IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS APPELLATE JURISDICTION
BEFORE THE HON. JUSTICE SHADE SUBAIR WILLIAMS
CASE NUMBER 2023: No. 55

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL GEOFFREY BELL
and

JUSTICE OF APPEAL IAN KAWALEY

B E T W E E N:

(1) RUBY LIGHTBOURNE-LAMB
(2) EDWARD LAMB

Appellants

-and-

(1) BRIGHTSIDE ENTERPRISES LTD.
(2) GWYNETH LIGHTBOURNE

Respondents

Appearances: Ms. Victoria Greening, Resolution Chambers, for the Appellants

Mr. Kevin Taylor, Walkers (Bermuda) Limited, for the Respondents

Date of hearing: 13th and 14th March 2024

Judgment delivered: 22 March 2024

INDEX

Appeal against judgment in favour of plaintiffs in respect of loans and undue influence-adequacy of factual findings

JUDGMENT

BELL, JA

Introduction

1. This appeal arises from an unfortunate family dispute where the protagonists are the Respondent ("Mrs Lightbourne" or "the Second Respondent") on the one hand, and her daughter and son-in-law ("Mrs L-L" and "Lt Col Lamb", together "the Appellants") on the other. There were originally two sets of proceedings, the first taken by a family owned company named Brightside Enterprises Limited ("Brightside") against Mrs L-L, and the second taken by Mrs Lightbourne against Mrs L-L and Lt Col Lamb, tried together because of the shared factual background, pursuant to an order made on 23 June 2016.

2. The first proceedings taken by Brightside claimed the sum of $82,991.35 from Mrs L-L. These were referred to by the first instance judge ("the Judge") as the Corporate Claim. The second proceedings were described by the Judge as consisting of personal claims for multiple unpaid loans, and were referred to as the Personal Claims. I will adopt the same definitions relating to these loans as used by the Judge. The second proceedings were taken by Mrs Lightbourne against both Mrs L-L and Lt Col Lamb, claiming the sum of $193,366.44 representing principal and interest in respect of the Second Loan, $116,927.63 representing principal and interest in respect of the Combined First and Third Loans, US$1,770,944.71 representing principal and interest in respect of the Fourth Loan (also referred to, later, as the 2009 Bank Transfers), and the Cottage Claim, which sought an account for rents and profits in respect of a property at Cartwheel Cottage, 6 Spanish Crescent in Smith's Parish, referred to as "the Knapton Hill Property" for the period from June 2012 to June 2018.

The Pleadings

3. The pleadings were amended a number of times, and remained separate pleadings in respect of the Corporate Claim and the Personal Claims. In relation to the Corporate Claim, the claim is pleaded as having been a loan made by Brightside to Mrs L-L in the sum of $90,000, to bear interest at the rate of 5%. Some principal reductions were made such that the outstanding principal at the time of the issue of proceedings was said to be $84,500.

4. The Defence in respect of the Corporate Claim denied that there was a loan. Mrs Lightbourne is the widow of Willard Lightbourne ("the Deceased"), who died in January 2011, and was Mrs L-L's father. Mrs L-L's defence to the Corporate Claim pleads that the Deceased gave her the sum of $90,000 out of natural love and affection, without any date being given for that event. There was a specific denial that Brightside had paid the $90,000 to her by cheque numbered 1723, as had been pleaded in the Statement of Claim. It was also denied that Brightside had demanded repayment of the loan in December 2012 at a meeting of the Brightside board of directors, as pleaded in the Statement of Claim, and that Mrs L-L had then agreed to repay the loan without interest at the rate of $500 per month. The Defence pleads that Mrs L-L admits offering to pay $500 per month "towards indebtedness" owed to the Deceased, but averred that any monies claimed in the writ were never a loan nor a debt owed by Mrs L-L to Brightside. Specifically, it was pleaded that any monies paid by Mrs L-L to Brightside were in respect of her indebtedness to the Deceased, and not the subject of these proceedings, since the monies given to Mrs L-L were not a loan. Why in those circumstances Mrs L-L should have either offered to or did pay $500 per month was not addressed in the pleading.

5. In relation to the Personal Claims, I will describe them only with reference to the final pleading, the Further Re-Amended Statement of Claim, which is undated, but appears to have been filed some time in February 2021. The Statement of Claim pleads that during their marriage Mrs Lightbourne and the Deceased had given financial assistance to Mrs L-L and Lt Col Lamb by way of three loans, and an additional transfer of funds, which took place in September 2009, and was referred to as the September 2009 Transfer. I will use that term, even though the payment was made in two tranches, the second of which was made in October 2009. In respect of the three loans, it was pleaded that these had not been fully repaid and remained outstanding, and details of the loans were particularised.

6. In respect of the September 2009 Transfer, it was said that this was not in the nature of a loan, and neither was it a gift, and that no part of this had been repaid. Specifically, the transfer was said to have been procured by Mrs L-L's undue influence, of which particulars were given, which were said to have caused Mrs Lightbourne to agree to effect the September 2009 Transfer. This reflected a fundamental change in Mrs Lightbourne's position as to the nature of the transfer of funds. Mrs Lightbourne's first witness statement had been to the effect that the transfer was made as a loan, bearing interest, which was to be later formalised into a written loan agreement. But her second supplemental witness statement had changed the position significantly, resiling from her previous position that the transfer of funds had been by way of loan, and her revised position was that the transfer of funds was neither a loan nor a gift. Mrs Lightbourne's oral evidence was recorded by the Judge as being to the effect that the transfers

had been effected as a result of her daughter's "trickery", aided by her familiarity with the bank officer who facilitated the transfer of funds.

7. As to the Cottage Claim, it was pleaded that Mrs Lightbourne and the Deceased had voluntarily conveyed an interest in the Knapton Hill Property to Mrs L-L, to be held with them as joint tenants. Upon the Deceased's death Mrs Lightbourne had become entitled to 50% of the rents and profits received by Mrs L-L from the property.

8. In broad terms, the Appellants' defence was that they had borrowed money on two occasions from the Deceased, in amounts of $165,000 and $150,000, on which regular repayments had been made. If money was owed, it was owed to the Deceased, and formed part of his estate. As to the Fourth Loan, or the September 2009 Transfer, it was denied that the monies claimed under this head were ever a loan or a debt owed by the Appellants to the Deceased or Mrs Lightbourne.

9. As to the First and Third Loans, it was admitted that $165,000 was the amount of the First Loan, but denied that the sum of $50,000 was added to that loan in 2009. The $50,000 in question was given to the Appellants by the Deceased as a gift to cover overseas school fees for his grandson.

10. In relation to the Second Loan, it was pleaded that the Deceased, from whom the monies had been received, had told the Appellants that there was no need to continue repaying the loan, and had released them from any obligation to repay. Alternatively, the claim was statute barred under section 6 of the Limitation Act 1984 ("the Act").

11. As to the Third Loan, the denial referred to above was repeated. As to the Fourth Loan, it was averred that the monies given were not a loan, but a gift, and there was also a denial that there was a 2019 transfer (there seems to have been an error in dating; it was clearly intended to refer to 2009). The claims of undue influence were denied. And lastly, as to the Cottage Claim, it was admitted that there had been a transfer of title to the property in 1991, but pleaded that there had never been an agreement that rents of any amounts would be paid to Mrs Lightbourne, and that after (then) 27 years of occupation, control and treating the property as exclusively Mrs L-L's, the claim was statute barred, or alternatively that the claim was barred by the equitable doctrine of laches.

