**MR JUSTICE CHRISTOPHER CLARKE:** QBD. Commercial Division. 24th March 2006.

1. Rabbi Joseph Halpern ("Joseph"[1] ) *(Throughout this judgment I have used anglicised versions of the first or second names of the Halperns concerned and dates from the Gregorian calendar.*) died on 2nd July 1999. He and his family were and are devout Orthodox Jews. Joseph was married to Frieda Halpern ("Frieda"). They had five sons –David, Mordechai, Jacob, Aron, and Israel – and one daughter – Esther. The family home was in Manchester where David, Mordechai and Jacob still live. The Halperns are prominent members of the Manchester Jewish community. By wills dated 6th February 1989 Joseph and Frieda appointed David, Mordechai and Jacob ("*the three brothers*") as their executors and left to them their entire estate on trust for sale, the net proceeds to belong to them in equal shares. On 26th June 1998 Joseph caused to be executed a Jewish will, written in Hebrew. This document, as is customary, was not signed by Joseph but is the record made by two witnesses on Joseph's instructions. It provided for (i) a legacy of £500 to be divided equally among his five sons, in fulfilment of the inheritance prescribed by the Torah; (ii) bequests of books and religious articles; and (iii) a bequest of his house to Frieda. The remainder of his possessions he left in accordance with a "***reckoning***" signed by him of 30th November 1992 and the remainder after that was to be divided into 8 parts. Part 1 was for Frieda, Parts 2, 3, 4 and 5 were for the three brothers and Esther. Parts 6 and 7 were to be held by his executors "***as True Owner***" for the benefit of Aron and Israel, but with £ 1,000 going to each of the two as a gift. Part 8 was to be given for charitable or benevolent purposes as selected by his executors. He appointed the three brothers as his executors and exempted them from the ***Shavuah*** – i.e. the requirement to swear an oath. The will provided that the executors should have the right to change the division (apart from the distribution of the £ 500).

2. The will contained a provision known as a ***Shtar Chatzi Zochor***, by which Joseph admitted that he owed Esther the sum of £ 10,000,000 payable one hour before his death on the condition that: *"..if my sons will want to give her a share, and allow the executors to fulfil all that has been explained above about the whole estate, even of those things the acquisition of which will not have been completely valid according to the laws of the Holy Torah, then they are exempt from repaying her the above sum."*

   The Torah provides that a daughter may not inherit unless there are no sons[2] (*Numbers Chapter 27, Verse 8.*) An admission of a debt in excess of the value of the estate to be forgiven if the bequest to the daughter is honoured is, however, a means, long recognised as valid by Orthodox Jews, of ensuring that a daughter inherits notwithstanding the Torah.

3. The wills of 1989 have, I was told, been proved and the three brothers have administered the estate. The evidence does not reveal what was the value of the estate, although Esther's witness statement states that the value of Joseph's estate was well below the £ 10,000,000 owed to her from her father's estate.

4. Israel has six sons, one of whom is Samuel, who lives in Israel. As is perhaps apparent from the Jewish will Joseph and Israel were estranged. Israel left home aged 15 and the relationship between Joseph and Israel, and his wife and some of his children, worsened.

5. Frieda died on 6th August 2000. She had also made a Jewish will, a copy of which is not in evidence, which contained a similar admission of liability to Esther of £10,000,000 to be foregone if her will was honoured.

6. Thereafter a dispute arose about the inheritance between Israel and the three brothers. Samuel, who is a Rabbinical scholar, represented Israel in this dispute. Israel and Samuel are now the claimants and the three brothers, together with Aron and Esther are the defendants. Aron and Esther have not been served.

7. It was incumbent on the Halperns, as Orthodox Jews, to seek to resolve the dispute in accordance with Jewish law and custom. The three brothers wished the matter to be resolved by the Manchester Beth Din or some other recognised Beth Din. The claimants wanted a specialist Beth Din. In the event it was agreed that the dispute should be decided by an ad hoc Beth Din, known as a ***Zavloh*** or ***Borrerus.*** Mordechai says that he and his brothers received a threat of a ***Ksav Sirruv***, a form of sanction to which I refer hereafter, if they did not agree to the ***Zavloh***.

8. Each side nominated a Rabbi. The three brothers nominated Rabbi Lichenstein. Israel and Samuel nominated Rabbi Marmarosh. The two Rabbis nominated Rabbi Schmerler. These three acted as *Dayanim* i.e. judges (hereafter "the dayanim"). The arbitration began in Zurich on 9th January 2002. Israel and Samuel and the three brothers executed two documents, one produced by Rabbi Lichenstein and one by Rabbi

Marmarosh. The one produced by Rabbi Lichenstein is described as a "*Deed of Submission and Arbitration*" and is between Israel and Samuel and the three brothers, all of whom have signed it. It is headed "*In the matter of the Arbitration Act 1996*" and "*In the matter of an arbitration between*" the claimants and the three brothers. It provides:

*"WHEREAS a dispute or difference has arisen and still exists between the above parties and they have failed to come to terms:*

*AND WHEREAS it is the desire of the parties to refer such dispute or difference by way of Din Torah to the arbitration and final decision of the Beth Din of the above Zabla:*

*NOW THEREFORE the parties agree as follows:-*

1. *The parties hereby agree to refer to the arbitration and final decision of the Beth Din of the above Zabla, all disputes and differences between them, and all claims which either party alleges that he has against the other party, for determination by way of Din Torah according to the rules of procedure customarily employed in arbitrations before the Beth Din, and according to principles of halachah and/or general principles of equity customarily employed in arbitrations before the Beth Din.*
2. *The parties hereby agree each on their part to accept and perform the Award of the said Beth Din touching all disputes, differences and claims between the parties, which Award shall be final and binding, and to pay such costs as the Beth Din may determine within the period specified in the Award.*
3. *The parties hereby agree that should either party, after the preliminary hearing has been heard inter partes, subsequently fail without good cause to attend any subsequent hearing, the Beth Din may proceed to determine the matter ex parte."*

9. The document produced by Rabbi Marmarosh was a Deed of Arbitration (known as a *Shtar Birurim*) also described as being between Israel and Samuel, on the one hand, and the three brothers on the other. It was signed by the claimants and the three brothers. It provided:

*"There are between us disputes in the matter of the inheritance of our father Rabbi Josef Halpern of blessed memory*
*AND we have accepted upon ourselves the following chosen Rabbis to judge between us on all these claims*
*Rabbi Moishe Chaim Schmerler: Zurich*
*Rabbi Yisroel Marmorish: Bnei Brak*
*Rabbi Yisroel Yakov Lichtenstein: London*
*In the event that one of the Dayanim shall leave/depart or not be able to judge for whatever reason [at the time fixed by the remaining judges] – then the two remaining judges shall choose the third judge.*
*AND we commit and bind ourselves and all our belongings to fulfil all that they will decide whether as law as compromise or mistakenly and we have no right to dispute the decision neither in Jewish Law nor in secular law.*
*All this has been done in our goodwill and with a Kinyan Gomur Agav Sudor and not as an Asmachtoh nor is this a specimen document in the best possible and effective manner whether in accordance with Jewish Law or in accordance with the law of the kingdom*
*AND as proof we have come to sign on the 25th of Teves 5762 here in Zurich all duly executed."*

10. On the first day of the hearing Samuel invited the tribunal to exercise a discretionary power under Jewish law to seek an oath from the three brothers in relation to their claim that assets transferred to them during Joseph's life were gifts, as opposed to transfers made as part of a tax avoidance scheme; and as to the nature, location and value of assets of Joseph and his wife. If the dayanim had agreed, the three brothers would have been required to depose by way of an oath known as *Chiyuv Shavuah* as to the truth of their evidence. The swearing of such an oath is a matter of considerable religious significance. Mordechai's evidence is that an observant Jew would not be prepared to swear such an oath, even if what he was deposing to was true. The requirement to swear such an oath could not have been imposed by Rabbi Schmerler alone. The dayanim never ruled on Samuel's request.

11. The Zavloh sat for four sittings of one or two days each between January and July 2002 as follows:
9th/10th January Zurich
27th January Manchester (Rabbi Schmerler did not attend)
6th / 7th March Zurich
1st/2nd July Zurich

12. By a letter to the three brothers of 2nd September 2002 Esther wrote as follows: *"Since you are unable to carry out the wishes of our dear parents I am claiming from you the £ 20,000,000 due to me (£10,000,000 from each one of our dear parents). If you do not have the full amount, then please let me have as much as there is."*

    She copied this letter to the dayanim.

13. The claimants suspect that Esther's claim for the £ 20,000,000 is a collusive arrangement with the three brothers. There is no evidence before me to support that suspicion.

14. In March 2003 Rabbi Schmerler invited Samuel and Mordechai to Zurich with a view to settling the dispute through his mediation, but in the absence of his brothers or Rabbi Tessler, who had been acting for him, or a chartered accountant who had attended the previous hearings. There is an issue as to whether Rabbi Schmerler was, at this stage, acting as a mediator or in a judicial capacity. Both Samuel and Mordechai attended with a view to making a settlement. Mordechai's evidence is that this was an invitation that he found very difficult, in practice, to refuse; that he attended reluctantly, and that he was subject to threats, ranting from Samuel, and pressure from Rabbi Schmerler and a Mr Lang, who was advising Rabbi Schmerler on financial matters.

15. Discussions took place between 9th and 11th March 2003. At some stage (according to Samuel it was on the first day) Mordechai produced a manuscript settlement agreement containing various terms. On 11th March Mordechai offered the claimants £ 1,000,000 in settlement. At the start of the settlement discussions Samuel had said that they were only prepared to settle for £ 5,000,000.

