In The Supreme Court of Bermuda

CIVIL JURISDICTION

2017: No. 264

BETWEEN:

(1) WANDA ANN PEDRO — 1st Plaintiff
(2) JENNIFER PEDRO — 2nd Plaintiff

-and-

(1) ROSEMARIE GAIL PEDRO — 1st Defendant
(2) HSBC BANK BERMUDA LIMITED — 2nd Defendant

COMMERCIAL JURISDICTION

2018: No 156

BETWEEN:

HSBC BANK BERMUDA LIMITED (FORMERLY THE BANK OF BERMUDA) — Plaintiff

-and-

(1) ROSEMARIE GAIL PEDRO — 1st Defendant
(2) THE ESTATE OF QUINTON HORACE DOWLING JR. — 2nd Defendant

Before: **Hon. Assistant Justice Attride-Stirling**

Appearances: **Ms Wanda Pedro, Plaintiff In Person**
Mrs Auralee Cassidy, Kairos, for the 1st Defendant
Mr John Hindess, Marshall Diel & Myers, for HSBC Bank Bermuda Limited
Ms Jennifer Pedro, 2nd Plaintiff, did not attend Court

Dates of Hearing: **8 – 10 April 2019**
14 – 16 May 2019

Date of Judgment: **23 August 2019**

JUDGMENT

Introduction

1. Wanda Pedro and her sister Jennifer Pedro issued proceedings against their sister Rosemarie Pedro on 18 July 2017 ("the First Action"). That claim included various allegations and claims for breach of trust, payment of rent and damages.

2. They were originally represented by Apex Law Group Ltd but ceased to be represented by that firm. Wanda (and going forward, for the sake of brevity only and meaning no disrespect, I will refer to the three sisters by their first names), claimed that she applied for but was refused legal aid. This case would have been much assisted if the Plaintiffs had had the benefit of counsel.

3. Rosemarie filed a Defence (which is undated) through Cox Hallett Wilkinson Ltd. That firm was replaced by Kairos. It is noted that it became apparent that partners from CHW would be witnesses at the trial.

4. Almost a year later on 16 May 2018, HSBC issued proceedings against Rosemarie Pedro and the Estate of Quinton Horace Dowling Jr ("the Second Action"). The late Mr Dowling was husband of Mrs Mary Dowling, the mother of Wanda, Jennifer and Rosemarie and thus their step-father.

5. There was no evidence before the Court of an Executor of a Will or of an order appointing an Administrator of the Estate of Mr Dowling. Nor was there evidence of the Estate having been served with the court proceedings or of a court order appointing a representative of the Estate. As such the Estate did not participate in the proceedings.

6. At some point there was a falling out between the Plaintiffs Wanda and Jennifer. Jennifer was removed as a Plaintiff and then re-added. Subsequently, Wanda applied for Jennifer to be removed again as a plaintiff on the grounds, principally that Wanda was doing all the work and Jennifer was delaying progress. Jennifer objected to being removed as a plaintiff although she indicated that due to serious health problems (but provided the court with no medical evidence of this), she

likely would not be able to play a large role. She did prepare and file a witness statement but did not attend at the trial to be cross-examined, and so no weight was attached to her statement (absent any strong grounds to permit this and absent any argument by the Plaintiffs to allow this).

7. Wanda says that at an earlier stage in the First Action, Mr Justice Hellman made an order permitting her to appear in court by video conferencing. None of the parties to the litigation contested this. All her appearances in relation to the conduct of the litigation as a personal litigant were done this way using telephone or Skype video conferencing. Whilst a review of the file does not show a written order by Hellman J, on 12 July 8018 Mrs Justice Subair Williams made an order which included provision for Wanda to attend the trial and to give evidence via skype.

8. It should be said at the outset that this was a wholly unsatisfactory way to conduct a trial. Having the examination and cross-examination of witness conducted by an unrepresented litigant in person, who was appearing by video conferencing, raised many problems with the trial, in particular it made it difficult to control the Plaintiff whose conduct is commented on further below.

9. Counsel in the case requested a two day hearing for the trial of the action, which was set down for April 8 – 9. At the conclusion of that period the trial was part-heard and the parties requested a further day and the trial continued on 10 April. At the conclusion of this period the matter was adjourned till May 14 – 15. At the conclusion of this period a further day was needed and matter continued on 16 May. In the end this two-day trial was heard over a six-day period.

Joinder Application and Consolidation

10. There was an application to join the two proceedings formally. The chronology for this was as follows:

11. HSBC had been following Wanda's proceedings and actually attended and sat in on one of the earlier hearings in chambers. At the time Wanda objected to them being present but the Court permitted this.

12. On 31 May 2018, Hellman J ordered that the Defendant Rosemarie, who was represented, formally set the First Action down for trial, for a two day trial, within 14 days. So it was anticipated that the First Action would have been concluded a year ago.

13. On 6 September 2018, the Chief Justice ordered that Wanda had leave to file a further affidavit and exhibit certain further documents. She was also given leave to put into evidence the covert recording made of a conversation with David Cooper, providing that she called him as a witness. He ordered that that matter be set down for a two-day trial.

14. HSBC (having commenced their action on 16 May 2018) filed a summons in their action dated 22 October 2018, seeking to add Wanda and Jennifer as defendants to the HSBC proceedings ("the Joinder Summons"). I heard this application on 22 November 2018. Jennifer appeared in person, Wanda appeared via a telephone call.

15. Wanda objected to being joined as a defendant to the HSBC proceedings. She said that she wanted to join HSBC as a defendant to her proceedings, but at a hearing before the Chief Justice, he encouraged her to not do so, and to deal with one case at a time. So she declined to join HSBC at that time. She made clear that it was always her intention to sue HSBC.

16. Mr Hindess made the point that the matters were intertwined. The facts were all the same. Either Wanda and Jennifer were added to his case, or HSBC was added

as a defendant to theirs. The parties indicated that they would agree to a consolidation of the proceedings and that HSBC would formally apply to do this.

17. HSBC filed a summons in their proceedings dated 31 January 2019, seeking an order that the two matters be consolidated ("the Consolidation Summons") and that the HSBC matter be heard first.

18. I agreed, with the consent of all parties to order that the two actions be heard together, on the basis that the underlying facts were effectively the same or similar and the fact that the parties consented to this course of action, but I declined to order that the Second Action be heard first.

19. HSBC agreed that Wanda should serve a statement of claim against them to which they would file a defence. In doing so, HSBC effectively agreed to be a Defendant in the First Action, on condition that the two matters be heard together.

20. Because Wanda was concerned that HSBC's joinder or consolidation would delay her trial, HSBC agreed to voluntarily provide early discovery, in advance of her Statement of Claim against them. They felt that they had heard Wanda and seen numerous emails from her setting out already what her claim against HSBC was and understood the nature of the discovery obligations which flowed from such claims.

21. Due to the fact that the Plaintiffs were unrepresented, counsel for the two defendants in the spirit of being helpful, agreed to various variations to normal practice. The Defendants agreed to undertake the burden of preparing the trial bundles. Further, counsel for HSBC agreed not only to give early discovery to Wanda but, to accept a letter from her as taking the place of her statement of claim against HSBC to which HSBC would serve a Defence, so the matter could proceed swiftly.

22. Eventually the trial proceeded on the basis of Wanda's Amended Statement of Claim (undated) against Rosemarie and against HSBC.

23. HSBC filed a Defence dated 19 February 2019 to that statement of claim. HSBC made no counter-claim against Wanda and Jennifer. The consolidated matters were set down for trial.

Without Prejudice Communications

24. There are multiple references in correspondence on the record, disclosing the contents of without prejudice communications. The Plaintiff (Wanda) did not have legal counsel and may not have been aware initially that all parties are forbidden from ever communicating the contents of without prejudice ("WoP") communications to the court, save but in limited circumstances which do not exist in the present case. Wanda did make some submissions to the effect that special circumstances arose to permit the use of WoP correspondence, but I am satisfied that they do not.

25. At the commencement of the trial, I indicated that subject to any further submissions the parties wish to make on the point at this time, I intended to order that all references to WoP communications be stricken and that the WoP written communications not form part of the court record. To the extent that I have seen this, I would not take this material into account in any decision I come to. There being no objection to this course I proceeded accordingly.

