that on the death of the surviving spouse the estate shall be divided into equal parts (§26) and that the surviving spouse's part shall pass by testament, subject to the rules on obligatory inheritance (§18).These are mandatory rules of division of the estate and obligatory inheritance. They do not involve a voluntary act on the part of the deceased. The issue therefore comes to this: how should Elizabeth's estate be distributed on her death? To repeat, this is an issue of succession, not the performance of a personal obligation.

63. As an issue of succession it falls to be determined (save as to immovables) by the law of her domicile on death. The Norwegian Inheritance Act has no application under English private international law because she was not domiciled in Norway when she died.

64. This view accords with the holistic and teleological approach commended by Mance LJ in *Raffeisen*: the applicable law (of succession) seems to me to be the appropriate one to decide the devolution of Elizabeth's estate.

65. I should finally refer to the joint statement of the Norwegian law experts. They agreed that "the grant of deferred probate of [Stein's] estate gave rise to an obligation pursuant to Norwegian law enforceable against the estate of [Elizabeth] at her death." That seems to me to be pitched at far too high a level to be of any real use. It is unclear what assumption the experts were making about the application of the Act to the estate (which involves questions of conflict of laws); it appears that they were probably assuming that the Act applied to the estate. Nor does the experts' agreement explain the nature or content of the obligation. In any case I have drawn on the substance evidence of the experts in assessing in detail the nature and effect of the relevant Norwegian law.

66. I therefore decide the first preliminary issue in favour of the defendants.

The second preliminary issue

67. The second issue is one of domestic law. The assumed facts can be repeated very briefly. Elizabeth made a will on 11 September 2012 in which she made a specific gift of balances with Den Norske bank to Per. At some date after that she lost the mental capacity to conduct her own affairs. After that, in May 2014, she transferred the balances from Den Norske bank to an account in her own name at Lloyds in the UK.

68. Per's case is for a declaration that the purported transfer of funds "do not cause the gift at clause 5 of the Will dated 11 September 2012 to fail by ademption".

69. The pleading does not identify any property said to represent the subject matter of the bequest. Instead it seeks an order that a sum equivalent to the then value of the Norwegian accounts be paid to Per. The preliminary issue as framed does not assume that there remained property in the estate at Elizabeth's death representing or derived the balances in the Norwegian accounts. It seems to me that this additional

assumption should be made for the purposes of the preliminary issue. Neither party suggested that they would be prejudiced by this course.

70. The arguments referred to the concept of ademption. That simply means the loss or withdrawal of a specific gift when at the date of the testator's death the subject matter of it has ceased to be within the testator's estate or its nature has fundamentally changed (see Williams, Mortimer and Sunnucks (21st Ed.) at [66-01]).

71. The starting point is section 24 of the Wills Act 1837 which provides that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear in the will.

72. Applying that rule, as at the date of Elizabeth's death the property referred to in clause 5 of the will did not exist. It follows that, unless some special exception applies, the gift must fail.

73. Counsel for Per accepted this starting point but submitted (in brief summary) that where a person has made a specific gift in a will and then, without capacity, disposes of property, the gift should be taken to apply to the proceeds of the original property. This is because the disposal has taken place without the relevant knowledge and act of the deceased (who lacked capacity).

74. Counsel for the defendants submitted (in brief summary) that there is no principle that a gift does not adeem because the transaction takes place without the deceased's knowledge. He said that ademption does not depend on knowledge or intent.

75. I was referred to the Mental Capacity Act 2005 and a number of authorities.

76. By the Mental Capacity Act 2005, Sch. 2, para 8, if a deputy appointed on behalf of a person without capacity (P) makes a disposition of property, and under P's will or intestacy any person would have taken an interest in the property but for the disposal, that person takes the same interest in any property representing the original property as circumstances allow. This re-enacts s.101 of the Mental Health Act 1983.

77. In *Jenkins v Jones* (1866) LR 2 Eq. 323 the testator made a specific gift of farm stock to his son; after he had lost capacity his wife and son (without the authority of the testator) sold farm stock and kept the proceeds in a separate account. The court held that as the conversion of the property was not the act of the testator the gift did not adeem and that it attached to the proceeds.

78. *Re Slater* [1907] 1 Ch 665 was a decision of the Court of Appeal. The testator made a specific gift of stock in a local water company. By an Act of Parliament the company along with a number of others was acquired by a metropolitan water company (for London). Shares in the (much larger) metropolitan company were distributed to the holder of stock in the old water companies. The Court of Appeal held that as a will speaks from the death of the testator and the testator no longer held stock in the (old) company there was no property covered by the gift in the will. The question was therefore answered as one of interpretation. Strictly speaking what was said about ademption was obiter, but at p.671 Cozens-Hardy M.R. said this:

> "There was a time when the Courts held that ademption was dependent on the testator's intention, on a presumed intention on his part; and it was therefore held in old days that when a change was effected by public authority, or without the will of the testator, ademption did not follow. But for many years that has ceased to be law, and I think it is now the law that where a change has occurred in the nature of the property, even though effected by virtue of an Act of Parliament, ademption will follow unless the case can be brought within what I may call the principle of *Oakes v. Oakes* (1) 9 Hare, 666, in which Turner V.-C. held that a bequest of shares in a railway company was not revoked by the subsequent change of those shares into stock by reason of a vote of the company under the powers of their special Act."