16. Later on 11th March a compromise was reached worth about £ 2.4 million to Israel subject to certain discounts and discretionary payments to charitable trusts. According to Samuel's evidence, which has not been disputed, before the settlement was reached, Mordechai indicated that he would be prepared to settle at £ 2.4 million but that he needed to run this past his brothers before confirming a formal offer. There was a break for each side to take instructions. Samuel sought the approval of his father, Israel. Mordechai, so Samuel believed, sought the approval either of all the defendants or of David and Jacob. Once approval had apparently been obtained Mordechai drafted the compromise agreement in Hebrew in his own handwriting. It was executed by Mordechai and Samuel. That agreement provides:

    *"1. This is an agreement between the parties namely Shmuel son of YM Halpern on behalf of his father and his descendants (and hereinafter referred to as Party A) and NM son of Rabbi Josef Halpern on behalf of himself and his brothers DM, AA and BJ and his sister (Party B).*

    *2. And this is a final agreement regarding the inheritance of their father and mother Rabbi Josef and his wife Mrs Frieda Halpern and Eldermount, Northquarry and Courtbride etc assets belonging to Party B, both parties undertake to keep all what follows herein whether by Jewish law, compromise or mistake whereafter no party has any right to challenge regarding the inheritance or anything else resulting therefrom other than as specified in clause 3 hereafter.*

    *3. The only way whereby it will be permissible to institute a new Din Torah, compromise or Court case G forbid or similar regarding the inheritance and what issues from there is on production of clear new proof before a new Jewish ecclesiastical court of three (dayonim) who will agree that in their opinion the proof is clear that one of the brothers or partnerships between them or their father and mother acquired building or buildings worth half a million pounds sterling at today's value which were not included in the lists presented to the Beth Din.*

    4. *Before party B will transfer assets to party A, YM Halpern, his wife and descendants have to confirm to the Dayonim either verbally or in writing and the Dayonim will confirm to party B that they received such confirmation that all papers, documents, tapes etc relating to this Compromise from the beginning to end were either returned to party B or were destroyed {from the world} and there is neither anything left nor have they retained anything nor passed them on to anyone else and that they are unaware of any person having any of them and also the Dayonim (Arbitrators) and the experts agree to return or to say that they saw how all was destroyed except what will be left in the hand of Mr Meir Lang who will only release them on the instruction of a Beth Din.*

    5. *Shmuel will accept the assets for his father YM and he undertakes to remain responsible that the assets shall not go to waste (shall not be squandered) and should at all times be invested in buildings in order that there be an income for YM and also for weddings of his grand children and for other important matters and he undertakes to receive a signature from Mr M Lang or his appointee for any investment or expenditure in excess of £50,000 – and that Mr*

*M Lang will see at least once a year for 25 years what (is happening) with all the assets and this clause in not a condition but that Shmuel undertakes without a vow in accordance with Rabbi Schmerler's request.*

13. *The three Dayonim will sign this compromise confirming that this is the result of the Borerus to which both parties submitted.*

14. *The sum in which they (the parties) compromised is two million two hundred and ninety thousand pounds Sterling £2,290,000 – by way of buildings or companies or whole Trust, plus ninety five thousand pounds Sterling £95,000 in cash. The transfer of assets B will endeavour as soon as possible and it is estimated that it will be completed by six months and fifty thousand from the £95,000 they will pay by one month and the remaining £45,000 by four months. Not to talk about the millions – both parties will endeavour this.*

*Income and expenditure is to be carried by B and B will pay A 2% [£45,000 –sterling] for the following six months and B will receive all income.*

*Appreciation and depreciation is to be borne by A on items already valued from today and on other items from the date of valuation. The new valuations (properties to be valued) will be given to the valuer within three months".*

17. The agreement was executed by Mordechai "*in the name of his brothers*". As is apparent Clause 1 recorded that the agreement was made by Mordechai on behalf of his brothers (apart from Israel) and his sister, even though Aron and Esther had not been party to the arbitration proceedings. It is Mordechai's case that he entered into the agreement without the authority of Aron and Esther; and despite the fact that, as he knew, she claimed that under her parents' wills she was entitled to £ 20,000,000. Esther's witness statement confirms that he did not have any authority to act for her.

18. During the course of the arbitration documents had been produced relating to assets and banking transactions, and certain admissions had been made. Clause 4 was inserted because the three brothers did not want such documents or the record of such admissions to continue to exist, unless in their hands.

19. There were added after the signatures the following: *"[Mordechai] and [Samuel] undertake to endeavour that there will not be controversy in the family and they will endeavour that there will be no talk about "The Millions"*

This is likely to have been a reference to the millions of pounds whose existence or alleged existence and whereabouts had been considered in the course of the proceedings and evidenced in the documents that were to be destroyed or delivered up.

20. On 26th March 2003 the dayanim in effect made the compromise agreement an award ("the compromise award") – *Psak Din* - by subscribing to the following words at the end of the compromise agreement: *"On the version of the agreement in the preceding (two) pages [which were initialled by Rabbi Schmerler] both parties agreed in Zurich on the 11th March 03 Bekabolas kinyan agav sudar and was signed by NMH on behalf of the brothers and SH on behalf of his father, and we the chosen Beth Din have seen it and we agree to it and give it the power of a judgement."*

21. The £ 50,000 and £ 45,000 were paid in April and July 2003. Mordechai claims that the £ 95,000 thus paid did not form part of any dispute as it was well within the amount that the brothers agreed was part of Israel's share.

22. Thereafter the claimants destroyed their documents in respect of the dispute. So, also did the three dayanim. Samuel's witness statement records that this included the destruction of all documentation relating to the claim and the inheritance disputes, all notes made in preparation for and during the course of the arbitration proceedings, all correspondence relating to the proceedings, the recordings taken of the arbitration proceedings, and the notes of the dayanim. Compliance with clause 4 of the compromise agreement was certified by Rabbi Schmerler on 19th September 2003. In that certificate Rabbi Schmerler stated that the other dayanim, Israel and his family, including his children, wives and sons in law, and others had confirmed to him that they had complied with clause 4 "*in its entirety*" and he confirmed that clause 4 had been "*upheld completely*".

23. On 24th September 2003 Mordechai gave notice to the claimants that he considered the compromise agreement to be null and void.

24. In October 2003 Esther brought a claim against each of the brothers and Samuel in the Beth Joseph Beth Din in New York. On 17th November 2003 the Beth Joseph Beth Din enjoined the three brothers not to distribute Joseph's estate to Israel or Samuel or to any of Joseph's children.

25. Later Esther pursued her claim, together with a claim by Aron, before the Beth Din of Rabbi Belski of the Orthodox Union of America. One of the reasons for her doing so was, according to Mordechai's evidence, because Rabbi Lichtenstein had stated that he would treat a ruling of that Beth Din as authoritative. The claimants did not agree to this Beth Din determining anything.

26. On 29th and 30th December 2003 further proceedings took place before the dayanim in Israel, in order to determine the true construction of the compromise agreement. There is a dispute as to whether these proceedings were initiated by the three brothers or whether they attended under coercion. Just before the hearing before me the claimants produced a witness statement, which exhibited an award by the dayanim of 1st March 2004 which includes a statement that the three brothers had requested this additional session. I was asked to adjourn the hearing to enable the three brothers to deal with the suggestion that they had initiated the proceedings. I declined then to do so, without prejudice to the question whether that might become necessary later, if fairness required it. In the event Mr Tager agreed that he would not place any reliance on the award or the statement in it that the brothers had initiated the proceedings but only on any of the facts contained in the evidence filed by the defendants or pleaded by them.

27. In December 2003 £ 68,700 was paid to Mr Lang, Rabbi Schmerler's advisor.

28. On 22nd January 2004, following a hearing on 7th and 8th January 2004, the three Rabbis of the Beth Din of Rabbi Belsky made a determination which in effect granted the entire estate to Esther. The determination records the fact that Mordechai, representing the three brothers, had submitted that because of the compromise agreement and the compromise award they were obliged to give Israel £ 2,385,000 and that what was left thereafter should be divided according to the conditions of the Jewish will.

29. In its determination the Rabbi Belsky Beth Din held:
    (i) that the three brothers were obliged to listen to all that the zavloh had ruled;
    (ii) that it was not its function to deal with complaints about what the zavloh had said or to judge whether the dayanim were right and
    (iii) that any complaints should be addressed to the dayanim.

    They regarded it as clear that the three bothers had agreed that their dispute with Israel should be decided by the zavloh; but that Esther was not invited to participate in that hearing and was not represented, so that any order of the zavloh was "*nothing to do with her at all*". Accordingly "*even a coin of minimal value*" could not be paid from Joseph's estate until the brothers had paid Esther £ 10,000,000 from the estate of Joseph and "*a share of the £ 10,000,000 from the estate of the mother*". The decision also records that the Belsky Beth Din had considered whether it was arguable that the provision of the Jewish will that the executors could alter the division of the estate meant that fulfilment of the compromise agreement was not inconsistent with fulfilment of the condition upon which the £ 10,000,000 would no longer be payable. They concluded that implementation of the compromise necessarily meant non-implementation of the will, and vice versa, and that the ability to change the distribution could only be regarded as allowing small changes in line with the spirit of the will.

30. The Besky Beth Din decided to delay the payment to Esther in order to allow Israel and Samuel to convene within 30, or at most 60, days another Beth Din acceptable to all the parties or another zavloh, failing which the brothers were bound to pay Esther what was due to her without any more delay. They also afforded the opportunity to any child of Joseph to assert that the Beth Din had not been shown all of the documents on which they based their ruling or that there had been "*in the words of those who appeared before us …any shadow of trickery or reducing the size of the estate … which deny the truth of the matters on which we relied*" in which case they would, if there was any substance to it, cancel their judgment if necessary.

31. Neither Israel nor Samuel regarded themselves as bound by any determination of the Belsky Beth Din, and, accordingly, neither of them convened a new Beth Din or Zavloh.