The Recusal Application

26. The Plaintiff Wanda Pedro was distraught by the proceedings. She was suing a large and powerful bank, difficult in and of itself, but also her sister, which clearly caused her a great deal of anxiety. On top of all of this, she was an unrepresented litigant. Perhaps as a consequence of these factors she became difficult and at times obstreperous. She constantly insulted all the other parties, their counsel and opposing witnesses. She had absolutely no understanding of the proprieties of court. She accused all opposing counsel of improper conduct in some instance amounting to dishonesty and of professional improprieties. She even accused the

Court staff of improprieties, in particular she suggested that they were preventing one of her witnesses, who might be outside, from entering the Court room (one of her witnesses failed to appear). She suggested that the Court staff together with everyone else, including the Judge, were conspiring against her. In the premises she argued that she was not getting a fair trial.

27. Counsel for Rosemarie suggested at an early stage in the proceedings that because Wanda was accusing the Judge of corruption and/or bias, that perhaps I should stop the hearing, given that Wanda said she had no confidence in the court rendering a fair decision. I considered this but decided that Wanda was an unrepresented person, in the circumstances I have described above, that I would give her more leeway than would be otherwise done. I considered then, that I was able to and in the interest of justice, could continue hearing the case.

28. At one point during the trial and following one of the many rude interruptions and personally offensive accusations, this time against Mr Hindess, that Mr Hindess invited the court to find Wanda in contempt of Court. Whilst the conduct exhibited by Wanda was bordering on contempt, and I was forced to seriously consider finding her in contempt, in the end I was conscious of the fact that she was unrepresented and taking part in proceedings by Skype, where perhaps it was difficult for her to understand the formalities required to be observed in Court. I invited her (again) to please refrain from attacking counsel personally.

29. Mid-way through the trial I was informed by a Court clerk that Wanda informed the Court Registry that she wished now to make an application for me to recuse myself from hearing the trial, on the basis that I was biased against her. At the next hearing I put it to her that this had been communicated to me by the Court clerk and I explained to her that if she wanted to make a formal application for me to recuse myself that she was entitled to do so. I explained that I would have to hear her application and then formally rule on this. If she was unsatisfied with my decision she could appeal that decision.
30. Wanda stated in response that she did not wish to make an application for recusal and wished the trial to continue.

31. I am conscious that, in an action where a party to the proceedings has accused the Tribunal of bias, there is a possibility of several perceptions:

    a. That the Tribunal will rule against the accuser, as a result of offence taken;

    b. That the Tribunal will rule in favour of the accuser, to avoid the view that the accusation of bias was real.

32. Thus the accusation alone might in some circumstances be sufficient for a Judge to consider whether he should recuse himself. In the present case I believe I should not, as the accusations were made by an unrepresented plaintiff caught up in a difficult position. Further, any Judge hearing this matter would likely face the same accusation. In the premises, I believed that I could and should put aside completely the issue of the accusations and address the legal issues and evidence before the court.

33. In the premises, I continued to hear the trial.

Background Facts

34. The Plaintiffs' parents Mrs Mary Dowling and Mr Quinton Horace Dowling Jr purchased a house on 31 January 1997 at 76 Glebe Road, Devonshire (the "Property"). This was secured by the use of a gift previously given by another relative to Mrs Dowling for the down-payment; and then the use of Mr Dowling's salary to pay monthly mortgage payments. This involved:

    a. A first mortgage provided by Bermuda Home Ltd (later to become part of the Bank of Bermuda Ltd/HSBC) in the amount of $101,000.
    b. A second mortgage provided by the Vendor, Ms Louise Beckett in the amount of $26,000.

35. On the same date (31 January 1997) as the purchase by Mr and Mrs Dowling of the above property and mortgages and as part and parcel of this transaction, a Declaration of Trust ("DoT") was made and signed by Rosemarie Pedro. Much turns on the meaning and effect of this document which is set out in full:

> "THIS DECLARATION OF TRUST is made this 31st day January 1997
> By me ROSEMARIE GAIL PEDRO of Pembroke Parish in the Islands of Bermuda
>
> W H E R E A S:
>
> 1. I have consented to go on the title to the property situate at #76 The Glebe Road together with my mother Mary Rita Dowling and her husband Quinton Horace Dowling, Jr., for the sole purpose of enabling them to get a mortgage to assist in the acquisition of the house.
>
> 2. My mother Mary Rita Dowling is desirous that on her death and that of the said Quinton Horace Dowling, Jr., if I am the sole survivor of them that I should hold the property for my two sisters and myself in equal shares.
>
> NOW THEREFORE I DO DECLARE that in the event I survive both Mary Rita Dowling and Quinton Horace Dowling, Jr., and by virtue thereof I am the sole legal owner of the said house that I shall hold the said house as trustee for myself and my surviving sisters as tenants-in-common in equal shares to the intent that should anyone or other of my two sisters predecease me their share will be held in trust for their children in equal shares.
> SIGNED SEALED and DELIVERED by The above-names ROSEMARIE GAIL PEDRO in the presence of…"

36. Whilst it is the case that only Rosemarie signed the Declaration of Trust, this was done at the same time as the signing of the Conveyance of the property and the first mortgage. The evidence is that all parties were present in the room when this was signed and that this document was created at the behest of both Mr and Mrs Dowling. I accepted all of this evidence as being true.

37. Mr Harry Kessaram, who drafted the documents in question, and whose firm represented both Mr and Mrs Dowling as well as the Bank/lender, stated in his oral testimony, which was not contested by the bank, that it was a practice of the bank (a practice of which he did not approve) to get "young blood" on the mortgage, to ensure that someone younger was on "on the hook" to repay the bank. This bank practice is in part responsible for the current mess, in terms of the poor understanding as to who owns the beneficial title in the property. It became clear that but for the bank insisting that Mr and Mrs Dowling put one of the children on the title deeds, requiring the use of the DoT, we would not be in this situation.

38. The uncontested evidence at trial was that the parents did not want to add Rosemarie to the title deeds at all, but did this at the insistence of the Bank. Rosemarie played no role in the acquisition of the property nor in the payment of the mortgages. Rosemarie claims however that this changed later.

39. Rosemarie's Defence in relation to the trust claim is contained at paragraph 2 of her Defence, which provides as follows:

> *"The Defendant will aver that any document as between the defendant and her late mother Mary Rita Dowling does not amount to a legally binding trust and merely reflects a gratuitous arrangement as between the Defendant and the said Mary Rita Dowling to which the other owner Quinton Dowling was not a party and which arrangement was subsequently varied as between the parties."*

40. Rosemarie during the course of the trial denied that there was any legally valid trust whatsoever and that she owed no trust fiduciary duties to her siblings. For the reasons set out below I have rejected Rosemarie's arguments on the trust issues.

41. In terms of chronology the following events then followed:

    a. 15 April 2004 - Mrs Mary Dowling died.

    b. 4 November 2009 - HSBC makes a second loan, this time to Rosemarie and Mr Dowling in the amount of $205,000 secured by a new mortgage.

    c. October 2011 - Mr Dowling suffers a stroke leaving him seriously incapacitated. He goes into the hospital and was never able to be released.

    d. 2012 - Rosemarie manages Mr Dowling's affairs including taking control of his bank accounts and pension entitlements. She says that she used all of this towards his up-keep and the payment of the existing mortgage.

    e. 18 February 2013 - Mr Dowling signs a Power of Attorney ("PoA") in favour of Rosemarie. This is drafted by an attorney at CHW. It was suggested that Mr Dowling lacked capacity to sign this document.

    f. 1 April 2013 - Facility Letter: the third loan/refinancing takes place. This effectively 're-aged' the 2009 loan which had fallen in arrears, and created a total amount due and new repayment obligations. Rosemarie signed this pursuant to the Power of Attorney.

    g. 12 September 2013 - Mr Dowling died.

42. Wanda had proceeded on the mistaken basis that after her mother died, that Mr Dowling was the sole legal owner and that Rosemarie was only a guarantor (see her affidavit of 14 May 2018 at page 33 of Tab 9 of the original Trial Bundle prepared by Kairos). However, this mistaken understanding of the law does not diminish the strength of her breach of trust claim.