12. I should note at this point that Mrs Lightbourne filed three witness statements dated 8 December 2017, 22 May 2018, and 13 August 2020. Mrs L-L filed four witness statements

dated 19 January 2018, 15 November 2018, December 2020 and 17 February 2021, and Lt Col Lamb filed three witness statements dated 19 January 2018, 15 November 2018, and December 2020.

The Judgment

13. The Judge set out the agreed background facts, and summarised the claims in some detail. In doing so, the Judge quoted extensively from the evidence given by the parties. As part of this exercise, she referred to a letter which had been written by the Appellants' lawyer Christopher Swan, dated 19 December 2013, ("the Swan Letter"), on which Mrs L-L had been cross-examined. Although the Appellants' case was that the combined First and Third Loans had been forgiven by the Deceased and the Third Loan was never a loan at all, the Swan Letter was inconsistent with that position. In relation to the Second Loan, on which the Appellants had consistently made payments of $750 per month between February 2002 and January 2008, the Judge referred to the loan statement prepared by an accountant employed at Brightside, and to the bank statements which had been produced. Mrs L-L confirmed that she had approved the draft of the Swan Letter before it had been sent, and maintained that the loans had been forgiven in December 2009, despite there being no reference to such forgiveness in the Swan Letter, or the fact that payments on the loans had continued after 2009.

14. In relation to the Fourth Loan, the Judge set out the competing positions of the parties, and similarly so in relation to the Cottage Claim. In relation to the September 2009 Transfer, she referred to Mrs Lightbourne's changed versions of events in paragraphs 132 and 133.

15. The Judge then set out her findings in relation to the various claims, starting with the Corporate Claim. She first found that the $90,000 payment had been made from Brightside's assets, referring to the cheque bearing the company's name. She found that that position was not undermined by the letter which Mrs Lightbourne had written to Mrs L-L suggesting that the sum would subsequently be drawn from the Gwen-Will Trust.

16. The Judge then turned to the question whether the payment was a gift or a loan. She referred to emails which made it clear that Mrs Lightbourne was seeking repayment of the $90,000 with interest, and that she had received no real response from her daughter. When the matter was ultimately dealt with in April 2012, she noted that Mrs L-L addressed only the issue of discrepancies in the figures, a position which the Judge described as being wholly inconsistent with the response of a person accused of owing money which had been granted as a gift. The Judge concluded that Mrs L-L well understood the payment to have been a loan.

17. The Judge then addressed the alternative case that if the Deceased had intended to gift the $90,000 to Mrs L-L, he would have had no unilateral right to do so, because the monies belonged to Brightside. She concluded that if it had been made as a gift, it would have been a clear misappropriation of company assets and a breach of duty resulting in the unjust enrichment of the Appellants. She accordingly found the Corporate Claim proved.

18. The Judge then turned to the first of the Personal Claims, the Combined First and Third Loans. The Appellants had accepted that the Deceased and Mrs Lightbourne had loaned them the First Loan. When the $50,000 had been added, Mrs L-L's evidence was that that sum was never a loan. Her explanation for having signed a combined loan agreement on 24 February 2009, that the Appellants had no intention of being bound by the agreement, was rejected by the Judge. The document had been signed at a time when the Deceased was alive and well, and Mrs L-L's witness statement had referred to the Deceased as being the real financial decision-maker. So if the Deceased had truly intended the $50,000 to be a gift, there would have been no reason for the Appellants to feel any pressure to enter into a legal agreement that was contrary to the Deceased's will.

19. The Judge also found that the Appellants' prolonged compliance with the express terms of the combined loan agreement to be probative of Mrs Lightbourne's case. She saw no reason to doubt the authenticity of the financial statements produced by Mrs Lightbourne, which she described as having been most persuasively verified by her. She accepted in terms that several monthly payments had been made, and rejected the Appellants' evidence that the payments had been made in good faith and to subvert the constant and intense harassment exacted by Mrs Lightbourne. Finally, the Judge referred to the Swan Letter, and the fact that this failed to assert that the monies claimed were a gift and/or a forgiven loan. She found it most unconvincing that the Appellants would have instructed an attorney to defend these allegations in the manner set out in the Swan Letter, had they sincerely believed in their primary case, that no monies were owed. Accordingly, she found the claim in relation to the Combined First and Third Loans proved.

20. The Judge then moved on to the Second Loan, where the issue was again whether the loan had effectively been forgiven in December 2009. And again the Judge placed reliance on the fact that the Swan Letter failed to assert the Appellants' case, describing the Appellants' case as a "desperate concoction designed to escape the cloud of financial liability lurking". But the Judge then found that any assurance which might have been given by the Deceased would have been legally ineffective unless made by deed, and that the Deceased was not empowered to release the Appellants' liability without the joint agreement of Mrs Lightbourne.

21. The Judge then addressed the issue of limitation raised by the Appellants, and accepted the argument made for Mrs Lightbourne that the Appellants' payment on 22 November 2010 qualified as an acknowledgement or part payment within the limitation period, such that section 30 (7) of the Act operated so as to prevent the action from being time barred. She accordingly found the claim in respect of the Second Loan proved.

22. Turning to the Fourth Loan, the Judge noted that the Appellants had not denied that Mrs L-L had been the beneficiary of bank transfers totalling $1,556,443.07, made by two separate advances from an HSBC bank account held jointly by Mrs Lightbourne and the Deceased. She noted the conflict in the evidence between Mrs Lightbourne and Mrs L-L, relating to the factual circumstances under which the transfers had been made.

23. The case for Mrs L-L was that the Deceased had not only offered the gift of $1,556,443.07, but that he had simultaneously absolved the Appellants of their responsibilities to repay the outstanding loans. This latter aspect had been covered by the Judge when she had rejected the Appellants' version of events. And she commented that the Deceased's refusal to provide a written statement evidencing his forgiveness of the loan (Lt Col Lamb's evidence) was consistent with her earlier view that, at best, the Deceased was prepared to pardon the Appellants for their delays in repaying their debts. And the Judge referred again to the inconsistency between forgiveness of the loans and the continued payments which were made after September 2009.

24. The Judge rehearsed the evidence of mother and daughter in detail. She concluded that Mrs Lightbourne had knowingly agreed to make the transfers to an account held by her daughter, but did not accept the notion that Mrs Lightbourne ever intended or intimated that the transferred sums would be gifted to Mrs L-L. In doing so, the Judge noted that it was clear, looking at the evidence as a whole, that the practice of both the Deceased and Mrs Lightbourne was to loan money with strict terms of interest, not to gift it. And the Judge noted the exchange of emails between mother and daughter on 22 June 2012. In Mrs L-L's response email, which the Judge set out, she had referred to making "more consistent payments" when the building project on which she and Lt Col Lamb had embarked was finished. As the Judge pointed out, the email was inconsistent with Mrs L-L's claim that the monies in question had been advanced as a gift, and with her evidence at trial. The Judge found that the Appellants both knew that these sums were never gifted to them and that any monies taken were to be repaid.

25. The Judge then continued to consider the question of undue influence, premised on the gift scenario having been established. She found that in those circumstances she would be bound to apply the presumption of undue influence, citing Inche Noria v Shaik Allie bin Omar [1929] AC 127 and Royal Bank of Scotland plc v Etridge (No.2) [2001] 3 WLR 1021. At paragraph

150 of the judgment, the Judge set out the various background facts, some ten in all, which would have led her to conclude that Mrs Lightbourne had discharged the burden of proof required to establish undue influence, and in the following paragraph concluded that on the evidence before the court, which evidence was not identified, Mrs L-L would have failed to discharge the evidential burden on her. The Judge added that on the basis of both her primary and alternative findings, both Appellants had been unjustly enriched by these transactions. She accordingly found in favour of Mrs Lightbourne in relation to the Fourth Loan.