32. On 1st March 2004, as I have said, the dayanim issued a supplemental award clarifying the compromise agreement and the compromise award. The award of 1st March provided that Mr Lang was to transfer to

Samuel the £ 68,700 which had been deposited with him by Eliezer, this being due as part of the profits due under clause 14 of the compromise agreement.

33. On 22nd March 2004 the Belksy Beth Din wrote stating that the three brothers were bound to pay £ 10,000,000 each from the estate of Joseph and Frieda to Esther unless every clause of the Jewish will had been fulfilled and that the three brothers should be enjoined from paying even the smallest sum under the compromise agreement before the two sets of £ 10,000,000 and every clause in the will had been fulfilled "*letter by letter without changing anything*". It also enjoined anyone from going to the Secular Courts until all of them got together at a mutually acceptable Beth Din.

34. According to Esther's witness statement all the assets of the estates of Joseph and Frieda have been transferred to her.

35. As appears from the above sums of £ 50,000, £ 45,000 and £ 68,700 have been paid to the Claimants. But the three brothers have failed to perform the principal obligation contained in clause 14 namely the obligation to pay over the equivalent of £2,290,000 in the form of buildings or companies or trusts.

***The pleadings***

36. According to the Points of Claim, the primary claim is for damages for repudiation of the compromise *agreement*, and the argument of Mr Romie Tager, Q.C. at the hearing on Friday 27th January, was directed to that claim. The Points of Claim also sought specific performance of the compromise award and "*all necessary and ancillary orders and relief as may be appropriate*". Paragraph 2 of the Defence stated that, although the proceedings had been entitled in the Claim Form as an Arbitration Claim, the defendants did not understand the proceedings to be an arbitration claim under CPR 62.2 for a number of reasons. In paragraph 2 (1) of the Reply the claimants stated that they had only sought to enforce the compromise *award* as an alternative claim because of the possibility of the defendants contending that it was the award that should be enforced, but that they now accepted that "*the only relief they are seeking is in damages for the repudiation of the compromise agreement*". In Paragraph 36 (2) they said that they did not "*seek to rely upon their alternative claim for relief as originally included in paragraph (iv) of their prayer in the Particulars of Claim (but no longer relied upon)*". The claimants' supplemental skeleton argument of 26th January 2006 stated that the claimant was not seeking to enforce the consent award either by way of an order for specific performance or otherwise.

37. To the claim for repudiation of the compromise agreement a number of defences have been put forward. The principal contentions are:
    (i) that the original submission to arbitration was agreed on the basis of a fraudulent misrepresentation;
    (ii) that the compromise agreement was procured by duress, so that the three brothers were entitled to rescind it;
    (iii) that the compromise agreement was entered into by the parties to it under a mutual mistake, namely that there was, as a matter of Jewish law, an estate in which Israel could share, when in truth the estate was swallowed up by the debt(s) to Esther.
    (iv) alternatively, that the compromise agreement was frustrated.
    (v) that the condition precedent contained in clause 4 has not been satisfied.

38. The claimants contend (i) that there was no fraud, duress or mutual mistake; (ii) that, in any event, the three brothers have affirmed the contract; (iii) that restitutio in integrum is no longer possible since, in pursuance of the agreement, the claimants and the dayanim have destroyed their documents; (iv) that the agreement has not been frustrated and (v) that the condition precedent to its operation has been satisfied.

***The applications***

39. I have before me applications by the claimants under CPR Part 24 and/or CPR 4 (2) (a) and (b). In short they contend that the three brothers have no real prospect of establishing a defence to the claim. They seek judgment for damages to be assessed and an interim payment. Alternatively they seek an order striking out certain sections of the pleadings. The three brothers say that they have defences which have a real prospect of success and that there is, in any event, a compelling reason for a trial given the complication of the facts and the difficulty without further evidence of evaluating the impact and significance of Jewish

laws and customs. They submit that the court is being asked, under the guise of an application for summary judgment, to conduct a mini trial of various issues which is wholly inappropriate.

*The argument at the hearing on 27th January 2006*

40. The pleadings in this case are not slight. They do not include any averment as to the applicability or content of any non English law, other than Jewish law. At the hearing on 27th January 2006 I was told by Mr David Berkley Q.C., that the three brothers had obtained advice on Swiss law. Mr Tager had only seen that advice, which is contained in a written opinion date 26th January 2006 from Dr Michael Haymann of Haymann & Baldi of Zurich, minutes before the hearing. He indicated to me that it took matters no further since it dealt with Swiss arbitration law and did not deal with questions of duress or mistake. Neither party then showed me that advice. Nor did either party refer to the decision of the Court of Appeal in ***Shamil Bank of Bahrain EC v Beximco Pharmaceuticals*** to which I refer below. I drew the attention of the parties to that decision and, in the light of time constraints, indicated that I would accept written submissions on it.

41. I received such submissions on Friday 3rd February. Mr Berkley's related solely to the impact of that decision. Those of Mr Tager[3] (These were revised on Monday 6th February ) dealt with that decision, but also relied on Dr Haymann's opinion which he had now had time to digest. As a result he now submitted that if Swiss law applied to the arbitration, there was no defence to a claim based on the *award*. The Court could and should give judgment on the award, allowing whatever amendments were needed to the pleadings, where enforcement had been sought under section 66 and not under Part III of the Arbitration Act 1996 ("the 1996 Act"). Since there appeared to me to be substance in the contention that the claimants were entitled to enforce the award, and since it was based on material that had been provided to the claimants by those acting for the three brothers, I decided that it would be appropriate to consider this new approach and gave Mr Berkley time to file a further written argument. This he did on 13th February. In that submission he made clear that he did not seek to adduce and rely on Dr Haymann's opinion and strongly objected to the Court entertaining this new approach on the grounds (a) that it was inconsistent with the claimants' pleading, (b) that Mr Tager's submission went well beyond dealing with the ***Shamil Bank*** case and (c) that, had the application for summary judgment been based on the award, the evidence would have been tailored differently.

42. This caused Mr Tager to produce a further written submission on 15th February, in which he indicated that the claimants were prepared to proceed upon the currently pleaded basis and without reference to Dr Haymann's report. He did not, however, confine himself to that but made some further submissions. This in turn caused Mr Berkley to produce further written submissions.

43. I do not propose to entertain the possibility of giving a summary judgment based on the compromise award; both because I consider Mr Berkley's objections to be well founded and because Mr Tager is content to proceed on the original basis. I turn, therefore, to consider whether the three brothers have any realistic defence to the claim based on repudiation of the compromise agreement. That involves considering, amongst other things, the applicable laws.

***Which law?***

44. There are two principal questions:
    (i) which law governs, or arguably governs, the compromise agreement?
    (ii) by that law, is the compromise agreement void or voidable for duress, mistake, frustration, or uncertainty?

45. When parties agree to arbitrate their dispute a number of laws may be relevant. These include:
    (iii) the law applicable to the *merits* of the dispute.
    (iv) the law applicable to the *agreement to arbitrate* the dispute.
    (v) the law applicable to *the arbitration itself*, sometimes called the curial law or the *lex arbitri*;
    (vi) the law applicable to any *compromise* of the dispute;

    In many cases all four of these laws, and particularly the last three are the same. It would be unusual, but by no means impossible, for (ii) and (iii) to differ. The issue as to which law applies has been the subject of considerable debate before me, although, in the end, it is only law (iv) that is of direct relevance. However, in the light of that debate I shall consider laws (i) – (iii) briefly.

***The law applicable to the merits of the dispute***

46. The law applicable to the dispute between Israel and the three brothers was Jewish law. The parties to the arbitration agreement expressly provided for their differences to be determined "*according to the principle of halachah (Jewish law) and/or the general principles of equity customarily employed in arbitration before the Beth Din*". It is not in dispute between these parties that there is a body of law, called *halachah.* For Orthodox Jews *halachah* and Jewish law are co-extensive. Other branches of Jewry e.g. Reform or Liberal Jews may regard Jewish Law only as a religious or moral law.

***The law applicable to the arbitration agreement***

47. The rival candidates in respect of this law, and that of the arbitration and the compromise agreement, are (1) Jewish; (2) English; and (3) Swiss law.

48. Jewish law is not simply a set of religious precepts. It is an established body of law covering, amongst other things, contractual rights, rights of property and rights of inheritance and succession, in an extensive way. But it is not, itself, the law of any nation state, even of the state of Israel. In English law the law governing most contracts is determined by the *Rome Convention*. Article 1 (1) of that *Convention* provides that: *"The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries"*

In ***Shamil Bank of Bahrain EC v Beximco Pharmaceuticals*** [2004] 1 WLR 1784 the Court of Appeal held that that wording, taken with Article 3 (1) ("*A contract shall be governed by the law chosen by the parties*") and the reference to choice of a "*foreign law*" in article 3 (3), made it clear that the Convention as a whole only contemplates and sanctions the application of the law of a country, and not any non-national system of law such as the *lex mercatoria* or the Sharia. In that case financing agreements contained a governing law clause which stated that: *"Subject to the principles of the Glorious Sharia'a, this agreement shall be governed by and construed in accordance with the laws of England".*

It was accepted that there could not be two governing laws[4] (This may require some qualification. Article 3 (1) of the Rome Convention expressly contemplates a choice of different laws for different parts of the same contract. Article 4 (1) provides that, in the absence of a choice of law by the parties, the contract is to be governed by the law of the country with which it is most closely connected. "*Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country*".) The argument was that the contract incorporated those rules of the Sharia that related to interest and to the nature of Morabaha and Ijarah contracts. The Court rejected this contention.

49. Mr Berkley submitted that it was arguably open to the parties to agree to exclude the application of the Convention. I disagree. The 1990 Act provides that the Convention "*shall have the force of law*". In any event the parties did not purport to exclude the application of the Convention.