Wanda's Claims

43. Wanda makes numerous claims. She says that:

a. Mr Dowling did not sign the 2009 loan application nor the 2009 mortgage and so it is of no legal effect;

b. If Mr Dowling did sign, he did not have mental capacity to sign the 2009 or later legal documents;

c. Rosemarie procured the signing of the 2009 application and mortgage, the power of attorney and the third financing facility letter by fraud;

d. HSBC conspired in this fraud;

e. Alternative, that Rosemarie procured the signing of these documents, in particular the 2009 mortgage through undue influence over her step-father Mr Dowling.

f. The 2009 second mortgage is therefore void *ab initio* and/or void as against everyone excepting Rosemarie.

g. If she is right then Wanda and Jennifer have a claim to an unencumbered two-thirds of the property.

h. Wanda also claims for rent or what may be described as mesne profits for the property.

44. Further claims by Wanda:

    i. Breach of trust by Rosemarie;

    j. Breach of fiduciary duty by Rosemarie;

    k. Breach of fiduciary duty by HSBC; and

    l. That Mr Dowling lacked mental capacity after his 2011 stroke to sign the PoA or any of the other documents relied upon after this point.

45. Rosemarie claims that the Trust document is of no legal effect whatsoever and that she owned the property as a joint tenant with her mother and step-father, then with her step-father alone and now she owns the Property legally and beneficially, subject to the mortgage, but not subject to any trust or fiduciary obligations to her sisters.

    a. Alternatively, Rosemarie says that if there is a trust it only became effective after her step-father died on 12 September 2016. As such the Second Mortgage was lawfully done.

    b. She denies fraud and undue influence.

    c. She maintains that her father had full mental capacity at all material times.

46. HSBC agreed with Rosemarie. They claim to be entitled to 100% of the sale proceeds of the property.

47. On the last day of trial, because time had run out, the parties agreed and the Court made an order permitting the parties to put in limited legal submissions relating to a narrow point of trust law raised in authorities raised by the court. In HSBC's

third submissions of 22 May 2019 (ie after the trial concluded), they made a new legal submission of an alternate case not claimed in their Defence of 19 February 2019.

48. HSBC had previously argued that:

    a. If Rosemarie was a trustee she had a right to mortgage the property as a matter of statutory and common law;

    b. If there was a trust, the beneficiaries' claims can only be against the Trustee.

49. HSBC's new alternative argument was that:

    a. If the trust is valid and the mortgage invalid, then they had an equitable mortgage over at least Mr Dowling's 50% share and Rosemarie's one-third share of the property. In this event, they also have a claim to the $55,000 that was outstanding in 2009 on the First Mortgage. So HSBC is entitled to an order for the sale of the property, to recover that $55,000 plus two-thirds of the sale proceeds.

50. Given the late time of the arrival of this new argument, and the fact that this claim had not been included in HSBC's pleading, it was not addressed by the Plaintiffs during the course of the trial. In the premises it is not clear that this new claim is properly before the court. The usual rule is that a party is required to advance all of its claims relating to a dispute in its pleading.

51. This case involved complex points of the law of trusts, mortgages, legal capacity and undue influence. Given this, the court was hampered by the fact that the Plaintiffs were unrepresented. In a case like this, an impecunious litigant should have had access to legal aid and it is a matter of some shame that legal aid was not available to her. As matters proceeded, the court did not have the benefit of contesting legal arguments. Whilst the Court raised some legal issues

independently and requested that counsel (and the parties) address these points, this was not the most favourable manner of dealing with such complex legal arguments.

The Validity of the Declaration of Trust

52. Because the validity of the DoT impacts on many other aspects of the case, I will deal with this issue first.

53. Wanda's case is that the Dot was a legally valid trust, which took effect upon signature. Rosemarie and the Bank took the position that DoT was ineffectual, alternatively that it took effect only after Mr and Mrs Dowling both died, which was well after the signing of the 2009 mortgage.

54. A way to test the validity of the competing claims is to ask whether, after Mrs Dowling died and at a time when Mr Dowling and Rosemarie were the two legal joint owners, could Rosemarie sever the joint tenancy, sell her fifty per cent share and pocket the sale proceeds personally? Both Rosemarie and HSBC argued that she could do so. That must be wrong. Looking at the face of the DoT, Rosemarie held her share at this time on trust for her sisters (and herself).

55. If it is correct that the trust took effect before Mr Dowling died in the scenario above, then it must be the case that it took effect immediately upon signature (see further below). It is as Mr Harry Kessaram put it in his evidence, an immediate trust of a future interest. But even if this is wrong and it did not take effect in 1997 when signed, it at latest took effect when Mrs Dowling died in 2004, which is still well before the second mortgage.

The Relevant Law Relating to Trusts

56. Lewin on Trusts (19th Ed) summarizes the law as follows:

"3-004 The first method of creating a trust is for the settlor to declare himself to be a trustee of property belonging to him. If the property is in his own name, he simply makes a declaration. If the intended trust property is held by nominees or other trustees for the settlor, he directs the nominees or trustees to hold it on the intended trusts."

...

"2. The Requisite Intention to Create A Trust"

General Principle

"4-002 Wherever a person having a power of disposition over property manifests any intention that it be held upon trust for another, the court, where any necessary formal requirements (such as that of writing) have been complied with, will execute that intention, however informal the language in which it happens to be expressed, so long as the three particulars mentioned in the next paragraph can be gathered from the language used."

The "three certainties"

4-003 Lord Langdale M.R. declared three essentials for the creation of a trust:

> *"As a general rule it has been laid down, that when property is given absolutely to any person, and the same person is by the giver who has power to command, recommend, or entreated or wished, to disposed of that property, in favour of another, the recommendation, entreaty or wish shall be held to create a trust:*
> *First, if the words are so used, that upon the whole, they ought to be construed as imperative,*
>
> *Secondly, if the subject of the recommendation or which be certain; and,*

Thirdly, if the object or persons intended to have the benefit of the recommendations or wish be also certain.

The "three certainties" which must be found in a declaration of trust are therefore certainty of words, certainty of subject-matter and certainty of objects."

57. In the present circumstances the three certainties are met. There was clearly an intention to create a trust and the court should give it effect.

58. There was a question as to when the trust had effect. This point is answered in Snell's Equity 33rd Ed, which provides as follows:

"3. Ways of Constitution a Trust

22-043 There are two main ways that a settlor may constitute an express trust. He may either convey the property to a trustee to hold for the beneficiaries, he may declare himself a trustee of it. If the conveyance upon trust to the intended trustee has been completed, then the beneficiary can enforce the trust. The outcome is the same where the settlor simply declares himself a trustee of the property in the beneficiary's favour: once the declaration has been made of the property already vested in the settlor, the beneficiaries can immediately enforce the trust."

59. This leads to the conclusion that the trust was valid from the time it was made in 1997 and gave rise to an immediate fiduciary relationship between Rosemarie as trustee and her sisters as beneficiaries.

60. Rosemarie and HSBC argued that Rosemarie as trustee had a statutory and common law power to enter into the mortgage. However, this appears to be contrary to the legal position which is set out in Halsbury's Laws of England:

Volume 32, page 197 – Parties to Mortgages - (ii) Trustees

"375. <u>Trustee's power to mortgage.</u> A trustee may not mortgage the trust property save in pursuance of a power to do so expressly or impliedly conferred upon him by the instrument creating the trust, or in pursuance of a power conferred by statute, or in pursuance of a court order. A power to mortgage will be implied from a power of sale if the power of sale is given for the purpose of raising a particular charge, but not if the testator's object is to effect an absolute conversion of his estate."

61. In their second written submissions of 10 May 2019, HSBC refers to an extract from Halsbury's Laws:

<u>378. Protection of Mortgagee.</u>

"A mortgagee advancing money in a mortgage purporting to be made under any trust or power vested in trustees is not concerned to see that the money is wanted, or that no more than is wanted is raised, or otherwise as to its application or to see that the trustees have consulted the beneficiaries and given effect to the wishes of the majority of them."

62. However HSBC failed to include the next sentence in that paragraph which is applicable and which reads:

"… A mortgagee of unregistered land may be similarly unconcerned as to beneficiaries' rights, and such a mortgage is not invalidated by any exclusion, limitation or restriction of the trustees' powers unless the mortgage has actual notice thereof…"

63. The above is relevant because the uncontested evidence at trial was that HSBC and its legal advisors were aware of the unusual declaration of trust and its terms.