26. Turning lastly to the Cottage Claim, and having set out the competing positions of the parties, the Judge addressed the defence of laches. The cottage in question had been conveyed into the joint names of Mrs L-L and her parents in October 1991, so more than twenty three years before the issue of proceedings. The Judge referred to Lord Selborne's speech in the case of Lindsay Petroleum v Hurd [1874] LR 5 PC 221 (PC), which stressed that the two factors of importance in considering the defence of laches were the length of the delay and the nature of the acts done during the interval. She then referred to the concession made on behalf of Mrs Lightbourne on the limitation point, such that an accounting was only sought in respect of the six year period leading up to the date of the issue of proceedings. The Judge concluded that it would be unconscionable for the court to award the sought after remedy for any period prior to the filing of the writ.

The Grounds of Appeal

27. In relation to the Corporate Claim, the grounds complained that the Judge failed:

- to consider the authenticity of the Brightside minutes of 7 December 2009 and 5 October 2012,
- failed to consider the authenticity of the transaction record,
- wrongly concluded that these documents were valid and supported the contention of a loan,
- failed to consider that Mrs L-L had made partial repayments,
- failed to consider that the real source of the payment was the Gwen-Will Trust,
- failed to consider that no loan agreement was made and no partial repayments were made, and
- failed properly to consider the discrepancies in the evidence, and could not have been satisfied that the claim had been proved.

And the Judge had been wrong to conclude that Mrs L-L had played a major role in the management of the finances of Brightside.

28. In relation to the First and Third Loans, for $165,000 and $50,000, the grounds complained that the Judge:

- wrongly concluded that the loan reflected in the loan agreement of 30 January 2003 had not been forgiven,
- failed to consider the authenticity of the loan agreement of 24 February 2009,
- failed to consider the authenticity of the document entitled “Revised Loan 3”, and
- wrongly concluded that the documents referred to above were valid.

29. In relation to the Second Loan, for $150,000, the complaint was that the Judge:

- failed to consider the authenticity of the loan agreement dated 5 February 2003,
- failed to consider the authenticity of the document entitled "Loan 2",
- failed to consider the authenticity of the document entitled “statement account history”,
- wrongly concluded that the above documents were valid, and
- wrongly concluded that the loan reflected in the loan agreement dated 5 February 2003 had not been forgiven.

30. In relation to the Fourth Loan, the complaint was that the Judge:
- wrongly concluded in the absence of a written or oral loan agreement that payment 4 was a loan,
- should not have found that a loan agreement for such a substantial amount would be concluded without supporting written documentation,
- wrongly found that it was Mrs Lightbourne's practice to lend and not gift significant amounts of money to Mrs L-L, without any written loan agreement in place, and
- failed to consider the various discrepancies in Mrs Lightbourne's evidence relating to this payment, and could not be satisfied that the claim had been proven.

31. In relation to undue influence, the complaint was that the Judge:

- failed to consider the various discrepancies in the evidence relating to the Fourth Loan, and could not be satisfied that undue influence had been proved.
- erred in law when applying the common law test of undue influence,
- erred when she came to the conclusion that there was undue influence. Specifically, having found that Mrs Lightbourne had an acute sense of awareness, the Judge was wrong to have found that she was "particularly vulnerable".

And the general claim was made that the findings were not supported by the evidence.

The Skeleton Arguments

32. I turn next to the skeleton argument filed on behalf of the Appellants, starting with the Corporate Claim. Reference was made to an affidavit sworn by the Brightside accountant, Sonya Darrell, on 15 January 2014. Ms Darrell had not been called to give evidence, and leave had not been granted to permit her affidavit to be filed. Criticism was also made of Mrs Lightbourne's evidence, and her reputed inability to confirm whether the transfer was a loan or a gift. The skeleton argument descends into irrelevant matters relating to the relationship between mother and daughter, as well as the Deceased's practice of making payments from the corporate entity for personal use.

33. The skeleton next turned to the combined First and Third Loans and the Second Loan. It was said that the evidence that the loans had been forgiven by the Deceased had not been "properly explored or considered", and that the Judge had failed to put the evidence of the loan in its proper context. It was said that the reason for the Appellants having made repayments was because of Mrs Lightbourne's bullying nature. What was not addressed at all was the contents of the Swan Letter, and the failure to give any explanation for the continued repayments in respect of a debt which it was claimed had been forgiven (including the explanation advanced in the skeleton).

34. In relation to the Fourth Loan, reference was made to the lack of written support for the transfer having been a loan. The same could be said in relation to the Appellants' case that it was a gift, perhaps a more significant scenario, given the size of the sum transferred, and the prior practice in relation to much smaller loans. And reference was made to the fact that no repayments had been made, but without any reference to Mrs L-L's email of 22 June 2012 (which sought to explain that failure), which the Judge had found to be inconsistent both with her claim that the loan had been forgiven, and with her evidence at trial - see paragraph 24 above.

35. Finally, the skeleton argument addressed the issue of undue influence, saying that there was no evidence to support the finding, but without making reference to the matters set out by the Judge - see paragraph 25 above.

36. I now turn to the skeleton argument filed on behalf of Mrs Lightbourne. In relation to the Corporate Claim, this referred not only to the fact that the $90,000 had been drawn on a Brightside cheque, but that Mrs L-L had acknowledged in her evidence that the $90,000 was an asset of Brightside. She had also acknowledged that the funds had gone into the Appellants' construction project at Cashew City, in which Brightside had no interest. The skeleton submitted details of the duties of directors in such circumstances.

37. In relation to the Personal Claims, the skeleton referred to the various loan documents which had been signed by Mrs L-L and Lt Col Lamb. It referred to the spreadsheet prepared by the Brightside accountant and produced at trial by Mrs Lightbourne. This was not contradicted by any evidence from the Appellants. The skeleton referred to the fact that loan repayments had been made after the supposed forgiveness of such loans, and the terms of the Swan Letter, submitting that there was no reasonable basis to disturb the Judge's findings in relation to the First and Third Loan Claims. The same was submitted in relation to the Second Loan Claim.

38. The skeleton dealt with the Fourth Claim as part of the Undue Influence Claim, referring to the Royal Bank of Scotland case, and Thompson v Foy [2009] EWHC 1076 (Ch) 30 at paragraph 99. The Judge was correct to hold that the transfer of a sum in excess of $1.5 million called for “a real explanation”. There was nothing wrong with the Judge's analysis, and this Court should not disturb her findings of fact.

39. Finally, the Cottage Claim was referred to in terms of the claim being based on the existence of the joint tenancy.

Oral Argument

40. I will deal with argument relatively briefly. In her address, Ms Greening for the Appellants started from the position that the Deceased had forgiven the debts. She did not make complaint that the Judge had made a finding in relation to the Fourth Loan which no longer represented the case for Mrs Lightbourne. As to the visits to the bank, she put the position as being that on the first visit Mrs L-L had attended with her mother and father in June or July 2009. And Mrs L-L's second supplementary witness statement was to the effect that she had visited the bank twice with her parents, prior to September 2009, had no reason to go back there, and had never attended with only her mother present. Her evidence was that she had gone overseas with her father in late August 2009, and was with him "for weeks" at around the time of the transfer in September 2009. Exhibited medical reports show that the Deceased was at the Lahey Clinic on 22 and 24 September 2009.