50. If the principles stated and applied by the Court of Appeal in relation to Sharia law apply equally to Jewish law, then parties who make a contract expressed to be governed by Jewish law, but which would, in the absence of that provision, be governed by English law (or the law of some other country), run the risk that their contract is treated either :

(vii) as governed by the law of England (or that other country), which they have not chosen, or

(viii) by Jewish law that they have chosen, but which is not recognised by the English courts as an available law by which the courts can determine contractual rights and obligations - such that their contract is unenforceable.

I shall for the moment assume for the moment that the principles expounded in ***Shamil*** apply to Jewish law also, a subject to which I shall, however, return.

51. The problem identified in the previous paragraph can be resolved by a submission to arbitration. If English law is applicable, then, by section 46 (1) (a) and (b) of the 1996 Act, the arbitral tribunal is bound to decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute; or, if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal. It is thus open to the parties to agree to have their contractual disputes decided under Jewish law, including Jewish rules of evidence, leading to an award which will be enforceable by virtue of the agreement to submit. They can do likewise in respect of non-contractual disputes. It is, however, necessary for this purpose that the agreement to arbitrate should, itself, be enforceable under a

national system of law. Further, only an award made pursuant to an arbitration agreement in writing can be enforced under either section 66(1) of the 1996 Act, if domestic, or section 100 (2) (a) if foreign.

52. In the present case the parties made an arbitration agreement, in two documents, which was intended to have legal effect. Such agreements are not subject to the *Rome Convention* (see Article 1.2.d) and their proper law is to be determined on common law principles. These require selection of the law of a country as the proper law of the agreement: ***Amin Rasheed Corpn. v Kuwait Insurance*** [1984] A.C. 50, 62A.

53. The parties did not expressly agree on the law of the arbitration agreement. There are, however, a number of pointers to their having chosen the law of England. The arbitration agreement was made between parties either located, or described as located, in England. One of the two documents is headed "*In the matter of the Arbitration Act 1996*". The body of the document is in the same terms, save as to the identity of the agreed Beth Din, as the arbitration agreements considered by the Court of Appeal in ***Cohen v Boram*** [1994] 2 Lloyd's Rep 138; and ***Kestner v Jason*** [2005] 1 Lloyds Rep 397. That is an indication that the parties intended that the arbitration agreement should be subject to English law, a law which would fully recognise an arbitration in which the substance of the dispute was to be determined by Jewish law, and under which, albeit in limited circumstances, the parties could have recourse to the English Courts: ***Cohen v Boram***. It is noticeable also that the *Shtar Biruruim* recorded that it was executed "*in the best possible manner whether in accordance with Jewish law*" or "*in accordance with the law of the Kingdom*" – which I take to be a recognition of the applicability, or at least potential applicability, of secular law to the agreement.

54. It is, however, to be noted that in ***Whitworth Street Estates Ltd v Miller*** [1970] A.C. 583 an application for the appointment of an arbitrator stated that there was a submission to arbitration within the meaning of the Arbitration Act 1950, but the arbitration was held to be subject to the law of Scotland. Similarly in ***Black Clawson v Papierwerke*** [1981] 2 Lloyd's Rep 446 a provision that a reference to arbitration, to be heard in Zurich, should be deemed to be a submission to arbitration within the meaning of the Arbitration Act 1950 was not treated as intended to apply the whole of the 1950 Act to the reference. These decisions indicate that a reference to the Arbitration Act does not necessarily mean that English law is the law of the arbitration. The expression "*submission to arbitration*" appears in the 1950 Act in reference to foreign arbitrations: section 4 (2); and the 1996 Act similarly has provisions that relate to foreign arbitrations.

55. On the other hand the arbitration agreement was signed in Zurich; and the arbitration was to be, and for the most part was, held in Zurich where Rabbi Schmerler is based. The seat of the arbitration is a pointer to the law of the arbitration agreement: *Dicey & Morris* 16-016. The seat of the arbitration is not necessarily the same as the place where the arbitrators or the parties choose that the arbitration shall be held. They may choose to meet in a country (such as a neutral country or the country in which the relevant events occurred) whose laws no one would suppose would govern the conduct of the arbitration. But, in the absence of a clear pointer to the contrary, there is a strong presumption that the place where the arbitration takes place is to constitute its "seat": ***Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*** [1993] A.C. 334. In the present case it was at the time of the hearing common ground that the seat of the Tribunal was Zurich (Simon Bergin's letter of 16th December 2004; claimants' original skeleton argument paragraph 7; defendants original skeleton argument paragraph 13).

56. But, in his submission of 13th February 2006 Mr Berkley contended that the reference to the Arbitration Act 1996 meant that the seat of the arbitration was in England. He also suggested that Israel's claim was not arbitrable because Israel did not have any claim in English law for provision otherwise than under the *Inheritance (Provision for Family and Dependants) Act 1975.* He placed reliance in this respect on the decision in ***Exeter City AFC Ltd v Football Conference Ltd*** (29th January 2004) in which Judge Weeks refused to regard the right to petition for unfair prejudice under section 459 as capable of being the subject of an arbitration. I do not accept this submission. The statutory right under section 459 can only be exercised in accordance with the statutory provisions. But the parties in this case where entitled to agree to have their dispute under Jewish law of inheritance determined by the Jewish arbitrators that they chose.

57. In his submissions of 13th February Mr Berkley further submitted ("*startling though it might seem*") that the true position was that there were no arbitration proceedings at all and the reference to the 1996 Act was a sham or pretence. He submitted that the role of the dayanim was closely analogous to the role of the Sharia Council in the case of ***Al-Midani***, to which I refer below. This submission is not well founded. It is plain

that the parties agreed to submit their disputes to arbitration. There is no realistic basis for suggesting that their agreement was a sham, an allegation of, or close to, fraud which is neither pleaded nor supported by evidence, nor intrinsically likely. The Sharia Council in ***Al-Midani*** is not closely analogous to the dayanim: it was not a body that derived any entitlement to act from the agreement of the relevant parties.

58. It is not necessary to decide, nor to have a trial to decide, whether the law of the arbitration agreement is English or Swiss, since no material difference has been identified between the two. There is a suggestion in Rabbi Gartner's report that in Jewish law the arbitration agreement is invalid because Aron and Esther were not parties to it. But that can only be relevant if Jewish law is, in English law, capable of applying. I incline to the view that the applicable law is that of England, rather than Switzerland, either as the implied choice of the parties or as the country with which the arbitration agreement has its closest connection.

***The law applicable to the arbitration***

59. The law applicable to the arbitration covers at least two areas: how the proceedings in the arbitration are to be conducted by the arbitrators and the extent to which the courts will supervise the conduct of the arbitration including setting aside or varying the award.

60. Part 1 of the Arbitration Act 1996 sets out a code governing the conduct of arbitrations pursuant to an arbitration agreement, including provision as to (a) the appointment of the arbitral tribunal, (b) its jurisdiction, (c) the conduct of its proceedings, (d) the making of an award, and (e) the powers of the court in respect of enforcement of, or challenge to, the award. Most of Part 1 is only applicable if the seat of the arbitration is in England and Wales. The seat is defined by section 3 as meaning "*the juridical seat of the arbitration*" as designated either, so far as presently relevant, by the parties to the agreement or by the arbitral tribunal, if so authorised by the parties, or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances. The fact that the seat is to be determined by the parties to the arbitration agreement or having regard to that agreement means that the seat of the arbitration and the law of the arbitration agreement are likely, but not certain, to be the same.

61. The juridical "*seat*" is a concept that pre-dates the Act. In English law every arbitration must have a legal home, i.e. a system of municipal law to which it is subject: ***Bank Mellat v Helliniki Techniki*** [1984] 1 Q.B.291, 301: *"Despite suggestions to the contrary by some learned writers under other systems, our jurisprudence does not recognise the concept of arbitral procedures floating in the transnational firmament unconnected with any municipal system of law"*

For this reason Jewish law is not a realistic candidate as the law of the arbitration. In addition Jewish law lacks any supervisory or appellate jurisdiction over arbitrations. That does not mean that the arbitration could not be conducted in accordance with Jewish law, since in English law, subject to certain mandatory provisions, the parties are free to agree that Jewish law and procedure will apply. There is no indication that Swiss law is different.

62. In the absence of agreement to the contrary, the law of the "seat" of the arbitration will govern its conduct: Dicey 16-019; *Mustill & Boyd* 62-5; ***Whitworth Street Estates Ltd v Miller*** [1970] A.C. 583; ***Naviera Maritima Peruana S.A. v Compania Internacional de Seguros de Peru*** [1988] I Lloyd's Rep 1116; ***Union of India v McDonnell*** [1993] 2 Lloyd's Rep 48. In ***Naviera Maritima Peruana*** the Court of Appeal overruled a first instance decision that an arbitration was to be conducted in Lima as the agreed forum (and therefore seat), but with English law as the lex fori. Kerr, L.J., referred to the complexities and inconveniences which such an arrangement would cause, including the impossibility or at best difficulty of the English Court exercising jurisdiction over an arbitration proceeding in Peru.

63. Taking all these considerations together it seems to me that the seat of the arbitration and the law of the arbitration is that of Switzerland - as the defendants assert (as their secondary case if Jewish law does not apply). In the light of the fact that the claimants no longer seek to obtain a summary judgment enforcing the award I do not, however, need to decide whether the law is that of Switzerland or England. If it is that of Switzerland most of Part I of the 1996 Act is inapplicable.

***The law applicable to the compromise Agreement***

64. The parties to the Compromise Agreement did not specify the law by which it was to be governed. To such an agreement the Rome Convention *does* apply. It is, therefore, necessary to consider whether the terms of

that contract or the circumstances in which it was made demonstrate with reasonable certainty what law the parties have chosen. If no such law is demonstrated the agreement is governed by the law of the country with which it is most closely connected. The presumption is that the agreement is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract had his habitual residence at the time of the conclusion of the contract, unless it appears from the circumstances as a whole that the contract is more closely connected with another country.