64. The Trusts (Special Provisions) Act 1989 provides as follows:

<u>Incorporation by Reference</u>

"17 Any instrument creating any trust may incorporate by reference any of the provisions set out in the Schedule, in which case the following expressions appearing in the provisions have, unless a contrary intention appears, the meanings respectively assigned to them: …"

65. The Schedule referred to in the 1989 Act includes at section 4 of the Schedule the following power:

> *"Additional Powers*
> *4. The Trustees shall have the following powers in addition to those conferred by law:*
> *… (2) Power to borrow on the security of the Trust Fund and for such purpose to make any outlay out of the Trust Fund or the income thereof and to enter into such contacts mortgages charge or undertakings relating thereto as the Trustees may in their absolute discretion think fit;"*

66. It is clear that absent an express power to mortgage in the trust deed there is no common law power to mortgage and an implied power can exist only if the trust deed includes an express reference, such as to the Trusts (Special Provisions) Act 1989 Schedule.

67. The Declaration of Trusts contains no express power to enter into mortgages. Nor does it contain, as is customary in trust documents which seek to give trustees broad powers, a reference to the general powers in the Schedule to the Trusts (Special Provisions) Act 1989. In the premises, Rosemarie had no power to enter into the 2009 Mortgage. Doing so was a breach of trust.

68. I find, for the reasons stated herein, that HSBC was aware of the Declaration of Trust and therefore aware of (or they ought to be aware of) the fact that it contained no power to mortgage. (See below the evidence relating to this.)

69. HSBC argued one last trust law point. They say that: *"… there was no obligation for the bank to look behind that power for the purpose of the loan or to*

determine that the trustee consulted the beneficiaries or even how the trustee uses the funds." They relied on s. 8 of the Trustee Act 1975 which provides as follows:

> *"No purchaser or mortgagee, paying or advancing money on a sale or mortgage purporting to be made under any trust or power vested in the trustees, shall be concerned to see that such money is wanted, or that no more than is wanted is raised, or otherwise as to the application thereof."*

70. The above argument is inapplicable to the facts of this case. In the present case the argument is that the Trustee had no power to enter into the mortgage at all. Further, that HSBC knew this. As such, s. 8 does not come into play.

71. In the premises it was *ultra vires* for Rosemarie to enter into the 2009 Mortgage. The same would apply to the 2013 Facility.

72. The 2009 Mortgage, which was signed by Rosemarie whilst subject to the DoT, is unenforceable against Wanda and Jennifer as beneficiaries.

73. I make no finding in relation to the 1997 Mortgage, as there is no claim under this lapsed document. The background to the 1997 transaction, limited as the parties were to that transaction, cannot give rise to an implied power for the trustee to enter into the 2009 Mortgage.

74. It was not suggested and the evidence would not support a conclusion that Mr and Mrs Dowling, nor Rosemarie, contemplated in 1997 that Rosemarie would ever enter into a further mortgage of the property, as transpired in 2009. It would be contrary to the evidence heard that Mr or Mrs Dowling, would have empowered Rosemarie in this way. The evidence leads to the opposite conclusion. The DoT was put in place in 1997 specifically to put restrictions on what Rosemarie could do. It was not contemplated and the DoT did not, empower Rosemarie to act beyond in the most neutral way, and to hold on trust and to convey the property to her sisters in due course.

The admissibility of secretly recorded telephone conversations between Wanda and Rosemarie and an openly recorded video of Mr Dowling

75. In their first written submissions dated 8 April and presented for the first time at the trial itself, HSBC raised an objection, that the video recording of October 2012 and the two telephone recordings of November 2017, whereby Wanda secretly recorded her conversations with Rosemarie, and the transcripts thereof were inadmissible because:

    a. They violated the hearsay rule;

    b. No formal notice was served pursuant to the Rules of the Supreme Court 1985 O. 38 r. 21 or r. 22;

    c. They might be admissible pursuant to s. 27D of the Evidence Act 1905 but are not because Wanda was not acting "under a duty" when she prepared the transcripts; and

    d. they violated the Telecommunications Act 1986.

The Telecommunications Act 1986

76. Dealing with this point first, Wanda made two audio recordings of telephone conversations with her sister Rosemarie in November 2017. These recording were made without informing Rosemarie of the recording. Wanda gave notice at the outset of the proceedings of her intention to rely on these recordings and transcript extracts which she prepared of the recordings.

77. On the second day of what was supposed to be a two-day trial, counsel for HSBC raised a new point. They referred the court to the decision of the Court of Appeal in *Lines Overseas Management Ltd v. LOM Securities v. Brian Lines* (2006) Bda LR 5. Mr Hindess forcibly argued that the Bermuda Court of Appeal had ruled

that telephone conversations secretly recorded by a party to the conversation violated s. 61 of the Telecommunications Act 1981 and that this evidence was therefore inadmissible.

78. A review of the history of the *Lines Overseas Management* case shows that at first instance, Bell J (as he then was) ruled that s.61 of the Telecommunications Act was not implicated when a party to the telephone conversation recorded it himself. That section provides:

> *"61. (1) Privacy of communication shall be inviolable except as is provided in Section 62.*
>
> *(2) No person not being authorized by the sender or the addressee shall intercept any signal in the course of telecommunication and willfully divulge or publish the existence, purport, effect or meaning of such intercepted signal to 20 any person.*
>
> *(5) No person, not being authorized by all the parties to any private signal shall tap any wire, cable or optical fibre or by using any other device or arrangement, shall secretly overhear, intercept, or record such signal in the course of telecommunication by using any electronic or other device. Provided that it shall be lawful for any police officer or officer of a Carrier acting with the consent of the person renting a circuit to trap or trace such circuit, or by using any other device secretly to overhear, intercept or record a communication passing over such circuit in order to detect an offence under Section 53."*

79. Bell J ruled at paragraph 47 of his ruling that:

> *"The use of the words "intercept", "tap", and "secretly overhear" all make it quite clear, in my view, that the mischief which this section is aimed at is the interception, tapping or recording of a telephone conversation by some person who is not a party to that conversation."*

80. The Court of Appeal disagreed with Bell J. It ruled that

> *"39. … Although he does not expressly say so, by implication the Judge must have held that 'the sender' within the meaning of the subsection is, where the employee is engaged on the employer's business, the employer and not the employee. I cannot see any warrant for this construction. In my judgment the words 'sender' and 'addressee' should be given their normal and ordinary meaning as referring to the two people taking part in the telephone conversation. I would simply mention in parentheses that in the case of a telephone conference, there may be more than one sender and addressee. There is no warrant for incorporating notions of master and servant, employer and employee, into this section. It seems to me that it was the Judge's perception that the subsection was only concerned with telephone tapping by the police, some other public authority or a hacker, that led him to give a strained and constricted interpretation to the words. If it were not so, it would give rise to an anomalous situation. Thus while conducting his own private business Brian Lines would be the sender, but when conducting LOM's business he would not be. LOM, not a person but a corporate legal entity, would be the sender.*
>
> *40. I see no difficulty in holding that what was happening when LOM recorded the conversations amount to an interception. Plainly something can amount to an interception even if it is authorised by the sender or the addressee, since that is what the subsection refers to."*

81. Whilst it is not clear why the Court of Appeal concluded that Bell J, by implication introduced "notions of master and servant" into his analysis, the Court of Appeal did conclude that there was an "interception" and so the Act was implicated.

82. In a subsequent case, *Scrymgeour v Hollis and Johnson* (2006) Bda LR 80, the plaintiff took the same s. 61 point. Riihiluoma AJ concluded that;

> *"4. … Stuart-Smith JA held that section 61 of the Telecommunications Act 1986 prohibits the unauthorised tape recording of telephone conversations…*
>
> *5. … I am bound to follow the Court of Appeal's decision in LOM and accordingly, I rule that transcripts of Alexander's unauthorised tape recordings of conversations with Mr Hollis and John are inadmissible."*

83. On appeal to the Court of Appeal ([2007] Bda LR 46), the decision in *Scrymgeour* was affirmed and the Court of Appeal's judgment makes no reference to the s. 61 point being canvassed.

84. Wanda objected to this line of argument coming late in the day, but the decision on s. 61 is binding on this court. Having heard Mr Hindess' submissions on this point and considered the Court of Appeal's decision, I ruled on day 2 of the trial that the audio recordings of the telephone conversations and the transcripts thereof were inadmissible.

85. Following my ruling Ms Cassidy, counsel for Rosemarie, accused Wanda of a blatant violation of the Telecommunications Act, which she submitted amounted to an act of dishonesty, which called into question all of her evidence or her reliability as a witness.

86. I do not believe that Wanda's breach of the Telecommunications Act can be categorized in this way. She was in technical breach of the Act, but it took the Court of Appeal to clarify this point.