41. Referring to the grounds of appeal, Ms Greening advised that she did not pursue grounds 1, 2, 3 and 4 (in relation to the Corporate Claim). She did not pursue an attempt to introduce the affidavit sworn by Sonya Darrell on 16 January 2024, relating to the Corporate Claim. In relation to the First and Third Loans, Ms Greening abandoned grounds 9, 10 and 11 (but not ground 8), and in relation to the Second Loan, she abandoned grounds 12,13,14 and 15 (but not ground 16). Grounds 8 and 16 refer to the forgiveness by the Deceased of those loans. There was no appeal regarding the Cottage Claim.

42. Mr Taylor began by emphasising this Court's standard of review, which he did by reference to the case of Kwok v Yao [2020] UKPC 52. In respect of the Corporate Claim, the Court was concerned only with the forgiveness defence, and in this regard he placed emphasis on the Swan Letter and the fact that this had been approved by Mrs L-L before it had been sent. He also referred to spreadsheets which showed payments continuing after the various debts were said to have been forgiven. He accepted that the order purporting to give effect to the judgment did not show the interest calculation as it should.

43. In relation to both of the personal loans he referred to the loan agreements, and to the spreadsheets showing repayments. He recognised that there were errors in the formal order which needed to be corrected. In relation to the September 2009 Transfer, he traced the movement of the large majority of those funds, $1,446,422.96, from the investment account of Mrs Lightbourne and the Deceased to their savings account and then to Mrs L-L's account, the transfers being effected on 23 and 24 September 2009. He repeated that exercise in relation to the subsequent transfer of $110,020.11, made on 15 and 16 October 2009. He maintained that the Judge was entitled to find as she did at paragraph 147, with reference to the June 2012 email exchange between mother and daughter. But Mr Taylor was bound to, and did, accept that the Judge had been in error in relation to her finding at paragraph 141 of the judgment that Mrs Lightbourne had agreed to make the September 2009 Transfer of funds by way of a loan. That case had been formally abandoned both in Mrs Lightbourne's evidence and in the amended pleading which reflected the changed case from a loan to a claim of undue influence alone. And in paragraph 147 of the judgment the same problem arises. That was why, Mr Taylor explained, he had concentrated (as had Ms Greening) on the claim for undue influence.

44. Mr Taylor reviewed the pertinent authorities on undue influence in the form of Royal Bank of Scotland v Etridge (No 2), and Thompson v Foy [2009] EWHC 1076 (Ch). He recognised that establishing undue influence depended on establishing the facts contained in Mrs Lightbourne's second supplementary witness statement, something which the Judge had not done, and that in terms of the Judge's factual findings at paragraph 150 of the judgment, these did not refer to any previous findings.

45. In reply Ms Greening maintained that the terms of Mrs L-L's 22 June 2012 email were inconsistent with undue influence. She also submitted that Mrs L-L's third supplemental witness statement clarified the different steps in the banking process. The decision to transfer funds had, she said, been made by Mrs Lightbourne and the Deceased months before, and all that was required was that Mrs Lightbourne had to attend the bank to sign the documents to effect the transfer in September 2009, which she did at a time when Mrs L-L was off the Island with her father at the Lahey Clinic.

46. Ms Greening also submitted that on the undue influence claim, the Judge had omitted a vital step, insofar as she had failed to consider the evidence after the burden had shifted from Mrs Lightbourne as the person making the claim, to Mrs L-L who was said to have been the person exerting the undue influence. Finally, she said that the Judge had erred in failing to consider Lt Col Lamb's evidence at all. It is to be noted that in his supplemental witness statement, Lt Col Lamb had said that he would never have accepted the funds in question as a loan, and thereby increased the family indebtedness, but would have left the land in question undeveloped.

Findings - The Corporate Claim

47. I shall deal with the various loans in the order which the Judge did. So, first is the Corporate Claim. The argument that this depended upon the authenticity of the Brightside minutes or transaction record cannot be sustained. Neither is the ultimate source of the funds relevant. The loan was made through a cheque from Brightside which the Appellants had endorsed. The Judge was right to find that the funds had been paid out of Brightside's funds. She was entitled to find, as she did, that the transaction record produced by Mrs Lightbourne at trial was authentic. And she was entitled to find on the basis of Mrs Lightbourne's evidence that there had been four separate instalment payments reducing the debt to $82,991.35. Finally, it is to be noted that the Judge closed this part of the judgment by finding that, if the $90,000 was made as a gift, it would have been a clear misappropriation of company assets, as she was entitled to do. It is not necessary to consider the further arguments canvassed. I would dismiss the appeal in relation to the Corporate Claim.

The First and Third Loans

48. As Mr Taylor submitted, the question in relation to these loans is effectively whether they had been forgiven by the Deceased. And the spreadsheets which were produced by Mrs Lightbourne showed repayments continuing through 2010 and well into 2011. The Judge rejected the notion that these spreadsheets were not accurate, noting that the Appellants had produced no evidence to controvert them and were unable to specify in their oral testimony which portion of the financial records were disputed, quite apart from the fact that the Swan Letter appeared to have expressly accepted their authenticity. Further, the Swan Letter failed to assert that the monies allegedly owed were either a gift or a forgiven loan. The Judge accepted the figure of $98,148.44 appearing in the spreadsheet had been proved. However, the order giving effect to the judgment referred to this sum "plus interest accruing at 5% per annum", without specifying the date from which interest was to run, and without making reference to the interest calculation which appears in the spreadsheet, showing total interest of $31,543.07 to be due for the years 2015 through 2017. It seems to me that the precise figure

should be confirmed, with the date from which interest should continue to run clarified, and that the appropriate way for this to be done is by an application under the Slip Rule, which I would invite the attorneys for the Respondent to make. Subject to that, I would dismiss the appeal in respect of these loans.

The Second Loan

49. The Second Loan falls to be dealt with similarly. There was a limitation issue which is not the subject of appeal, so that, as the Judge found, the issue for determination is whether this loan was effectively pardoned in December 2009, as the Appellants contend. As the Judge pointed out, the record produced by Mrs Lightbourne in relation to the Second Loan showed monthly payments made in October and November 2010, nearly a year after the loan was said to have been forgiven. She noted that these payments were particularly significant because at this time the Deceased was alive and well. The Judge confirmed that she accepted the authenticity and veracity of Mrs Lightbourne's spreadsheet. I pause to note that the spreadsheet I have shows five further payments made in 2011. The Judge again noted that the Swan Letter referred to this loan only in terms of the calculation, and never stated that it had been forgiven. Unsurprisingly, the Judge was highly critical of the Appellants' assertion that the loan had been forgiven.

50. In the order confirming the judgment, the interest is stated to accrue from 16 March 2009. When asked where this date came from, Mr Taylor suggested that it might have come from a spreadsheet which is no longer to be found, but the fact remains that the spreadsheet the Court has shows some 19 payments of interest made after March 2009. So it may also be appropriate for this aspect of matters to be addressed in any Slip Rule application. Subject to that issue being resolved, I would dismiss the appeal in respect of this loan.

The September 2009 Transfer, or the Fourth Loan

51. As I have already indicated (paragraph 43 above), the Judge's finding that the transfer of funds effected in September 2009 were a loan to the Appellants cannot be sustained. By the time of the trial, that was not the pleaded case for Mrs Lightbourne, and there was in any event no evidence to support such a position. Given the Judge's findings, it is necessary to consider the evidence for Mrs Lightbourne carefully.