65. The Compromise Agreement was made between signatories described in it as located in England. England was in fact the residence of all the signatories save Samuel. It compromised a dispute in relation to the wills of Joseph and Frieda who lived and died in England. The characteristic performance of the agreement was the payment or transfer to Samuel or Israel which the three brothers, whose habitual residence is in England, were to effect. The agreement called for (a) a valuation of property by a well known firm of English surveyors, (b) the transfer of property to Samuel on behalf of Israel; (b) the payment, in certain circumstances, of a sum to a UK charity, and (c) the choice of a plot in a graveyard in Manchester. It is plain from the language of the document that the parties intended it to be legally enforceable, including in Court (see the provision in clause 3 precluding the commencement of a new Court case regarding the inheritance save in prescribed circumstances). The only possible candidates for the applicable law (other than Jewish law) are the laws of England & Wales or Switzerland. In favour of Switzerland is the fact that the compromise agreement was made in Switzerland and compromised a dispute the subject of a Swiss arbitration.

66. I am not persuaded that the terms of the contract or the circumstances in which it was made demonstrated with reasonable certainty which of those laws the parties chose. It is debatable whether the compromise agreement is most closely connected with Switzerland or England.

67. There is no evidence before me that the law of Switzerland differs from that of England in relation to duress, misrepresentation, mistake or frustration affecting the compromise agreement. That being so a choice between English and Swiss law is, again, subject to one point, academic, although it seems to me likely that the law is that of England since there is nothing sufficiently strong to outweigh the presumption.

***Is there a real prospect of establishing that Jewish law is the law applicable to the compromise agreement?***

68. There is, however, evidence that Jewish law differs from English law in at least one material respect in that it regards an agreement procured by duress as void, not voidable: see footnote 6 to Rabbi Gartner's report. The claimants contend that, if there was duress, the three brothers cannot rely on it because they have affirmed what is at best a voidable contract. If they are right on that it would be necessary to consider whether, notwithstanding the decision of the Court of Appeal in ***Shamil Bank*** there is any realistic prospect of the three brothers establishing that the compromise agreement is subject to Jewish Law.

69. In ***Al Midani v Al Midani*** [1999] I Lloyd's Rep Rix J, as he then was, was concerned with an arbitration agreement entered into by the heirs of a wealthy Saudi by which they submitted a dispute as to their late father's estate to a named arbitrator. Rix J held that that agreement was probably governed by either Sharia law or such law as modified by the law of Saudi Arabia, and that Islamic or Sharia law was to be regarded as a branch of foreign law. This decision, on which Mr Berkley relies, does not appear to have been cited in *Shamil Bank*. It was reached at a hearing at which the defendants were not represented, a circumstance which, as Rix J observed, caused "*special difficulties*" to a Court. No reference appears to have been made to the Rome Convention.

70. Mr Berkley submits that the English courts- are likely to recognize and give effect to the ***halachah*** as a settled and clearly defined set of rules which the parties must be presumed to have agreed to have incorporated into their dealings with each other, even if those rules are not the rules of any national system. The sources of this law, apart from the Talmud and the works of earlier commentators, include the sixteenth century codification - the ***Shulhan Arukh*** - of Rabbi Joseph Caro and the works of later writers. There is also a leading textbook in four volumes (dealing with the law as it affects relationships in human society) written by Professor Menachem Elon, a former Deputy President of the Israel Supreme Court, who describes the *Shulhan Arukh* as "*the definitive and authoritative code for all Jews throughout the world"*. He is not, however, a Rabbinical authority and the claimants would regard him as unqualified to give binding rulings on matters of ***halachah.***

71. There is a dispute as to whether there is a uniform and settled corpus of Jewish Law. The history of the present case certainly shows that different Beth Din can reach radically different views on the effect of ***halachah***, without characterising the opposite view as invalid, and without any system of appeal; although that does not, of itself, mean that there is no such corpus.

72. Insofar as ***Al Midani*** held that Sharia law, as opposed to the law of any nation state including Sharia law as part of its national law, was the law of the arbitration agreement, it cannot, in my respectful opinion, stand in the light of the subsequent decision of the Court of Appeal in ***Shamil Bank***, which rules out a non national system of law as the applicable law of a contract, even if chosen expressly.

73. But there remains for consideration whether there is a realistic prospect of contending that the parties to the compromise agreement, assuming it to be governed by the law either of Switzerland or England, can be taken impliedly to have incorporated the rules of ***halachah,*** or some of them, as *terms* of their agreement. That argument failed in ***Shamil*** on the ground that the doctrine of incorporation can only sensibly operate where the parties have: *"..by the terms of their contract sufficiently identified "black letter" provisions of a foreign law or an international code or set of rules apt to be incorporated as terms of the relevant contract such as a particular article or articles of the French Civil Code or the Hague Rules."*

    In that case the general reference to principles of Sharia did not identify any of the aspects of it which were to be incorporated or the terms in which they were framed. Further, as the Court held, the reference to the principles of the Sharia was a reference to the body of Sharia law generally and, as such, those principles were *"inevitably repugnant to the choice of English law as the law of the contract and render the clause self contradictory and therefore meaningless".*

74. It seems to me, in the light of ***Shamil,*** that if Jewish law is not available as the applicable law under the Rome Convention, there is no realistic prospect of successfully contending that the parties *impliedly* incorporated ***halachah*** (or such of it as relates to contracts) *as a term* or terms of the compromise agreement. No terms have been identified, let alone pleaded, as the corpus of terms apt to be implied. Further the effect of the supposed implication would be to substitute ***halachah*** law for Swiss or English law. This would be inconsistent with either of those laws being the applicable law. Those laws would only be a shell in which to incorporate a different non national law.

75. The point to which I referred in paragraph 67 is that Switzerland, unlike the United Kingdom is not a party to the Rome Convention. It is, therefore, possible that Swiss law would treat the compromise agreement as governed, in whole or in part by Jewish law. But there is no evidence to that effect. Further Article 15 of the Rome Convention provides that the application of the law of any country specified by the Convention means the application of rules of law in force in that country other than its rules of private international law.

76. In his submissions of 3rd February 2006 Mr Berkley contends that by submitting to a forum applying Jewish law the claimants represented that they would only be seeking their entitlement under Jewish law, that the compromise agreement was intended to take effect under Jewish law, and that if Jewish law determines that the claimants had no entitlement or that the compromise agreement is void then the claimants are estopped from claiming any relief. I do not regard these contentions, which are not reflected in any pleading or evidence, as having any realistic chance of success. The claimants agreed to have their claim adjudicated by the dayanim. In the event the claim was compromised – by an agreement that was not expressed to be and, in the light of the Rome Convention, is not governed by Jewish law. It is impossible to infer from that that the claimants unequivocally represented that they would not rely on that compromise if it should turn out that the sum that they agreed to settle for was not what Jewish law, (determined by some mode that the suggested representation does not specify), would have given them if they had not compromised.

***The merits***

77. I turn then to consider whether any realistic prospect of defence to a claim for damages for breach of the compromise agreement.

***Fraud inducing the arbitration agreement***

78. The fraud allegation is that Samuel fraudulently misrepresented to the Defendants that a manuscript endorsement by Rabbi Shafran, contained in a letter in Hebrew dated the equivalent of 22nd April 2001, was in the Rabbi's own hand writing when in fact his handwriting was forged.

79. A letter was originally written, on the notepaper of the Beth Din Bnei Brak, by Rabbi Karelitz, addressed to Mordechai and his brothers, expressing the view that it was totally improper for the dispute to be judged before judges from Manchester and that the claimant had the right to opt for a special tribunal under a procedure known as HCOFH ("He Chooses One For Himself"). Below Rabbi Karelitz' signature was a paragraph evidencing that Rabbi M.S. Klein had shown Rabbi Karelitz' letter to another Rabbi, Rabbi Wozner, who agreed with it. Below that paragraph is a further paragraph signed by Rabbi Shafran on or around 13th May 2001 which reads: *"Since one of the judges in Manchester said that the matter could not be judged there because of the importance, status and influence of the contestants in the city, and also because it is very customary that big matters are judged by HCOFH in those places and also – that if one of the Rabbis is the one who wrote or advised how to write the will, and the matter of consideration is the validity of the will, then this invalidates him from judging on the matter – therefore I hereby join all of the abovementioned"*

    I call this letter "Document A".

80. In a witness statement of 22nd November 2005, signed in the presence of a member of the Israeli Bar, Rabbi Shafran has explained that in May 2001 he was asked by Samuel whether he agreed with the opinions of Rabbi Karelitz and Rabbi Wozner and, if so, whether he would endorse the letter in which those opinions were expressed. Since he did agree with those opinions he endorsed the letter in his own hand in Hebrew (Document A).

81. There also came into existence a copy of the letter but with Rabbi Shafran's words written out more legibly ("Document B"). This document was at some stage received by Mordechai. According to Mordechai's evidence he would not have submitted to the Zavloh process had he not believed that the document that he was shown was in the handwriting of, and personally signed by, Rabbi Shafran and endorsed by Rabbi Klein in the name of Rabbi Wosner.

82. Samuel's evidence is that he faxed the original letter, i.e. Document A, to his brother-in-law – Yehuda Hess – in England. Mr Hess provided a copy to Mordechai. Because of the illegibility of Rabbi Shafran's original manuscript Samuel, either on his own initiative or at the request of Mordechai, used a photocopy of the original manuscript letter and inserted Rabbi Shafran's words in his own handwriting. This is Document B, in which, as Rabbi Shafran confirms, his words have been faithfully transcribed. Samuel, according to his evidence, never suggested that document B contained the original of the endorsement of Rabbi Shafran.