87. The position is entirely different in relation to the video evidence. *Lines Overseas Management* is inapplicable to the video recording of Mr Dowling as there is no Telecommunications Act offence. The video was recorded in person. Further it was not suggested that Mr Dowling did not consent to this.

Recordings: RSC O. 38 point

88. HSBC says that no Notice under the Rules of the Supreme Court 1981, O. 38 r. 21 was given so the video recording also should be excluded. Further, that the strict requirements as to the contents of a Notice under O. 38 r. 22 have not been complied with. The requirement referred to are to provide:

    a. The time, place and circumstances of the statements;

    b. The person by whom and to whom the statement was made;

    c. The substance of the statement.

89. In relation to this point it is noted that:

    a. Wanda does not have the benefit of legal representation, but she did give notice of her intention to adduce this evidence from an early point in the proceedings.

    b. Informal notice was given by Wanda of her intention to rely on all the recordings and transcripts she made. The essential requirements of the RSC have been complied with through the various emails, affidavits and witness statements provided by Wanda.

    c. The Defendants had ample opportunity to raise these technical arguments against this form of notice before the trial. If HSBC wanted to challenge this they could have formally done so prior to the trial (see RSC O. 38 r. 27).

    d. Wanda has therefore proceeded to trial, only to be ambushed at the trial with these technical arguments as to the failure to use the correct form.

90. RSC O. 38 r. 29 provides as follows:

"(1) Without prejudice to section 27B(2)(a) and 27D(2)(a) of the Act and rule 28, the Court may, if it thinks it just to do so, allow a statement falling within section 27B(1), 27D(1) or 27E(1) of the Act to be given in evidence at the trial or hearing of a cause or matter notwithstanding—

a. That the statement is one in relation to which rule 21(1) applies and that the party desiring to give the statement in evidence has failed to comply with that rule…"

91. For the reasons described above, I believe that I should exercise my discretion under RSC O. 38 r. 29 to permit the evidence, notwithstanding the failure of the unrepresented plaintiff to file the correct form of Notice. On this basis, I permitted into evidence the video recording of Mr Dowling as well as the transcript of this.

Evidence Act Point

92. HSBC further argued that the transcripts could only be potentially admissible under the Evidence Act 1905 s. 27D. This is the section that deals with documents which are a "part of, a record compiled by a person acting under a duty from information supplied by a person…" who had personal knowledge. This includes chains of "intermediaries each acting under a duty."

93. S. 27D defines "acting under a duty" as to include persons "acting in the course of any trade, business, profession or other occupation…". This provision tends to be used where an employee in a business is giving what could amount to multiple-hearsay, because he is relying on business records prepared by others. I found that s. 27D was not relevant to the present case, which does not involve business records and declined to disallow the video evidence on this additional ground.

94. If I was wrong on this, I would still have exercised my discretion to allow the video of Mr Dowling under RSC O. 38 r. 29.

95. Whilst it is accepted that the recording of Mr Dowling is not clear, the essence of what is said is discernible and I accept that the parts that Wanda relies are accurate. For example, Mr Dowling did say that he did not sign the 2009 loan documentation. However, that is not the end of the matter. The video evidence does not prove the point for which Wanda argues (see further below) and so its admission was not very material to the outcome of the trial or my decision.

The Evidence

96. The process of discovery of documents in this case left much to be desired. The parties, appeared to not take seriously the obligations to provide discovery. This led to all three parties producing key evidence very late. The Defendants both produced discovery documents in the middle of the trial.

97. In relation to HSBC's very late production of documents, the Plaintiff suggested that HSBC failed to produce documents early because they were hiding a fraud. HSBC's approach appears to have been that they were faced with a belligerent plaintiff who made a nuisance of herself in her broad demand of documents. In any event HSBC was slow to produce discovery, producing large swathes of documents at trial.

98. Each party complained about the other's late production of evidence. Wanda had the greatest cause of complaint in terms of the volume of late documents and the extent of lateness. The delays were a serious problem. In the interest of justice and in trying to get to the correct decision, I exercised my discretion to permit the introduction of late-produced evidence.

Witnesses

99. The following witnesses were called to testify. Some of these had nothing or little of value to add.

100. The following Witnesses were called to testify for Wanda:

    a. Louise Becket (subpoena). The Vendor. She contributed no useful testimony.
    b. David Cooper (subpoena) released
       David Cooper re-called by Defendants
    c. Zakina Darrell (subpoena). For BAS, Mr Dowling's former employers. She knew nothing and contributed nothing to the proceedings.
    d. Tyrone Simons
    e. Joyce Lee
    f. Harry Kessaram (subpoena)
    g. Wanda Pedro
    h. Joan K Aspinal
    i. Michelle Saunders

101. The following Witnesses were called to testify for HSBC:

    a. Doreen Joell
    b. Kathy Hollis

102. Rosemarie gave evidence but did not call any witnesses.

Rosemarie Pedro

103. Rosemarie's approach to the trial was unusual. She did not attend any of the trial other than to give evidence. This was her right. She produced evidence late and mid-trial. She called no witnesses to testify on her behalf. She claimed during oral testimony that there was a witness who could completely vindicate a key part of her case, yet despite this action being pending for almost two years, she says

that she only reached out to that witness days before her testimony (ie after the trial commenced). Her evidence at times was not credible.

104. Rosemarie agrees that she signed the DoT and at the time she understood that she would be holding on trust for her sisters. But she says everything changed, in her mind, a year later when she moved into the apartment and she was asked to start contributing to the mortgage directly. She says at that point only, she became a substantive owner.

105. She says later in her evidence, however, that she had actually forgot about the existence of the Declaration of Trust until it was recently brought to her attention by Wanda. In the premises, it appears that her actions in mortgaging the property and perhaps using some of the proceeds for herself, were consistent with her not remembering about the existence of the trust, rather than her believing at the time that her legal position as trustee had changed.

106. In Rosemarie's witness statement she stated categorically that her mother (Mrs Dowling) never worked. This statement is disproved by Wanda's evidence and that of Mrs Dowling's sister (Joyce Lee) to the effect that Mrs Dowling had worked, albeit earlier and that her husband (Mr Dowling) was able to claim a widower's pension from the government, based on his wife's previous employment.

107. A significant aspect of the case was the allegation that Rosemarie used the 2009 sale proceeds mostly for herself and not the development of the Property. Wanda claims, for example, that Rosemarie used the money to buy a $6,000 Pomeranian dog, several flat screen TVs and to finance several overseas shopping sprees with her children.

108. Whilst not condescending to specifics, Rosemarie claimed the money was all used for renovations to the property. In fact she says the loan was insufficient for the work and she paid for parts of the work out of her own pocket.

109. Rosemarie however produced scant evidence to support her expenditure of $205,000. She claimed in oral testimony for the first time, although this important point was not addressed in her Defence, nor in her Witness Statement, that that most of the work was done by a contractor, namely a Mr Fisher. But she did not call Mr Fisher to give evidence nor did she produce a single invoice of his to show how she spent the money.

110. Rosemarie explained that she had detailed invoices for all the expenses, but that these were all in a back-room at the property which was destroyed in a storm. As such all her invoices were lost. This claim would have been more believable if she had produced bank statements to show all these expenses (she produced some albeit insufficient to address the issue fully). Further, she might have asked the contractors to produce invoices to assist her. She could have called them to give evidence, in particular Mr Fisher, to whom it is claimed most of the money was paid. She testified that she asked Mr Fisher to provide invoices. However, when asked further about this in court, she conceded that she had only approached him some days prior to her testimony, for the first time.

111. So, despite this issue being a pleaded part of the case, and despite the Plaintiff asking for discovery of all documents supporting her expenditure, Rosemarie made no effort to secure the testimony and documentary evidence of the main contractor on the job (or others), who might have been able to address the issue of costs spent on the renovations.

112. Wanda cross-examined Rosemarie carefully in relation to all the items of expenditure and Rosemarie seemed to remember surprisingly quickly how much everything cost. For example, Rosemarie said in response to cross examination that she spent:

> *"... about 5,000 on the roof; on plumbing through a Mr Crane $4,000 on materials and 6,500 on labour; around $6,000 on electrical work through Jason's with material here of $1 – 2,000; on doors 1,200 and 800; on windows (6 at $250 each) $1,250"*

113. Rosemarie says that she purchased as much herself to save money and shipped somethings in. Having impressed the court with her recollection of all the work done and money spent, it was noted that the amounts she recalled totalled only $26,750. In any case this falls far short of the $205,000 loan proceeds.