52. In her first witness statement dated 8 December 2017, Mrs Lightbourne stated that what she referred to as "Loan 4" was made by way of an unwritten loan agreement dated 24 September 2009, by the Deceased and herself to both Appellants. The use of the word "dated" is itself

curious, given that the loan agreement was said to have been unwritten. Mrs Lightbourne said that Loan 4 was not evidenced by a written agreement because the Deceased was very ill at the time. Were that not the case, she said, this loan would have been so evidenced.

53. It should also be noted that Mrs Lightbourne signed a further witness statement on 22 May 2018, in which, coincidentally, she touched on the manner in which she and her husband had transferred interests in certain co-owned real estate to each of their three children.

54. Then, in her second supplementary witness statement dated 13 August 2020, Mrs Lightbourne explained her change of position in relation to the status of Loan 4. It should be noted that that change in position resulted in a position being taken which was fundamentally inconsistent with the previous position. A trial date had been set for 18 March 2019, and the day before the scheduled start, Mrs Lightbourne told her attorneys (who were not the attorneys originally acting for her) for the first time, that what she then called the Fourth Transaction was not, in fact, a loan. This led to a last minute adjournment of the trial, made on the basis that she should bear the costs of the adjournment. She said that she was deeply embarrassed by the circumstances which led to the Fourth Transaction, on which she then elaborated. She said that she had attended with her daughter at the bank on 21 September 2009, knowing that the investment account which she had jointly with the deceased was about to mature, and wanting to know how much money was in that account. She knew that she had to decide whether to redeem or reinvest the funds in question, and said that she had asked her daughter to accompany her for emotional support. She said that she did not recall the exact conversation which she had with her daughter and the bank teller, and she recalled asking her daughter into which account the funds should be paid. She described having felt foolish when she left the bank.

55. A Re-Amended Statement of Claim was filed (apparently on 21 October 2020, although the version in the record of appeal is unsigned and undated). All references to the fourth loan agreement were replaced by references to the September 2009 Transfer, and it was said in terms that this was not in the nature of a loan and neither was it a gift. The particulars of undue influence were pleaded in detail for the first time. (At least it appears so, although the amended language is not in colour, as would have been helpful).

56. Against that background, let me turn to Mrs Lightbourne's oral evidence. First, Mr Taylor had opened his case at trial by referring to the transfer of these funds as being the subject of an undue influence claim. He had indicated to this Court that in the course of his presentation at trial, his client had simply confirmed the truth of her witness statements at the outset of her evidence, without explaining the different versions of the September 2009 Transfer, but the transcript shows that Mrs Lightbourne was simply asked to confirm the accuracy of her second

supplementary witness statement, and was then cross-examined by Mr Swan, who originally appeared for the Appellants. The first questions put to Mrs Lightbourne in relation to this transaction referred to her change of position, and asked why it had taken her so long to change her mind. She could not answer that, and the position was not made clear subsequently. Mrs Lightbourne was asked about the September 2009 Transfer, without any reference to the date of the attendance at the bank, and said that the money had not gone into the account that it was supposed to go into. Specifically, she said that she had asked Mrs L-L which account the money should go into, and had been directed to an account number which, she said, was the account of her daughter and son-in-law (Mrs L-L and Lt Col Lamb), though she immediately referred to the account being that of her son-in-law alone. We know from the documents that the money in fact went into an account in Mrs L-L's sole name.

57. Mrs Lightbourne could not remember how long the Deceased had been overseas for medical treatment in 2009, but she did say that her daughter had not been with her father the entire time that he had been overseas in 2010. She did not say the same for 2009. Questioning returned to the September 2009 Transfer, and Mrs Lightbourne said that she had not needed to go to the bank on multiple occasions because it was "done on the spot". She denied having visited the bank with Mrs L-L and the Deceased in June or July of 2009, and she firmly denied having misremembered the date of 21 September 2009 as the date of the bank visit, when it was put to her that Mrs L-L was with the Deceased at the Lahey Clinic at the time. She denied that the Deceased had, months earlier, taken steps to transfer the funds in question to Mrs L-L. But she did accept at one point that the Deceased had been the driving force between the transfer of this large amount of money to Mrs L-L.

58. So the position in relation to Mrs Lightbourne's evidence at trial does not begin to support the basis upon which the Judge found there to have been a loan, quite apart from the fact that such was not, by that time, Mrs Lightbourne's pleaded case, something which the Judge had recognised at paragraph 79 of the judgment. It was simply not open to the Judge to make such a finding, and that finding must be set aside. That takes one to the undue influence claim, which of course the Judge had treated as the alternative position. And the problem in relation to the undue influence claim is to work out exactly what was the factual basis for establishing undue influence. It simply is not possible to proceed to consider the undue influence claim on the basis of the Judge's finding made as to the loan. That finding was not supported by the evidence, and neither would it represent undue influence on the part of Mrs L-L.

59. The reality is that it is not easy to determine what happened in relation to the September 2009 Transfer. What was necessary was that the Judge should have made findings as to what did happen, in the face of one version from Mrs L-L, and a very unclear position from Mrs Lightbourne which conflicted with her daughter's evidence, and was also in conflict with her original version of events. It also conflicted with the evidence which showed that Mrs L-L was

likely off the Island with her father on the date when Mrs Lightbourne said she had gone with her daughter to the bank. The matters described in paragraph 150 of the judgment as being background facts which supported the undue influence claim were general in nature, not all relevant to the issue, and in some respects in dispute between the parties. Mrs Lightbourne's second supplementary witness statement is light on detail. She said she had attended at the bank because she had wanted to know how much money was in the joint investment account, and she had to make a decision as to reinvestment or redemption. She did not recall the terms of the conversation which took place with the bank officer, and was really unable to say more than that the funds were redeemed and paid into Mrs L-L's account, as being what ultimately transpired.

60. And critically, there was no finding by the Judge in relation to what the true position was. This was particularly important in circumstances where the pleaded case had moved from the transfer of funds being described as a loan, to a case where it was pleaded that Mrs Lightbourne had essentially been tricked out of funds which belonged to her. The evidence had similarly changed, and the two versions were incompatible. And of course both were in conflict with Mrs L-L's evidence, when the Judge did not say in terms that she rejected that evidence, or give reasons for doing so. This is particularly troubling when there was evidence tending to support Mrs L-L's assertion that Mrs Lightbourne had been wrong in saying that she had gone to the bank on 21 September 2009 with Mrs L-L, when the latter's evidence was that she had been at the Lahey Clinic with her father on that date, and there was documentary evidence to support the case that the Deceased was at Lahey on that date.

61. In paragraph 133 of the judgment the Judge had referred to Mrs Lightbourne's changed case as being the result of her daughter's "trickery". That word is not used in the amended pleading, and I could not find it in the transcript, but it does represent the gravamen of Mrs Lightbourne's changed case. At paragraph 139, the Judge found that Mrs L-L must have known prior to going to the bank that her mother had investment monies to redeem, and intended or hoped for a large sum of money to be transferred to her for she and her husband to use for the property development they were engaged on. This led to the finding at paragraph 141 that Mrs Lightbourne had agreed to make the money available to Mrs L-L by way of a loan, a finding that, as I have said, cannot be sustained.

62. I am conscious of two points made by Ms Greening for the Appellants, first that the Judge had not made any reference to Lt Col Lamb's evidence, and secondly that the Judge had not addressed the Appellants' case once the burden of proof had shifted on undue influence. But all that I have described above is sufficient for me to say that the finding of undue influence cannot stand, and since this Court is not in a position to make its own findings on those matters, that finding on the part of the Judge must be set aside and the matter remitted to the trial court

for reconsideration. In those circumstances, I see no useful purpose to be served by considering the law in relation to undue influence.