83. David Halpern, not the 2nd defendant but a cousin of the defendants, has included in his witness statement, to which I refer below, the account given to him by his son Israel of the investigations of Israel and his brother, Benjamin, into Rabbi Shafran's footnote. In January 2005, Israel showed Rabbi Shafran document B, or a copy of it, and was told that the handwriting of the footnote was not his but was in his language. On Friday 10th June, Rabbi Shafran again confirmed that the letter was not in his handwriting, nor was the signature his, but it could be a transcription. On 16th or 17th August, Israel, who had now been given a copy of document A, saw Rabbi Shafran who told him that he had written document A in unclear handwriting and that what he had written had been transcribed word for word. On Thursday 18th August, Israel and his brother Benjamin went to Rabbi Shafran who confirmed that letter A, which contains a stamp of the Beth Din, was in his handwriting and bore his signature. Israel's statement records that he had passed on to the Defendants the news that there was no forgery "*and they accepted it*".

84. I am satisfied that there is no realistic prospect of the three brothers establishing a defence based on the supposed forgery of Rabbi Shafran's endorsement on Document A or B. There is no reason to doubt the accuracy of Rabbi Shafran's witness statement as to document A and nothing to gainsay it. I do not regard the defendants' asserted wish to cross examine Rabbi Shafran, a wish which can only come true if he is called in person (which he cannot be compelled to do), as a compelling reason for a trial on this point, and since the original was destroyed pursuant to the compromise agreement, the brothers' call for its production is futile. Mordechai does not in fact say whether he ever received document A, and it is not completely clear from paragraph 12 of his statement whether the forged document to which he refers is

document B. He says that the document in question is the document pleaded in paragraph 14 of the Defence and Counterclaim, which paragraph 15 claims to be forged. Mordechai says that he proposes to deal with the precise circumstances in which he received the forged document but does not thereafter do so. But even if he was only shown document B, that document copied out what Rabbi Shafran had actually written. Whilst Mordechai says that he believed that the document he was given was in Rabbi Shafran's handwriting and signed by him, he does not say that that was what he was told by Samuel about document B, and I decline in the face of Samuel's statement that he never represented document B to be an original endorsement, to assume that he did. Even if he had so represented, given that document B is an accurate transcription of document A, it does not seem to me to be material whether or not the words of Rabbi Shafran, which are his words, were written or transcribed. In any event it is far too late to rescind the submission to arbitration since it is not possible to restore the parties to their former position. The arbitration has taken place; a compromise agreement has been made; it has been confirmed by the arbitrators; and the parties to the arbitration and the arbitrators have destroyed their documents. Even if the arbitration agreement were rescinded, the compromise agreement is a separate agreement the validity of which depends on the circumstances of its own formation.

***Duress***

85. The compromise agreement is said to have been obtained by duress. In the settlement negotiations in March 2003, which were conducted predominantly in Yiddish, Rabbi Schmerler is said to have insisted that, in the absence of a compromise, the defendants were obliged to make a *Shavuah*, the making of which they could avoid by making payment of a forfeit set by Rabbi Schmerler at £ 250,000 for each of the defendants. The ***Chiyuv Shavuah*** is a ritual oath which, as I have said, according to Mordechai's evidence, an observant Jew would not in practice be willing to swear, even if what he said was true, and which he could only avoid doing by paying a forfeit set by the Rabbi in place of the oath.

86. In relation to the duress allegation the claimants contend (a) that there has been no relevant duress and (b) that there can, in any event, be no rescission.

87. As to (a) I am not prepared, on a summary application, to rule that an unjustified requirement by the chairman of a Zavloh to take a ***Chiyuv Shavuth*** oath could not amount to duress. Whether not such a requirement constituted illegitimate pressure whose effect was that Mordechai had only one practical choice is something upon which it would be necessary to have evidence as to the true religious significance of such an oath and as to its actual impact on the person required to swear it. The former is properly the subject of expert evidence. Mordechai has given written evidence of the latter; but it appears to me that this is an issue which requires oral testimony and cross examination. At any rate his written evidence cannot be dismissed out of hand.

88. There is a conflict of evidence as to whether Rabbi Shchmerler did in fact make a threat which could be treated as duress. Mordechai's evidence is that such a threat was made, that the forfeit was fixed at £ 250,000 per defendant, and that he believed that Rabbi Schmerler was empowered to demand such an oath, notwithstanding the reference in the Jewish will exempting the executors from having to swear such an oath.

89. Mordechai made, to the knowledge of Rabbi Schmerler an audio recording of the settlement negotiations which apparently extends to some 18 hours. By December 2004 the defendants' solicitors had obtained a transcription of the tapes in the original Yiddish[5]. (A small amount of the exchanges was in Hebrew or Aramaic.) In a letter of 16th December 2004 the three brothers' solicitors said: *"As the proceedings were conducted in Yiddish it will be necessary to have the transcript translated before we could present it to a judge but we are confident that such transcript will demonstrate that Rabbi Schmerler acted in a manner that was quite contrary to the principles of Halakha as well as any notion of natural justice …"*

90. Despite such confidence no transcript has been provided to the Court. In July 2005 the brothers' solicitors provided copies of the audio tapes to the claimants' solicitors. The claimants, having listened to the tapes, were unable, they say, to find in them the conversations and statements which the defendants relied on in their pleading as constituting the threat. Accordingly in September 2005 the claimants asked the defendants to identify with reference to the audio recordings the occasions where that which they alleged had occurred. On 20th September their solicitor said that he hoped to have everything in place by the third

week of November. On 23rd January the three brothers' solicitors supplied details of times at which the various aspects of the settlement discussion referred to in David Halpern's statement are said to have occurred. (e.g. Time 1.14 on File 100025).

91. The claimants filed the evidence of Yehuda Hess, which Samuel confirms, of what he discovered on listening to 18 hours worth of audiotapes. The gist of his evidence is as follows:

1. Rabbi Schmerler did not insist that any of the defendants would have to take the oath or threaten that they would be required to do so. On the contrary he made it clear that he personally, when sitting as a dayan, would not make Mordechai swear an oath because it was not his custom to force people to do so.

2. But he reminded Mordechai that to be the subject of a formal request to have a religious oath administered was something that he and his brother would wish to avoid if possible, and that the advantage of a settlement was that he would not be in that position.

3. Mordechai asked the Rabbi whether the 4th and 5th defendants were potentially liable to swear an oath and was told that they were most likely to be regarded as potentially having that obligation, without suggesting that they would in fact be required to do so.

4. Rabbi Schmerler did not impose a forfeit of £ 250,000 on each defendant. Instead, the negotiations reached a point where Samuel reduced his figure to £ 2.4 million and Mordechai said his last offer was £ 1.4. At this stage Rabbi Schmerler explained "*very delicately*" why it was of benefit to the brothers to pay more than they wanted, one of the reasons being to remove the obligation to swear an oath which might otherwise have existed, it being to their advantage to avoid a situation in which they could be perceived as having a potential obligation to take such an oath.

5. Eventually the figure of £ 2.4 million was agreed. Mordechai asked how the defendants should divide the additional money being paid. Rabbi Schmerler indicated that the removal of the obligation of the oath was a personal matter for each defendant and that what they should pay was relative to how much they thought it was worth. Rabbi Schmerler said that he would not hold it against the parties if they did not agree to the settlement but that he thought it was the right thing to do.

6. Mordechai then said that he had to speak to the other defendants as it would cost each of them about £ 250,000 more than they had expected to pay ( c £ 2,250,000 - £ 1,000,000 = £ 1,250,000, divided by 5).

According to the report of Rabbi Gartner of 15th January 2006, Mr Hess's evidence reveals *"an unfamiliarity with the halachic concepts coming into play, which led him to misinterpret the meaning and significance of the various statements he heard"*. A report from Rabbi Kopschitz, a respected scholar, translated by Rabbi Gartner, records, presumably on the basis of transcripts of the audio recordings, that : *"[Rabbi Schmerler] informed them that if they did not negotiate a settlement he would resign from his position (rather than have to administer an oath] but he imagined that any other dayan sitting on the case would likewise require them to swear – and as a result they entered into the agreement to avoid the oath"*

But earlier in the same report he records that Rabbi Schmerler had stated that *"the beth din had made known their opinion that ….there were grounds for requiring the defendants to validate their claim with a hesses oath; if they did not wish to take the oath, then they would have to settle with the claimants. Rabbi Scmerler further acknowledges (in [a] letter, and as quoted by his son. .. in a separate letter) that the entire reason why the brothers entered into the agreement was due to the threat of an oath, so that they would not have to swear"*. Rabbi Gartner records in his report that he had seen various portions of the transcript and that: *"[Mordechai …was] informed by Rabbi M.C. Schmerler …. that all five [defendants] would be called upon to verify their claims before the beth din with an oath"*.

92. In response the three brothers have filed the evidence of their cousin, David Halpern. He has also listened to the audio recordings and describes some of what is in them. He describes three days of "*inordinate pressure and cajoling*", wild allegations by Samuel, and vociferous demands by Samuel that the defendants be required to take an oath. Over the first two days Rabbi Schmerler did not accede to these demands. But on the third, when Mr Lang, by a tortuous and erroneous process had got to a figure of £ 2.4 million, Rabbi Schmerler "*explicitly stated that he would be minded to impose a Shavuah not only upon the First Defendant but also*

*upon each of his four siblings including [Esther]. Rabbi Schmerler states that the Shavuah can be redeemed by paying the Claimants more money saying – whether they like it or not that is the only way out. If any of the five so desire they can swear on their portion and will then not have to pay the extra*". The extra that they have to pay is £1,250,000. As a result Mordechai was, in his opinion, left with no choice but to give in (*"[he] was in a vice"*).