114. She claimed she spent $26,000 on a car for Mr Dowling, however Wanda produced evidence that Mr Dowling purchased this car himself before the 2009 loan proceeds were received.

115. On the evidence before me I am unable to conclude that Rosemarie used all or even most of the loan proceeds for the renovations. Further I conclude that Rosemarie used some of the loan proceeds for her personal use. Given the state of the evidence, the court is not able to determine with precision what was spent and how it was spent.

116. Wanda alleges that, amongst other things, Rosemarie fraudulently signed the Transport Control Department form to transfer ownership of Mr Dowling's car and pocketed the money. Wanda claims Rosemarie did this before the Power of Attorney (which she claims was bad in any event).

117. Further Wanda alleges that Rosemarie fraudulently instructed the pensions department to change the payee of Mr Dowling's pension, to an account she controlled (and Wanda produced documentary evidence to support both these allegations). Rosemarie did both of these things without a power of attorney.

118. Someone, likely Rosemarie, who was the person dealing with Mr Dowling's affairs, appears to have forged the signature of Mr Dowling on the car transfer form, as the signature on the form bears no resemblance whatsover to his own.

119. Rosemarie admits that she transferred the payments of Mr Dowling's pension. But she says she did all of this to use the funds to make provision for his care as

he was in the hospital. Further the moneys were used to pay the mortgage payments and associated expenses.

120. The evidence here against Rosemarie is quite strong, particularly on the car sale document. I am nevertheless prepared to give her the benefit of the doubt on these two points, given her strong argument that she used these funds for her step-father and the mortgage. But this does not assist Rosemarie on the broader issue, namely that she had no authority to enter into the second mortgage or that she exercised undue influence to cause her step-father to do so.

General Evidence Issues

121. Wanda's evidence is that when Rosemarie first went to live at the property that she paid rent to her mother. This evidence is supported by the evidence of Mrs Dowling's sister Ms Joyce P. Lee who is very clear (and credible) that Mrs Dowling charged her daughter Rosemarie rent; and that Rosemarie often upset Mrs Dowling by the late payment of her rent.

122. The two sisters (Dowling and Lee) spoke almost daily and Mrs Lee is very clear as to the position of Mrs Dowling, which entirely supports Wanda's case on this point. Further Mrs Lee gives, again, clear evidence as to her sister's intention as to the ownership of the property, namely that the three daughters would inherit this in equal parts and that Rosemarie was only trustee of the property for her sisters, as opposed to an absolute owner. In cross-examination by Ms Cassidy for Rosemarie, Mrs Lee was clear that from her discussions with Mr Dowling himself, that he always intended all three girls to inherit the property equally.

123. Wanda also called Mrs Joan K. Aspinall-Haggstrom to testify in support of her case. Mrs Aspinall-Haggstrom had known Wanda's mother Mrs Dowling for many years and was a very close friend of Mr and Mrs Dowling. She testifies credibly that Mr Dowling who had no children of his own loved and treated the three "girls" as his own. Further that Mr and Mrs Dowling loved all three children equally. Mrs Dowling often spoke of the three girls inheriting the

property equally. Further that Mr and Mrs Dowling would be "horrified" if only one child got the property.

124. Rosemarie says that she never paid rent. She says that the money she paid was always as an owner paying her share of the mortgage. Rosemarie is adamant that she owned the property absolutely and that this was her parents' intention when she moved in to the apartment.

125. Having heard the evidence of these four witnesses, I prefer the evidence of Wanda, Mrs Lee and Mrs Aspinall-Haggstrom. Rosemarie went to stay at the apartment as a tenant paying rent. It was never intended by Mr and Mrs Dowling, when Rosemarie moved to the apartment, that the trust arrangement should be varied or that Rosemarie should become an absolute owner of the property on the death of Mr and Mrs Dowling. Rosemarie's evidence that it was her parent's intention that she become an absolute owner of the property is contrary to the manner in which her parents operated. Furthermore, Rosemarie's evidence on this point is simply not credible.

126. A part of Wanda's submissions was that she believed that Rosemarie was only a guarantor and never a legal owner of the property. Wanda is acting in this matter without the benefit of legal advice. Her submission in this regard is incorrect as a matter of law. Rosemarie did become a legal owner of the property in 1997. A joint tenancy is a form of legal ownership, although it does not necessarily denote beneficial ownership. When her mother died, Rosemarie now held the property in a joint tenancy with Mr Dowling. But she was not a 50/50 beneficial owner of the property. She held her interest on trust for her sister's (and herself) in three equal shares.

Tyrone R. Simons

127. Mr Simons was called by Wanda and testified that he was the plumber who did all the work in question and that this was not significant work and limited to $500. Whilst his evidence was credible as to the work he did, it did not preclude the possibility that other plumbers did other work (as Rosemarie maintained, although she did not call those other plumbers or put in evidence of what they charged).

Oral Testimony of the Telephone Conversations

128. Whilst I have ruled that the audio files of the secretly made telephone recordings and the transcripts of those calls were inadmissible, Wanda was still able to testify as to the conversation and repeat in her evidence what was said in conversations between her and others. I can have regard to this oral testimony subject to the rule against double hearsay. In particular Wanda says several things, in particular that Rosemarie said to her:

> *"... that she got the loan from the Bank to improve her living conditions..."*

> *"... that no court on this planet, would give credence to anything he (our step-father) stated because his brain had suffered damage after his stroke that affected his ability to speak coherently and sensibly all of the time..."*

129. Further, Wanda's daughter Michelle Saunders gave credible oral testimony that she overheard the conversation and she corroborates the conversation and words spoken.

130. It is important to note that in relation to the key allegations as to the conversation, Rosemarie does not deny that the conversation took place or that words alleged by Wanda were spoken. Rosemarie does challenge the intent and meaning of the exchange. So I find as a fact, that the words alleged by Wanda were spoken by Rosemarie. Amongst other things, these raise a real issue as to the mental capacity of Mr Dowling, but only after his stroke in 2011. This therefore impacts

the Power of Attorney and the Dowling memorandum, but not the 2009 second mortgage.

David Cooper

131. Mr Cooper gave evidence of various issues. Whist he was forthright, his recollection of some of the issues were shown to be incorrect. For example, after his oral testimony was over, he appeared to ask to be recalled to correct the record (on issues relating to the Memorandum and the PoA, in particular the timing of the preparation of these). Whilst his testimony was changed to attempt to clarify a point, it was clear to the court that this change was due to failure of memory and not due to any intention to mislead the court. In any event, the change in his testimony did not alter the outcome of the case.

132. Having said this, Mr Cooper was clearly partisan. He drafted Rosemarie's original defence, despite the fact this his firm should not have, given the allegations made by Wanda against her sister from inception, and that it was likely that in relation to any dispute as between them that he would clearly, or at least likely be called as a witnessed, as transpired.

133. Mr Cooper's firm (or one of its predecessor firms) drafted all the legal documents in question, including the DoT. They also acted for HSBC in relation to both the 1997 and 2009 mortgages. Despite the dispute between the siblings and his and his firm's involvement, he originally represented Rosemarie in this dispute even though he had earlier identified a possible conflict in his firm doing so (according to Wanda's evidence). He appears to have thought that he could get the parties to compromise the dispute seeing this as a "mathematical problem".

134. CHW did not consider the possibility that Rosemarie was exercising undue influence over Mr Dowling. Nor did they address the issue of Mr Dowling's mental capacity, for example, by asking for some certification as to this by a doctor, even after Mr Dowling's massive stroke (which came later but before the PoA). There is no record on the file which Mr Cooper brought to court, of any

discussion about Mr Dowling's mental capacity at any stage. Nor did Mr Cooper ever speak to Mr Dowling alone, away from his step-daughter.

135. I am satisfied that Mr Cooper acted honestly, however he did not inquire as to Mr Dowling's capacity nor as to whether Rosemarie had gained ascendency over him and whether Mr Dowling was acting fully independently. In the unusual circumstances of this case, it would have been prudent for CHW to have investigated both of these issues. It may be that CHW simply was not aware at the time, of all the facts that have been brought out during the course of this trial.

Evidence: The Fraud Claim Against HSBC

136. Wanda's pleaded case is that HSBC knew at the relevant times of the existence of the Declaration of Trust. HSBC do not deny this allegation in their Defence, nor did they call any evidence to rebut this.