63. There being no appeal against the Judge's finding in relation to the Cottage Claim, that part of the judgment stands.

Summary

64. I would therefore dismiss the appeals against the Judge's findings regarding the Corporate Claim, the First and Third Loans and the Second Loan (subject to correction of the matters referenced at paragraphs 48 and 50), but would allow the appeal in respect of the September 2009 Transfer, and remit that matter to the trial court for reconsideration.

Costs

65. Subject to any application made within 21 days, I would award the Second Respondent her costs of the appeals in relation to the Corporate Claim, the First and Third Loans and the Second Loan. In relation to the September 2009 Transfer, I would award the Appellants' their costs in relation to that issue.

KAWALEY, JA

66. I too agree that the appeals in relation to the transactions described in the Supreme Court Judgment as the Corporate Claim and Loans 1, 2 and 3 should be dismissed for the reasons set out in the Judgments of Bell JA above and Sir Christopher Clarke P, below. I further agree that the appeal concerning the decision made by the Learned Judge in relation to the transaction described in the Judgment as "Loan 4" should be allowed. Finally, I also concur with the orders which Bell JA proposes in relation to the costs of the appeal.

67. I set out below some additional observations of my own in relation to the final limb of the appeal (the Fourth Loan/the September 2009 Transfer) which this Court agrees must be allowed. The relevant decision had two elements to it:

(a) the Judge's primary finding that the monies found to be due were advanced and were recoverable as a loan; and

(b) the Judge's alternative findings that on the hypothesis that the monies were advanced as a gift, the relevant transfers were liable to be set aside on the grounds of undue influence.

68. I feel bound to note at the outset that I have considerable sympathy for the difficult circumstances in which the Learned Judge clearly conducted this case. The present trial spanned several hearings over more than one calendar year. It started at the end of the first week in April 2022, continued in late June 2022 and concluded on 9 March 2022, with Judgment being delivered on 31 July 2023. It is a matter of record that her judicial workload was at all material times prodigious, spanning the civil and criminal trial jurisdictions. It is judicial burdens such as these in mind that an English appellate judge reportedly gave the following advice to a trial judge: "The trial judge's main job is to decide, not to be right."

Challenging factual findings made by a trial judge on appeal: Governing Principles

69. Mr Taylor helpfully referred the Court to the Judicial Committee of the Privy Council's decision in *Kwok-v-Yao* [2022] UKPC for a recent statement of the relevant principles on challenging factual findings made by a trial judge. Dame Elizabeth Andrews (with whom the rest of the panel agreed) opined as follows:

> "*39. The circumstances in which an appellate court is entitled to interfere with findings of fact made by a trial judge based on the oral evidence of witnesses are severely circumscribed. The guiding principles are well established and were not disputed. They have been reiterated in numerous decisions of the Judicial Committee and the UK Supreme Court, including Henderson v Foxworth Investments Ltd [2014] UKSC 41; [2014] 1 WLR 2600, paras 58 – 68; Beacon Insurance Co Ltd v Maharaj Bookstore Ltd [2014] UKPC 21, [2014] 4 All ER 419, paras 11 – 17; and Pleshakov v Sky Stream Corpn [2021] UKPC 15, para 32.*
>
> *40. An appellate court should not interfere with a judge's findings of primary fact unless they are 'plainly wrong', which in this context connotes that either there was no evidence to support the finding, or the finding was based on a misunderstanding of the evidence, or the finding was one that no reasonable judge could have reached (or, as it is sometimes put, 'outside the bounds within which reasonable disagreement is possible').*
>
> *41. The appellate court will be rarely justified in overturning a finding of fact which turns on the credibility of the witnesses. It should not do so unless it is satisfied that any advantage enjoyed by the trial judge by having seen and heard the witnesses could not be sufficient to explain or justify his conclusions.*
>
> *42. The inhibition on interfering with the trial judge's findings of fact extends to his evaluation of the facts and any inferences to be drawn from them: see e.g. Beacon Insurance at para 17.*"

70. The application of these principles explain why the appeal against all other limbs of the impugned decision has been dismissed. The Second Respondent's counsel very properly, when pressed by the Court, conceded that the Judge's primary findings could not be sustained because the Plaintiff/Respondent had abandoned her initial case in relation to the Fourth Loan prior to the commencement of the trial. This was, on any view, a fundamental misunderstanding of the factual and legal issues she was required to decide in relation to the fifth and final part of the case.

71. This test applies only in part to the second limb of the appeal against the findings made in relation to undue influence, because these findings are challenged on the grounds of both errors of fact and law. Oddly, the Appellants' counsel did not directly attack these findings on the straightforward basis that (1) the Judge's primary findings addressed an issue no longer before the Court and (2) the only relevant findings were summarily set out in the form of alternative findings. However, there can be little doubt that where a judicial decision is arrived at without the relevant issues being adequately considered, the impugned decision will ordinarily be set aside and remitted to the trial court for reconsideration.

72. No authority ought to be required for this elementary proposition. However, it is helpfully illustrated in a general sense by *Sandhu-v-Secretary of State for Work and Pensions* [2010] EWCA Civ 962 (which was not referred to in the course of argument), where Maurice Kay LJ (as he then was) held:

> "*6. For this court to be able to re-make the decision, we would have to be in possession of clear factual findings by the First-Tier Tribunal. The very error of law which lies at the heart of this successful appeal, the inconsistency of the First-Tier Tribunal's findings, renders such a disposal inappropriate. Mr Rutledge seeks to preserve and elevate the first of the two inconsistent sentences, and says that it amounts to an unequivocal finding of an inability to put any weight or stand in any way on the right leg. However, that is to cherry-pick from the basket of inconsistency. It seems to me that with such flawed findings of fact, there is no alternative but to remit to the First-Tier Tribunal for a determination de novo.*
>
> *7. Mr Rutledge formulated his appeal to this court on a broader basis than the one which has led us to allow it, and with a mind still on that broader basis, he has invited us not only to re-make the decision, but also to take the opportunity to provide authoritative guidance on the meaning of 'unable to walk or virtually unable to do so', in the circumstances of a case such as this. Again, however, I consider that it would be wholly inappropriate to do so without satisfactory findings of fact.*" [Emphasis added]

The inadequacies of the alternative findings in relation to undue influence

73. In my judgment the loan claim and the undue influence claim required such different primary factual findings, that it was inevitable that if the Judge's primary findings were rejected, the alternative summary findings of undue influence could not be upheld. This was not the type of case where the primary and alternative findings related such similar claims that factual findings made on the primary case would apply without modification to the alternative claim. Busy trial judges (myself included) often feel obliged to set out alternative conclusions in summary form, hoping that their primary findings will be upheld, in cases where the alternative claims probably require fuller analysis. The astute trial judge will (or ought to) well appreciate that if their primary findings are not upheld, the matter will quite possibly be returned for them to reconsider more fully on the alternative basis.