79. In *Banks v National Westminster Bank* [2005] EWHC 3479 (Ch) the testator lost capacity and the holder of an enduring power of attorney disposed of property specifically bequeathed by the will. HH Judge Rich QC (sitting as a High Court judge) reviewed the authorities, including those listed above, and concluded that the change made by the attorney adeemed the gift. He rejected the argument that there was an exception where the subject-matter of the gift had been extinguished without the knowledge of the (incompetent) testator.

80. Building on these materials, counsel for Per submits that there is no ademption where there is a change to the property of which the testator has no knowledge (because of incompetence). He says that the provisions of Sch2, para 8 of the Mental Capacity Act reflect an underlying principle of the common law that the disposal of the property of a person without capacity should not operate to disturb specific gifts made in a will. He also seeks to draw from *Jenkins v Jones* the broad proposition that a transfer of property without the knowledge of the testator will not cause a gift to adeem where it is represented by other property at the date of death. He also observes that it would be open for the executors to seek to set aside the transfers and that it would therefore be anomalous that the gift under the will should adeem.

81. Counsel for the defendants submits that there is no such principle. He says that ademption does not depend on intention or knowledge. Indeed if there had been such a principle at common law there would have been no need for the statutory intervention. He also points out that the ademption takes place where the change in the property is made by a duly authorised attorney, but the testator lacks capacity; so lack of capacity cannot be the touchstone.

82. I prefer the defendants' submissions.

83. The starting point, as explained above, is the principle that a will speaks from the date of death. You read the specific gifts of the will and ask whether the testator held property answering to that description when he died. If not, that is usually the end of things.

84. That is how the Court of Appeal treated the issue in *Re Slater*. The Court also treated it as well-established that ademption does not depend on the intention of the testator. Counsel for Per said that he based his argument on Elizabeth's lack of knowledge and capacity to act rather than an absence of intention. But that seems to me to be a distinction without a difference. The point made by the Court of Appeal was that

ademption does not depend on the state of mind of the testator. As for the lack of capacity, unless and until the transfers are set aside, they operate in law as her acts.

85. I do not consider that *Jenkins v Jones* assists Per's position. The reasoning of the court was highly compressed, but in my view it turned on the finding that the wife and son had sold the property without the testator's authority as well as without his knowledge (see the passage at p.328 but also the way the judge expressed the essential question at p.326: "But can another man, against the will and authority of the testator, by converting the specific legacy disappoint the legatee, and deprive him of the legacy in its converted state?").

86. This is how Judge Rich analysed the case in *Banks* at [29]. He also drew a contrast at [10] with *Re Palmer* [1945] 1 Ch 8. In that case the subject matter of a gift was destroyed by a duly authorised transfer by a receiver appointed by the court in lunacy acting within the scope of his authority. That shows that the mere lack of capacity on the part of the testator cannot be enough to engage the court's intervention.

87. There is then the statutory exception under the Mental Capacity Act. The statutory intervention does not appear to me to assist Per's argument. It would not have been necessary if the mere fact of incapacity of the testator would have prevented ademption of a gift. Moreover the statutory rule is confined to dispositions of deputies and is no more general. I do not think one can draw from the statutory rule a principle to be applied by analogy to a case where it does not apply.

88. Drawing the threads together, there is no support in the cases for the broad proposition that a change in the character of the testator's property made without the knowledge of the testator (through incapacity) does not adeem a specific gift of the original property. There is a recognised exception where the person making the change acts without the authority (and knowledge) of the testator; but not where he acts with the authority (but not the knowledge) of the testator. Here there is no question of a breach of authority as the transfers were effected by Elizabeth herself (albeit, on the assumed facts, without capacity).

89. Moreover, it is widely accepted (illustrated by *Re Slater*) that ademption is not based on intention. The question therefore usually comes down to asking whether the specific property described in the gift is held by the testator at death. I do not think there is any basis for the courts (rather than the legislature) to extend the recognised exceptions to this rule.

90. I do not think that there is any force in the argument that the executors might be able to set aside the transfers. That would depend (in English law at least) on showing that the banks were aware of Elizabeth's incapacity. Moreover there may be no reason for the executors to seek to set aside transfers which had no impact on the amount of the estate. An application to set aside would also be potentially complex and expensive.

91. To summarise: clause 5 of the will referred to Norwegian deposits; Elizabeth did not hold any such deposits when she died; therefore there was nothing on which the clause 5 could bite. There is no legal basis for treating clause 5 as applying to anything else.

92. I therefore decide the second preliminary issue in favour of the defendants.