93. The onus of proving duress rests on the defendants. In circumstances where the duress is said to result from what was said at a settlement meeting of which an audio recording and a transcript exists, it is profoundly unsatisfactory, and surprising, that the defendants have not put before the Court a transcript of the relevant passages. This is all the more so if, as the evidence of David Halpern suggests (as does that of Mordechai), there is a short passage in which Rabbi Schmerler made an explicit threat.

94. I do not, however, feel able in the present state of the evidence to hold that there is no realistic prospect of the three brothers establishing that there was duress in the form of an illegitimate requirement to take an oath.

95. The claimants submit that, even if Rabbi Schmerler's actions amounted to duress, that cannot avail the three brothers since:
(a) the putative duress was that of a third party – Rabbi Schmerler - and not either of the claimants;
(b) the three brothers have affirmed the contract and
(c) *restitutio in integrum* is impossible.

96. As to (a) the fact that Rabbi Schmerler was the person who exercised the alleged duress does not automatically exonerate the claimants. But it would have, at the least, to be established that Samuel knew that Rabbi Schmerler was exerting illegitimate pressure on Mordechai and took the benefit of it. In the present case, if there was duress, it seems to me that there is a realistic prospect of the three brothers establishing that it was a duress which is capable of making the contract voidable. On their case it was Samuel, himself a scholar, who was seeking to procure the taking of an oath. Samuel says – see paragraphs 16 and 25 of his statement - that Rabbi Schmerler had no power, acting on his own, to require the taking of an oath by Mordechai, let alone anyone else. The claimants rely on that as showing that Rabbi Schmerler made no such requirement. But, if such a requirement was made or threatened, it would seem at least arguable that Samuel was pressing Rabbi Schmerler to do something that he knew was not justified in order to procure a compromise.

97. As to (b) the claimants submit that the defendants, even if at one stage subject to duress, have, when no longer subject to duress, affirmed the contract by:
(i) their partial performance of it, as summarised in paragraph 35 above;
(ii) their failure to seek to set aside the compromise agreement or the compromise award until their defence in these proceedings;
(iii) their participation in the ad hoc proceedings in December 2003; and
(iv) their reliance on the compromise agreement before the Beth Din of Rabbi Belsky as a ground for resisting Esther's claim.

98. As to (i) the suggestion made by Mordechai in his witness statement that the £ 95,000 paid was referable to Israel's undisputed entitlement to a share in the estate of the deceased is difficult to reconcile with his evidence that Israel had no entitlement to the capital of the estate (see paragraph 5 (a) of his statement). At the time when those payments – of £ 50,000 and £ 45,000, the precise figures provided for in the compromise agreement - were made, Mordechai had not, according to his witness statement, appreciated the full extent of the flawed nature of the procedure and that no oath obligation could have been imposed. On that hypothesis it is arguable that, because of his ignorance of the illegitimacy of the requirement to take an oath, the effect of the duress was at that stage continuing.

99. So far as the payment of the £ 68,700 is concerned, Mordechai's evidence is that it was paid by his son Eliezer, after he (the son) was placed under very considerable pressure resulting from the threat of a *Ksav Sirruv*. There is no evidence before me from the son in this respect. The evidence in relation to this payment and the threatened *Ksav Sirruv*, is very limited. The threat appears to have been made by the dayanim before they held the further hearing in December 2003. A *Ksav Sirruv* appears to be a form of sanction, short of excommunication but involving potential ostracism, which involves a statement that those against

whom it is directed must be treated as those who refuse to honour the decision of a Beth Din. On the present material I am not, however, prepared to hold that the payment unarguably amounted to an affirmation. Eliezer was a third party but he was presumably paying on behalf of his father. If he was not, the payment cannot count as an affirmation by Mordechai. If he was, and there was duress on him, such duress could negative affirmation. Perhaps more significantly the £ 68,700 was paid in December i.e. after Mordechai had, on his evidence, indicated to the claimants (on 24th September 2003) that he regarded the compromise agreement as null and void. Mordechai's statement does not indicate in what form this notice was given but, on the assumption that what he says is or may be true (there is no evidence to the contrary), that seems to me, at least arguably, an actual avoidance. Prima facie a payment in December could not affirm a contract previously avoided, although it might be evidence of a new contract on the same terms as the original. If such a payment could be regarded as an affirmation, notwithstanding what was said in September, it seems to me that more would need to be known as to why and on what basis the payment was made, and possibly as to what knowledge Mordechai had of his rights, before it could be said that affirmation had unarguably been made out.

100. As to (ii), the three brothers did not take any steps to claim that the compromise agreement was void until September 2003 or to challenge the compromise award until they did so in these proceedings. I am not, however, persuaded that, on a summary application, I should regard the brothers' failure between March and September (during which period Mordechai claims still to have been under the effect of the duress) to treat the compromise agreement as void, or to take steps to challenge the compromise award, as an affirmation of the compromise agreement. I further note that it is the claimants' case that the parties to the arbitration agreement excluded any right of appeal under sections 69 of the 1996 Act.

101. As to (iii) the brothers were represented at the ad hoc proceedings in December 2003. But since, on the claimants' evidence they were represented in order, inter alia, to assert that the compromise agreement was invalid, I am not persuaded that their presence amounts to an affirmation of the agreement, even if they also sought clarification as to its effect.

102. As to (iv) in January 2004 Mordechai, according to the decision of the Rabbi Belsky Beth Din: *"[answered] that he is strongly obliged to fulfil first what he has been commanded by the [dayanim] and from what it will be left of the estate after that will be divided according to the written Jewish will".*

Reliance upon an agreement later claimed to be voidable is a classic form of affirmation. It is, however, necessary to consider both the nature of the reliance and the context. Mordechai had by January 2004 already given notice that he considered the compromise agreement null and void. His answer to the Rabbi Belsky Beth Din was, on one view, merely a statement of the undoubted fact that the dayanim had, by the compromise award, obliged him to transfer assets to the claimants coupled with a submission that he ought not to be required both to do that and to divide the inheritance in strict accordance with the will. In those circumstances it is arguable that there was no affirmation.

103. As to (c) the claimants say that they have performed the condition precedent by destroying the documents and that as a result restitutio in integrum is impossible.

***Fulfilment of the condition precedent***

104. It is convenient at this juncture to consider Mr Berkley's submission that clause 4 requires that the papers and documents to which it refers have either been destroyed *before* the date of the compromise agreement or that they are returned to party B thereafter. It is not sufficient that the papers are destroyed *after* the date of the compromise agreement. He supported this submission by contending that it would not be acceptable to the three brothers to be told after the compromise agreement that the papers had been destroyed. If they were still in existence at the date of the compromise the brothers would want them returned to their hands.

105. I do not regard this construction as a realistic one. At the date of the compromise agreement the dayanim and the claimants were in possession of the relevant documents. The clause requires confirmation, obviously to be given after the agreement, that all papers etc were either returned or destroyed. It does not provide that the return or destruction shall happen or have happened by any particular date. It is accepted that it is sufficient if the documents are returned after the date of the compromise agreement. There is

nothing to indicate that the position is different in the case of destruction. If the agreement was intended to provide that, after the agreement, return of the documents would satisfy the clause but destruction would not, far more explicit words would have been necessary. In my judgment the three brothers have no realistic prospect of establishing that the condition precedent has not been fulfilled.

106. The act of destruction of the documents is one which has benefited the defendants and prejudiced the claimants. It can neither be undone nor reversed. Nor can any pecuniary relief put the claimants in as good a position as they would have been in if the agreement could have been rescinded and matters restored to the position in which they were before the agreement was made i.e. that the claimants and the dayanim retained their documents, unless, perhaps, Mr Lang had retained and is prepared to produce a copy of every material document. Accordingly *restitutio in integrum* would not appear to be possible. It is not however clear that an inability to make *restitutio in integrum* is a bar to avoidance of a contract on the ground of duress. Avoidance of a contract for duress (as opposed to rescission for undue influence) is a common law remedy. In essence the illegitimate pressure imposed on the victim renders his apparent consent revocable : *Anson's Law of Contract*, 274. If, after the illegitimate pressure has ceased to operate, the victim treats the contract as valid, he can no longer revoke it. Equity, as a condition of granting rescission where there has been undue influence would require *restitutio*, at least in substance. It does not however necessarily follow that, if the victim of duress has not affirmed the contract, he loses his right of revocation if he cannot restore the other party to substantially the same position. At any rate I decline on an application for summary judgment to rule that that is so.

107. Accordingly I regard the three brothers as having a prospect that cannot be described as unrealistic of establishing that the compromise agreement was induced by duress and that they have not acted in such a way as to be precluded from relying on it.

***Mistake***

108. The defendants also seek to defend the action on the ground that the compromise agreement was entered into under a mistake. The mistake is said to be constituted by Mordechai's erroneous belief:
   (a) that Rabbi Schmerler was empowered under Jewish law to demand a Shavuah from the defendants when in fact he was not and
   (b) that the Estate was not, in Jewish law, indebted to Esther in a sum that would either exhaust it, or render it insolvent.

***Common mistake***

109. A contract is void if it is based on a mistake by both parties as to a matter which was regarded by them as fundamental to their contract, such that the mistake "*render[s] the subject matter of the contract essentially and radically different from the subject matter which the parties believed to exist*"(Associated Japanese Bank (International) Ltd v Credit du Nord [1989] 1 WLR 255, 268 or that it renders the thing contracted for "*essentially different from the thing as it was believed to be*" (Bell v Lever Bros [1932 AC 161, 218). For the purposes of a summary application I will assume that a mistake as to Jewish law is capable of being a mistake that would avoid a contract, even if the contract is governed by English or Swiss law. There is first instance authority that a mistake as to English law can have that consequence: ***Brennan v Bolt Burdon*** [2004] 1 WLR 1240. applying ***Kleinwort Benson Ltd v Lincoln City Council*** [1999] 2 AC 349. If so there would seem to be no logical reason why a mistake as to Jewish law cannot do so, either by analogy with that case, or on the basis that Jewish law is, in English law, to be treated as a matter of fact.