74. Undue influence claims require very careful factual analysis through the lens of this equitable claim. The Judge stated (at paragraph 148):

> "*148. It is perhaps worthwhile for me to consider the alternative position, had I instead found that the Mother and Deceased had indeed communicated that these transfers totalling $1, 556,443.07 were made as a gift to the Daughter. If those were the established facts, which they are not, I would be bound to apply the presumption of undue influence, as settled by the Privy Council in Inche Noria-v- Shaik Allie Bin Omar [1929] AC 29…*"

75. Ten "*background facts*" were then set out in a single paragraph (paragraph 150) in support of the conclusory finding that "*the Plaintiff had discharged the burden of proof of undue influence*". The Judgment then proceeds:

> "*151. On the evidence before this Court, the Defendants would have failed to sufficiently discharge the evidential burden and I would have found that the transfers, if gifted, were not made of the Plaintiff's or the Deceased's free will but as a result of the undue influence of the Daughter.*"

76. Bell JA has conducted a laser-like forensic analysis above of why these findings cannot be sustained above. The President has set out an equally detailed analysis below which explains why the relevant claim must be considered *de novo*. These findings were, viewed more broadly, fundamentally flawed because (a) the "*background facts*" were largely contentious and (b) no explanation is set out as to why the Defendants' case in opposition to this claim was rejected.

77. There are some cases where the fact that the claimant has established a *prima facie* case of undue influence is not disputed and the defendant accepts that it bears the burden from the outset of displacing the presumption. This is not such a case. Equally, there are some categories of relationship where proof of the relationship, without more, is sufficient to give rise to the presumption: *Royal Bank of Scotland-v-Etrick* [2001] UKHL at paragraph 18. The relationship between adult parent and adult child is not one of them. Accordingly, the presumption operates in the following way as described by Lord Nicholls in the same case:

> "*16. …This use of the term 'presumption' is descriptive of a shift in the evidential onus on a question of fact. When a plaintiff succeeds by this route he does so because he has succeeded in establishing a case of undue influence. The court has drawn appropriate inferences of fact upon a balanced consideration of the whole of the evidence at the end of a trial in which the burden of proof rested upon the plaintiff. The use, in the course of the trial, of the forensic tool of a shift in the evidential burden of proof should not be permitted to obscure the overall position. These cases are the equitable counterpart of common law cases where the principle of res ipsa loquitur is invoked. There is a rebuttable evidential presumption of undue influence."* [Emphasis added]

78. The present factual matrix was far removed from the sort of case where it was obvious that Mrs Lightbourne and the Deceased were vulnerable to Mrs L-L because of a relationship of trust and confidence in the requite legal sense. The September 2009 Transfer clearly called for an explanation, but an explanation which could not be summarily rejected was advanced and not evaluated in the Judgment. The Deceased was admittedly "*gravely*" ill, but far from on his deathbed. He sadly passed away in 2011. Mrs L-L, over 12 years later, was still able to pursue highly contentious litigation without a guardian. The Learned Judge eloquently described the Plaintiff in the Judgment as "*now an elderly lady over 90 years of age, notwithstanding her well-groomed and fashionable appearance and her acute sense of awareness*" (paragraph 3).

79. In these circumstances, although the Learned Judge accurately summarised the law on undue influence and identified matters which might potentially have supported a finding that the September 2009 Transfer was vitiated by undue influence, the summary findings which were recorded as an alternative to her primary findings must be set aside.

CLARKE, P

80. I agree with both Judgments.

81. In relation to what was originally described as Loan 4, matters have gone seriously awry. In September 2009 $ 1,446,422.96 was transferred from the investment account of the Lightbournes to a savings account of theirs (Account Number 010-576015-511), and from that savings account to an account in the name of Ruby. The transfer to the savings account took place on 23 September 2009 [ROA 135/143] and the transfer to Ruby took place on 24 September 2009 [ROA 144]. On 15 October 2009 $ 110,020.11 was similarly transferred [ROA 137/148] to the savings account and on 18 October 2009 that sum was transferred to Ruby's account [ROA 152]

82. At around the same time an HSBC Bank account was opened numbered 010-576001-513. This account, for which we have not seen any statements, appears to have been in the name of Mr and Mrs Lightbourne and Ruby and Edward. Mrs Lightbourne described it in her first statement as "*the payback account of Edward and Ruby in relation to Loan 4*" i.e. this was to be the account from which Loan 4 (sic) would be repaid. Ruby's evidence was that this was to be a savings account for her to save money toward future balloon payments on existing mortgages because her father did not want her to be indebted to the Bank for several years [ROA 179].

83. It was Ruby's case that the September and October dispositions followed visits to the Bank by her parents and her on two occasions prior to September 2009, the first being in June or July. The purpose of the visits was to set up the transfer of the investment funds, once they matured, and to open an account into which the monies would be transferred by way of gift. Ruby denied that she ever took her mother to the Bank in September 2009 and said that all that her mother had to do in September 2009 was to sign the documents to effect the transfer: see her third supplemental witness statement at 38 (ii): ROA 272. Her account is contained in [27] of her first witness statement [ROA 179], and in [56] - [57] of her supplemental witness statement [ROA 228].

84. The original case for the Plaintiffs was that the $ 1,446,422.96 and $ 110,020.11 were loaned to Edward and Ruby "*by way of an unwritten loan agreement dated 24 September 2009*"- something which seems a contradiction in terms - with "*interest at the rate of 2.5% per annum ("Loan 4")*": see [32] of Dr Lightbourne's first witness statement (ROA 95).

85. However, in a second supplementary witness statement signed on August 13 2020 (ROA 243) - "the SSSW" - Mrs Lightbourne records that on Sunday 17 March 2019 she had informed her current attorneys - Walkers (Bermuda) Limited) - for the first time that "*the Fourth Transaction was not in fact a loan*". What she said was this:

> "*I had described it as such previously, because that was the terminology I was familiar with in relation to financial transactions with my children, but the reality is that this was not a "loan" in the real sense of the word. I was deeply embarrassed by the circumstances that led to the Fourth Transaction and, in particular, how I was taken advantage of by Ruby. Without waiving privilege I was informed by my attorneys that the trial could not proceed on the basis of my witness statements which were before the Court at the time; and that I would need to file supplemental evidence to reveal the true facts behind the Fourth Transaction. It was for this reason that the requested adjournment formed part of the Order.*"

86. It was on account of this change of tack that the proceedings, scheduled to commence on 18 March 2019 were, on that date, adjourned *sine die*.

87. In the SSSW Mrs Lightbourne set out in great detail her new account of what happened on a visit to the Bank on or around 21 September 2019, and the judge cited much of it in [82] of her judgment, which I will not repeat.

88. As a result of this development the Statement of Claim was re-amended so as to excise a claim under Loan 4. What had been referred to as a loan became referred to as the "September 2009 Transfer", and that transfer was said to have been procured by undue influence.

89. In her judgment the Learned Judge referred to the fact there were two versions of the Plaintiff's evidence (a) the original loan account [132]; and (b) the account contained in the SSSW ("*the trickery account*") [133] She recorded that "*on this narrative, the Plaintiff's case was that her daughter had taken advantage of her and that she, the Mother, had been unduly influenced*".

90. In the course of her judgment the judge found:

(i) that the Mother well understood , before departing from the bank that the transfers had been made to an account held by the Daughter (138);

(ii) that the Daughter must have discovered at some point prior to the arrival at the bank that her mother had invested monies to redeem, and that it was a significant sum that would assist her and her husband to develop the Cashew City property. So when she took the mother to the bank, she well intended or hoped for a large sum of money to be transferred out her for that purpose [139];

(iii) that at some point, hesitantly or not, the Mother knowingly agreed to make the transfers to an account held by the Daughter; but she did not accept that the Mother ever intended or intimated that the transferred sums would be gifted to the Daughter [140].