137. Further, this point is supported by the fact that the DoT was drafted by the Bank's own' attorney Harry Kessaram who acted for the Bank and Mr and Mrs Dowling at the time of the 1997 First Mortgage. HSBC's own witness testified at trial that the present scenario was normal for them, ie that the Bank's lawyers drafting the mortgage were also acting for the buyers in the related conveyance.

138. Wanda then proceeds to use this fact to support her general allegation of fraud against the Bank. However, Wanda's fraud claim against the bank is simply not supported by the evidence.

139. In HSBC's Defence they include a pleading to say fraud has not been particularized and that the fraud claims should be struck out. However, HSBC did not follow this up with a formal application under the Rules of the Supreme Court strike out the fraud claim. If they had, it likely would have been successful. Instead, and perhaps as a matter of strategy, HSBC permitted the fraud claim to go to trial and used the empty allegations of fraud to attack the entirety of the Wanda's claim against the Bank.

140. A standard definition of fraud is obtaining of a material advantage by unfair or wrongful means. It could be proved by showing that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false (see Osbourne's Concise Law Dictionary).

141. Fraud must be pleaded to a high degree of particularity. This has not been done in the present case. The pleaded case of fraud, even giving the unrepresented Plaintiff a benefit of the doubt, does not come close to providing the necessary particulars. Nor on the evidence called by Wanda, does the evidence support such a pleading, even if the pleading was made out. Further there were no inferences to support such an allegation pleaded, or called as evidence.

142. The same applies to the breach of fiduciary duty claim against HSBC. It is not clear how it is said that the fiduciary duty is said to arise. This was not sufficiently pleaded, but even if pleaded, no evidence was called to demonstrate the existence of a fiduciary duty by HSBC to the Plaintiffs. Needless to say there was no evidence of fraud or of a breach of any fiduciary duty.

Evidence: The 2009 Mortgage

143. Wanda's case is that Mr Dowling did not sign the 2009 Mortgage and she recorded him saying this at the hospital in October 2012 in a video which was played to the court. Mr Dowling told Wanda that he did not go to the bank nor sign the 2009 Mortgage.

144. There was a live issue as to the admissibility of this video and of Mr Dowling's mental capacity, both are addressed separately.

145. Wanda suggested the 2009 Mortgage was secured by the fraud of Rosemarie; alternatively by the undue influence of Rosemarie.

146. Wanda alleged that the signature on the loan application and the mortgage deed did not appear to be that of Mr Dowling. Earlier in the proceedings she had stated that she intended to call a hand-writing expert to make good this argument but no such expert was called. Despite there being no expert evidence adduced as to the various contentious signatures, I was invited by the parties to examine the signatures and make a decision. I reviewed the signature of Mr Dowling on other uncontested documents and compared these to the contested signature on the loan application. On a careful review, in my opinion, they appear to me to be the same.

147. Even assuming that the fraud claim against Rosemarie was pleaded with sufficient particularity, the evidence does not support Wanda's allegation against Rosemarie (and HSBC) that the 2009 loan application was secured by the fraudulent or forgery of the Mr Dowling's signature. This part of Wanda's claim fails.

148. As to the video evidence of Mr Dowling in October 2012, I believe that at this point Mr Dowling, who had suffered a massive stroke in October 2011, did have his mental capacity affected by the stroke. To what extent is unclear. This is supported by the limited medical evidence procured from the Hospital. In any event, whether or not he had capacity, at that point it appears that Mr Dowling may have been easily persuaded to go along with whatever was been said to him by his step-daughters. It appears that he may have told both Wanda and Rosemarie what they wanted to hear. Mr Dowling claims to not have signed the 2009 Mortgage but his signature is on that document and I find that he did sign the mortgage documents. Mr Dowling may have been confused, in 2012, when he told Wanda that he did not sign this.

149. I proceed on the basis that in 2009 Mr Dowling did have mental capacity (I deal with capacity separately) to sign the 2009 Mortgage, and did sign this as a matter of fact. This however still leaves open the issue of undue influence.

150. For the reasons stated below, I found that Rosemarie exercised undue influence over Mr Dowling in 2009 at the time of the signing of the 2009 Mortgage and the February 2013 Power of Attorney.

151. Given that I have found that Rosemarie secured the 2009 Mortgage signing by Mr Dowling by undue influence, the question then is, who had notice of or was put on inquiry of this undue influence? At a minimum, based on the evidence heard, Cox Hallett Wilkinson should have had notice of this, or were put on inquiry as to this. The Loan was to fix Rosemarie's apartment. Only she benefited from this, on the evidence heard.

152. HSBC's new equitable mortgage claim against the Estate is not properly before the court because this was not pleaded and was purportedly introduced in post-trial legal submissions. The usual rule is that a party is required to advance all of its claims relating to a dispute in its pleading. In the authorities where equitable mortgage claims succeeded, these were required to be part of the expressly pleaded claim. See for example *First National Bank v. Achampong* (2003) EWCA Civ 487, where the bank had to amend its particulars of claim in order to raise the plea.

153. Whilst the new equitable mortgage claim against the Estate is not properly before the court and has not been fully argued, I address the issue generally without deciding it. Cox Hallett Wilkinson at the time were attorneys for Mr Dowling, Rosemarie and HSBC. The Bank was aware (or ought to have been aware) of the terms of the DoT and that nevertheless Rosemarie was entering into a mortgage which she had no authority to do so. The loan application to HSBC was to fix her apartment and only she, not Mr Dowling, was benefiting from the loan. The fact that the property was jointly owned does not change the factual background. The Property was split into two apartments, one occupied by Mr Dowling and one occupied by Rosemarie. The 2009 loan application to HSBC was for renovations to Rosemarie's apartment.

154. Given this, if I had to decide this issue now, on the evidence heard, I would have found that HSBC was put on inquiry of the undue influence and should have made further inquiries as to this. HSBC should have satisfied themselves that Mr Dowling received independent advice as to the impact on him of signing the 2009 mortgage which was clearly only for Rosemarie's advantage. (See *Santander v. Fletcher* (2018) EWHC 2778 (Ch); *First National Bank v. Achampong* (2003) EWCA Civ 487; *Edwards v. Lloyds TSB Bank* (2004) EWHC 1745 (Ch). These cases were not referred to by counsel in their submissions, but they arise as a result of HSBC's post-trial written submissions. Whilst CHW represented all parties, there is no evidence that they gave such advice to Mr Dowling or that HSBC were aware if such advice had been given.

155. So where does this leave the 2009 Mortgage?

a. I have ruled that Rosemarie's signature of this was ultra vires, so that the 2009 Mortgage fails and is unenforceable on that basis. The normal principle however is that the lender could still pursue, if it wished, the other valid signatory on equitable mortgage principles. However, those principles might be inapplicable if Mr Dowling's signature of the mortgage failed for other reasons (ie the undue influence arguments).

b. Secondly, I have found that Mr Dowling was under undue influence when he signed the 2009 Mortgage. That document would then arguably be bad and unenforceable against him or his Estate on that additional basis.

i. HSBC might argue that they are entitled to claim against the Estate on the basis that they say that they were not aware of the undue influence. However, all that need be shown is that they have been put on inquiry.

ii. I have stated that they likely were put on inquiry, but I do not need to decide this issue because it is not properly before the court. I do

note that it is by no means clear that HSBC would be able to enforce the Second Mortgage against the Estate on the basis of the factual findings I have made.

c. HSBC's equitable mortgage claim could not be brought directly against Wanda and Jennifer (and they have not purported to do so as there is no counter-claim against them pleaded). Such a claim would be brought against the Estate and then enforced against assets of the Estate.

i. Could HSBC make an equitable mortgage against Mr Dowling? The answer must be no, because he is dead. They might claim against his Estate, and in the Second Action they named the Estate of Mr Dowling as a Defendant but they did not serve an Administrator of the Estate.

ii. No Executor or Administrator of the Estate is presently known to exist and HSBC has not applied to court for the appointment of a representative of the Estate such that any judgment in this consolidated action might bind the Estate.

iii. After the trial concluded, HSBC (and the other parties, with leave of court) submitted in writing legal submissions which were supposed to be restricted to certain trust law issues. However in these new submissions, HSBC raised for the first time, a reference to an equitable mortgage claim against the Estate of Mr Dowling. But that was too little too late. Such a claim should have been pleaded and pursued formally against the Estate, such that evidence relating to this could be properly explored and addressed fully. A claim of this nature is not something that could be properly raised in post-trial legal submissions in the current, as presently pleaded and formulated action.

iv. Instead, for whatever reasons, HSBC elected to ignore the action against the Estate and pursue only Rosemarie. During the action, Rosemarie claimed to own 100% of the property (having taken this on the survivorship of the joint tenancy and not under the Estate) legally and beneficially. HSBC agreed with Rosemarie's position.

v. It may be that no claim was formally pursued against the Estate because the Estate has no assets, we do not know.

vi. The evidence heard showed that the loan proceeds all went to Rosemarie. That is who HSBC pursued.

d. The failure of Rosemarie's signature of the mortgage alone, might not prevent HSBC from making a claim against Rosemarie for monies had and received, but that is a personal claim against her.