110. Mistake (a) is not said in the defence to have been common. Mistake (b) is not pleaded. In any event I find it impossible to accept that it was a fundamental assumption of the claimants in entering into the compromise agreement that either of the facts said to have been mistakenly believed were correct. The claimants' interest was to secure payment of an acceptable sum of money and to put an end to the inheritance dispute. It was not fundamental to their reaching an agreement whether or not Rabbi Schmerler was entitled to require an oath and whether Esther's clam was good or not.

111. Further, as to mistake (b), the three brothers knew that Esther had made a claim which, if valid, would, if Esther's evidence (which they do not confirm) as to the value of the estate is right, probably absorb all or most of the estate. Mordechai's statement complains that Rabbi Schmerler ignored Esther's request but is silent as to what assumption he made as to its validity. In any event the compromise agreement was

expressed to be entered into by Mordechai on behalf of his brothers (other than Israel) and Esther. In those circumstances, even if the claimants were aware of Esther's claim, a subject on which the pleadings and the evidence are silent, far from there being a common mistaken assumption that Esther had no valid claim, the agreement itself purported to bind Esther and her siblings to transfer assets to Samuel and thus to forego any inconsistent claim that she might have. If there was any mistake on the claimants part it was their mistaken belief (if mistaken it was) that Mordechai had the authority that he claimed. But that is not something that Mordechai can rely on, nor David and Jacob if the compromise agreement was signed by Mordechai with their authority. Further it is impossible to suppose that it was, so far as the claimants were concerned, fundamental to the agreement that Esther had, as a matter of Jewish law, no valid claim. What they sought was a settlement of the inheritance claim which would render moot, so far as Israel was concerned, any further question as to which siblings were entitled to what.

***Unilateral mistake***

112. So far as unilateral mistake is concerned, the mistake pleaded – mistake (a)- is a mistake on the part of Mordechai as to Rabbi Schmerler's power to require an oath. It is not pleaded that the claimants knew or contributed to that mistake. But Mr Berkley submitted that Moredchai's mistaken belief was induced by Samuel's representations to Rabbi Schmerler. That may amount to duress; but it is not a ground for avoiding the contract on the ground of mistake. It is not suggested that there was any mistake as to the *terms* of the compromise agreement and a unilateral mistake "*will only operate where the mistake or misunderstanding is about the terms of the contract*": Chitty 5 -005; 5-065.

113. As to mistake (b), it is not suggested that Samuel knew that Mordechai mistakenly believed that Esther had no claim that would exhaust the estate and mean that the claimants could not be paid. This is not surprising since Mordechai was purporting to bind his sister to a compromise agreement which would ensure that they would be. In any event any such mistake would not be as to the terms of the agreement.

***Frustration***

114. It was further submitted (but not pleaded) that, if the agreement was not void or voidable for mistake, it was frustrated in that, by virtue of the supervening decision of the Belski Beth Din that Esther was entitled to £ 20,000,000, as a result of which the performance of the compromise agreement became something radically different from that which the parties had contemplated. As Mr Tager pointed out there is some difficulty in treating that decision as a supervening event given that it was delivered in January 2004 and performance of the obligation to transfer the assets was to be done as soon as possible after the compromise agreement with an estimate of six months. But in any event the argument must founder on the fact that the compromise agreement purported to bind Esther, and, thus, to address the question of her entitlement to be paid from the estate in preference to the claimants. The agreement thus catered for the contingency (that Esther might have had a claim which would preclude that of Israel) which is now said to constitute the frustrating event.

***Uncertainty***

115. The three brothers contend that the compromise agreement is too uncertain to be enforced in that there was uncertainty over the following:
    (a) the identity or class of the properties to be transferred; and whether 22 Wellington Street East was to be one of the assets transferred;
    (b) the capacity in which Samuel would hold any assets transferred and the mode of settlement for the benefit of Israel and his grandchildren;
    (c) the effect of clauses 4 and 5 and the role of Mr Lang.

    A court strives to give effect to agreements, unless not intended to create legal relations, particularly when the agreement is a compromise of an existing dispute and when it has been acted on: ***Scammel v Dicker*** [2005] EWCA Civ 405, para 31 (*"the courts should strain to be the preserver and not the destroyer of bargains, especially where, as here, the parties have acted upon their apparent agreement (viz. by settling their litigation…)"*. In my judgment there is no realistic prospect of the three brothers establishing that the compromise agreement was so uncertain that a court cannot give any effect to it. In relation to the areas of uncertainty identified:

(a) the agreement requires B to transfer assets worth £ 2,290,000 to be valued by Knight Frank and Rutley (see clause 6) "*by way of buildings or companies or whole trust*". B can choose what to transfer.

(b) Samuel is to accept the assets "*for his father*", ensure that they do not go to waste and that they should be invested to provide an income. The effect of that is, as it seems to me, that he holds as trustee. If he is not a trustee, he is in any event under an obligation to look after the assets and see that they provide an income for Israel and capital for weddings "*and other important matters*".

(c) I have considered the construction of clause 4 in paragraph 109 above.

(d) the role of Mr Lang is to approve, by his signature, investment or expenditure in excess of £ 50,000 and to review what has happened to the assets once a year. It may be, depending on the meaning of "*but that Samuel undertakes without a vow in accordance with Schmerler's request*" that this provision was not intended to give rise to a *contractual obligation,* but, even if that was intended, and even if there was an irresolvable ambiguity as to Mr Lang's role, that would not render the whole agreement unenforceable.

***Personal liability***

116. Mr Berkley further contends that the three brothers never intended to assume personal liability under the compromise agreement. The agreement, he submits, concerned the division of the estates of Joseph and Frieda ("*This is the final agreement regarding the legacy of {Joseph] and [Frieda]"*). It purported to resolve a dispute about inheritance and only fell to be honoured if, in Jewish law, there was something left of the inheritance after satisfaction of Esther's prior claim. I do not accept that this argument is realistic. The agreement was entered into by Mordechai on behalf of his siblings other than Israel, who between them were Joseph's heirs or potential heirs. The estates of both parents had devolved on the three brothers. The obligations contained in it are expressed to be obligations of "*Party B*" i.e. the 5 siblings other than Israel, to transfer assets to the claimants. In English law the three brothers had succeeded to the assets of Joseph and Frieda, whose heirs they were. Clause 2 of the agreement expressly states that the agreement is an agreement regarding the inheritance and "*Eldermount, Northquarry and Courtbride etc assets belonging to Party B*". In those circumstances, and having regard also to the fact that the claimants' claims in the arbitration had extended to assets transferred to the three brothers during their parents' lifetimes, it is not surprising that the obligations of the siblings are expressed in this way. Those obligations are not conditional on Esther having no claim in Jewish law or, to put it another way, on there being assets in the Estate which Jewish law would regard as available to satisfy the claimants. Nor can such a provision be implied.

117. Accordingly the orders that I propose to make, the precise form of which I shall discuss with counsel, are as follows:

(a) I propose to strike out such parts of the defence and counterclaim as allege:
  (i) fraud in the procurement of the arbitration agreement;
  (ii) mistake;
  (iii) that the compromise agreement is ineffectual:
    (aa) by reference to halachah; or
    (bb) Esther's prior interest;
  (iv) that there was a failure to comply with the condition precedent contained in clause 4 of the compromise agreement;
  (v) that the three brothers can have no personal liability.

(b) Subject to discussion with Counsel as to their precise form I propose to give the directions for the conduct of the case set out below.

(c) The 1st to 3rd defendants (hereafter "the defendants") must forthwith provide to the claimants the transcript in their possession in Yiddish of the settlement discussions and within a period that I shall specify procure and produce to the claimants a transcript in English of (i) such part of the Yiddish transcript of the settlement discussions as they rely on in support of their plea of duress and (ii) any part of the Yiddish transcript which the claimants seek to have translated. The costs of this shall be borne in the first instance by the defendants. The ultimate incidence of those costs will be reserved. The parties should endeavour to agree on a translation. I wish to consider with counsel whether agreement is likely

to be reached or whether it is necessary for the court to specify a translator. The translated transcript should be suitably paginated.

(d) There shall be a trial of the following issue: *"whether the compromise agreement was procured by duress and, if so whether the defendants are precluded from relying on that duress by reason of affirmation or the inability of the defendants to effect restitutio in integrum"*

(e) I will give directions as to the trial of that issue.

(f) It seems to me that those directions should include a requirement for discrete statements of case on the issue in which (a) the defendants identify in some convenient manner, by reference to the translation of the transcript, which are the passages in the settlement discussions that they rely on as constituting duress; (b) the claimants identify what acts (or omissions) they rely upon as constituting affirmation and precluding *restitutio*; (c) the defendants indicate what they say in relation to the matters relied on under (b). The parties must indicate which witnesses they intend to call. I assume that they will include Samuel, Mordechai, Eliezer and one expert for each side. Self contained statements should be prepared. A bundle of documents must be prepared containing, in chronological order, the documents on which reliance is placed by either party with translations of any document not in English. It must be made clear which document in English is a translation of which document in another language (this is not apparent in all cases at the moment).

118. In the light of the submissions made at the hearing it appears to me that a decision on the issue that I have identified will be determinative of the liability of the defendants subject to the question as to whether Mordechai had authority to agree the compromise agreement on behalf of David and Jacob. Paragraph 20 of the Defence denies that Mordechai had any authority to enter into the compromise agreement on behalf of any of the other defendants. In paragraph 14 of his witness statement Mordechai says that he had no authority to bind Aron or Esther; but noticeably does not say the same in respect of David and Jacob. Nor has David or Jacob given a witness statement. If David and Jacob seek to maintain this plea, that is an issue which can appropriately be added to the issue identified above.

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David Berkley QC (instructed by Simon Bergin) for the Defendants