91. Then at [141] the Judge said this:

> "*141.On this occasion, the evidence reveals that the Mother agreed to make the money available to the Daughter by way of a loan but only for a portion of the sum transferred as part of these monies belonged to the Gwen Will Trust. This is consistent with the evidence that the Mother expected that the Daughter would seek her permission before making any withdrawals.*"

92. This was the primary basis upon which the Judge found in favour of the Plaintiffs. But this is the ground which had been expressly resiled from by Mrs Lightbourne (as the Judge pointed out at [79]; and which had been removed from the pleading. It was not, in my view, open to the Judge to make this finding. Mr Taylor did not seek to support the judgment on the basis that there was an agreement for a loan nor had he relied on there being a loan in his closing submissions to the Judge; he relied only on undue influence. Nor was he able to direct us to the evidence to which the judge appeared to be referring in [141].

93. In these circumstances the question arises as to whether the findings of the Learned Judge in relation to undue influence can stand. In my judgment they cannot for a number of reasons.

94. First, in order to address the question of undue influence it is necessary to determine exactly what occurred at the relevant time. The Judge has found that there was a loan. That finding was not open to her. But the question then arises as to what exactly the position was. The

obvious candidate is the trickery account. But that account is markedly different to the previous account of a loan. And what the Judge has actually found as the basis for her primary decision is inconsistent with the trickery account. If there is to be any consideration of the question of undue influence it is necessary for the judge to make findings as to exactly what occurred. She would need to indicate to what extent (if at all) she considers the trickery account to be accurate; and how she reconciles any finding on that issue with her finding at [141].

95. Second, the central question in undue influence cases is whether the donor (if there was one) placed trust and confidence in the donee, and in what respect; or whether the donee had acquired ascendancy over the donor. But before any finding of undue influence can be made it is necessary for the Court to have a full picture of what did or did not occur.

96. Third, even on the assumption that the onus of proof had passed to Mrs L-L, it was necessary to consider the reason that was advanced for the making of the payment to see whether that showed that there was no undue influence. The reason advanced by the Defendants was that the father had a keen interest in property development; that he was the driving force behind the decision to give the money; and that he had decided to give the money to the daughter in order that she and her husband might complete their building projects in St David's as well as reduce their mortgage. The evidence of Lt Col Lamb was particularly relevant in this regard: in particular in his supplemental witness statement. And it is not without relevance that at around the time that the $ 1.5m was transferred to Ruby her brother was given by the father a waterfront property in Harrington Sound (see ROA 277).

97. In my judgment we should, therefore, set aside the decision of the Judge in relation to this aspect of the claim and, if one is sought, order a new trial.

98. If such a trial takes place it seems to me that the Judge should approach the question of what did or did not happen, in effect, de novo. I say that because, in my judgment, there are a number of matters which the current judgment does not address.

99. First and foremost there is the question of where Ruby was in September 2009. In her judgment the Judge said this:

> "*143.The parties were in dispute as to the state of the Deceased's health in September 2009 and whether he had personally accompanied the Mother and the*

> *Daughter to the bank on one or two trips to effect the transfers. The Mother's evidence is that the Deceased was not present as he was overseas during this period receiving medical treatment. This is arguably consistent with the evidence agreed by both sides that at some point in 2009 and in the spring of 2010, the Daughter accompanied the Deceased overseas for his medical care. Whether or not he was overseas during the September 2009 bank transfers, I find that it is more likely than not, that the Deceased was indeed unwell during this period and not in attendance at the bank when the transfers were effected.*"

100. There was in fact clear evidence that the Deceased was in Lahey in September 2009: see the diagnostic reports of September 22 and 24 2009 at ROA 245.6. It was also common ground that Mrs L-L accompanied her father to the clinic in 2009. Mrs Lightbourne said that in 2010, when her husband went to Lahey for a longer period than in 2009 Ruby did not stay with him the entire time that he was there: Tab 30/410. She did not say that in relation to September 2009. And there was evidence from Mrs L-L that she was with her father in September 2009. Some of her evidence is imprecise as to the dates but at 38 (xi) of her third supplemental statement she said in terms:

> "*At the time of the transfer, it was my father who was relying on me for medical, emotional and physical support and I was with him at Lahey Clinic for weeks around the time of the transfer in September 2009.*"

101. The Judge did not refer to this evidence. If accepted it would mean that the trickery account was ill founded.

102. Second, the Judge referred at [85] to Mrs L-L's evidence that there were two meetings which she attended with her parents at the bank prior to September 2009. She does not expressly decide that no such meetings ever occurred (although that may be said to be implicit in her judgment). But, if Mrs L-L was not in Bermuda in September 2009, the position needs to be re-addressed. In addition, when cross-examined Mrs Lightbourne accepted that there had been two visits to the Bank with Ruby. She first said that her husband was there on both occasions and later that he was not there on the second [Tab 30/438ff].

103. Third, Mrs Lightbourne accepted in cross-examination (Tab 30/418) that her "*late husband was really the driving force behind the $ 1.5 million to Ruby*". This is not consistent with the trickery case,

104. Fourth, it will be necessary to reconsider with some care the trickery account. The volte face from the loan account to the trickery account is substantial. The two cannot stand together. And the trickery account does not explain with any clarity how the transfers from a joint investment account to a joint savings account to Mrs L-L's account came about.

105. Fifth, it is necessary to assess the position in the light of the communications to which the judge refers at [145] where she says this:

> "*145. I have also considered the Mother's 22 June 2012 email to the Daughter where the Mother referred to her life savings at HSBC. The Mother informed the daughter that this account held not only her "entire life savings" but also the investment of the Gwen-Will Lightbourne Trust. The Mother also wrote '...Now, if you follow closely all the other monies that were loaned to yourself and Eddie, you will recall that the procedure was to write up an agreement with signatures attached...' In closing, the Mother sought an explanation from the Daughter to be shared with the beneficiaries of the Gwen-Will Lightbourne Trust.*"
>
> *146. Mrs L-L's reply to this communication is significant. She wrote:*
>
> > '*…You refer to the Gwen Will Trust and moneys owed to the trust. I am unclear as to what you are talking about. An account set up at the bank with all of our signatures (including dad's) was set up for me to credit with the understanding that when Eddie and I had finished the building project in St David's I could make more consistent payments. Before I left with dad to go to Lahey I had started to build the account to a substantial amount but unfortunately, I have not been able to put anything more in. In fact I did have to use some monies last year and when you found out you brought this to my attention and scolded me for not getting permission from you…*"
>
> *147. Nowhere in this email does Mrs L-L claim that these funds were advanced as a gift. This is inconsistent with her evidence at trial that this transfer would be made by way of a gift in furtherance of her father's efforts to help her and Lt Col Lamb with their mortgage obligations and building projects in St David's. In my judgment, the Defendants both knew that these sums were never gifted to them and that any moneys taken were to be repaid.*"

106. The assessment of this correspondence is, of course, a matter for the Judge. But a question arises as to whether or not Mrs Lightbourne's email of June 22, 2012, fits with the trickery account and whether Mrs L-L's reply (although not referring to a gift) has the significance that was attributed to it given that she says that she is unclear what her mother was talking about when she referred to moneys owed to the Trust. Further, the reference to "*more consistent payments*" might be thought to be ambiguous. Mrs Lightbourne says that it refers to repayment of the loan made to her daughter; Mrs L-L says that it refers to repayment of outstanding mortgages. Since the phrase appears in an email from Mrs L-L, which can be regarded as denying that there was any loan, it could be thought that what she meant was the latter.

107. Sixth, it is material to note that the claim in respect of the $1.5 million was vigorously denied in the Swan letter of December 2013.

108. Lastly I would observe that the Judge gave judgment against both Mrs L-L and Lt Col Lamb in circumstances where there seems no basis for a judgment against him.