156. I turn then to HSBC'S alternate claim against Rosemarie only in her personal capacity.

a. In relation to the claim for the $55,000 outstanding in 2009, given that the 2009 Mortgage fails, all of the payments made would have been first against the $55K outstanding, which would have been extinguished within 29 months (assuming payments of $1,705 per month (Rosemarie Statement para 24), as per the second mortgage). There is therefore no evidence that any balance remains outstanding on the first mortgage. In fact Rosemarie's evidence is that from 2009 and April 2018, a total of $103,526.98 has been paid. This figure was not contested by the Bank.

b. In relation to the 2009 loan proceeds, the evidence established that Rosemarie received the loan proceeds and HSBC unquestionably has a claim against her personally for the repayment of this.

c. Rosemarie holds the property on trust for her two siblings and herself. Assuming an immediate sale, Wanda and Jennifer would be entitled to a claim to one-third each of the sale proceeds. HSBC would be entitled to claim Rosemarie's one-third.

d. Rosemarie does not resist HSBC's claim against her so I would make an order against Rosemarie personally for the full amount of HSBC's claim, however this claim is not enforceable against the two-thirds of the Property beneficially owned by Wanda and Jennifer.

Evidence: The DoT

157. Wanda maintained that the Declaration of Trust was signed by David Cooper, as a witness to the document. On looking at the DoT witness signature this certainly did bear a resemblance to Mr Cooper's signature, as shown in other documents produced in court.

158. Mr Cooper gave evidence that he did not witness the signatures on the DoT. Further, that at the time of the signature of this document in 1997, he did not work in same firm as Harry Kessaram (Cox & Wilkinson), instead he worked at Hallett Whitney & Patton. Those two firms merged some years later, so Mr Cooper explained it would have been odd for him to witness a document in which he had not been involved.

159. I found Mr Cooper's evidence on this point to be believable. I find as a matter of fact that Mr Cooper did not witness this document. However, despite Wanda's apparent belief to the contrary, it is immaterial whether or not Mr Cooper witnessed this. The legal effect of the DoT remains as strong regardless of who witnesses the execution.

160. Mr Harry Kessaram's evidence was that the DoT was simple and clear. He explained that this was an immediate trust of a future interest. He says that everyone understood it at the time. On cross-examination he replied, exasperated,

that “an idiot could understand it”. Whilst this was strong language, the terms of the Trust are simple and understandable.

161. Rosemarie testified that Mr Harry Kessaram did explain the DoT to her and she understood his explanation, that she was to be only a trustee. On cross-examination by Wanda, Rosemarie said that she thought the DoT should have been changed. This appears to be an implied admission that the DoT did what Mr Kessaram said it did.

162. Rosemarie’s evidence is that in her mind everything changed automatically when she moved in to the house a year later and started to make payments. When asked in cross-examination if she ever discussed this change with her mother, she replied that she had not. This is material as it makes clear that Rosemarie never thought to try this argument on, whilst her mother was alive. The evidence before the court is that her mother would never have accepted this.

The Memorandum of Mr Dowling

163. Late in the day, the Defendants put into evidence an unsigned Memorandum dated 22 April 2013 purportedly setting out Mr Dowling’s wishes. In further (very late) production of documents, various additional versions of this memorandum surfaced, with various different dates or undated. These were allegedly prepared by an attorney at Cox Hallett Wilkinson who was not called to give evidence.

164. Whilst Mr Cooper gave some evidence in relation to the memorandum, this was of limited value because he did not prepare it. Mr Cooper testified that he believed that another lawyer in his firm, a Ms McIntosh, was principally responsible for the preparation of the memorandum based on email instructions from Rosemarie. There was some debate as to the precise timing of these documents. The memorandum suggested that Mr Dowling wanted to leave his entire estate to Rosemarie.

165. At the time the Memorandum was made or finalized, based on its (or their) dates, Mr Dowling was already permanently hospitalized after his massive stroke. I have found as a matter of fact that his mental capacity at that point may have been impaired (see separate analysis re capacity). A sufficient question mark arises such as to his capacity to shift the burden of proof to those alleging he had capacity.

166. Rosemarie disputes the dates of the memos. The Defendants could have but did not call the lawyer who prepared these documents. There was no sufficient evidence of Mr Dowling being interviewed by the lawyer who prepared the memorandum or that she considered or inquired into his capacity or inquired into possible undue influence. What we do have is Mr Cooper's testimony that Rosemarie sent email instructions to Ms McInstosh relating to this. Even assuming, as Mr Cooper sought to clarify when he was recalled to testify, that his own earlier notes were used for parts of the memorandum, this still is insufficient given the contents of this document. No explanation was given as to why Ms McIntosh, as the drafter of the memorandum was not called to testify.

167. On review, the memos seem to fly in the face of the evidence as to Mr Dowling's intention that all three of the children should inherit the property. This is evidenced by the DoT, but also the hand-written notes produced at the trial by Mr David Cooper. Further, I accept Wanda's evidence, supported by Mrs Dowling's sister Joyce Lee and her friend Mrs Aspinall-Haggstrom, that Mr Dowling loved all his step-children equally and always wanted the three of them to inherit equally.

168. At the time of the Memorandum (2013) there was a live issue as to Mr Dowling's mental capacity. At that point, in time, for the reasons stated herein, the burden of proof would have shifted and now be on Rosemarie to prove that Mr Dowling had capacity to sign this document or to give instructions to write a will in which Rosemarie was the sole beneficiary. Rosemarie has not satisfied this burden.

169. For the reasons above, I found that the 2013 Memorandum (and related drafts) is inadmissible. However, if I had admitted them as evidence, I would have given them very little weight, given that the maker of the memos was not called to give evidence.

170. In any event, I would have ruled that the 22 April 2013 memorandum or whichever of the numerous version of this, even if it had been signed by Mr Dowling (there was a signature line for him), would have been procured by undue influence, for the same reason which I have ruled that the 2009 mortgage was procured by the undue influence of Rosemarie (see separate analysis on undue influence).

The Capacity of Mr Dowling

171. Wanda argued that Mr Dowling had limited intellectual abilities and that he relied heavily and was led by his wife Mary, who did all the intellectual heavy lifting for the pair.

172. Wanda argued that Mr Dowling did not have mental capacity to sign the 2009 loan documents and further that as a matter of fact, he did not do so. Her evidence, including a video recording of Mr Dowling, is that he never signed the 2009 loan documents.

173. Separately, Wanda argues that following his severe stroke in 2011, that this further and seriously affected his mental capacity, such that he had no capacity when he signed the power of attorney in 2013 or when the third re-financing documents were executed.

The Law on Mental Capacity

174. Mr Hindess, Counsel for HSBC provided substantive written submissions on the law relating to mental capacity. He argued that the test for capacity to enter into a

contract was the same as for a power of attorney and the plaintiff had the burden of proof to prove an absence of capacity.

175. Mr Hindess, relying on the decision of *Fehily v. Atkinson* (2016) EWHC 30609 (ch), stated that:

> *"Capacity is determined by reference to the specific transaction in question. This will be different depending on whether the issue in question is testamentary capacity (the capacity to make a will), capacity to contract, capacity to enter a marriage etc."*

176. Mr Hindess relied on the same case for the proposition that "he who alleges [the invalidity] must prove" as support for his proposition that the Plaintiff had the burden of proof. No objection was taken to these two points which are clearly correct as to the starting point of the analysis.

177. Mr Hindess however went on to state that this case also supported his submission that test/burden for capacity to enter a power of attorney is the same as "capacity to contract". *Fehily* however stands for the opposite contention.

178. Mr Hindess sets out the law on capacity by reference to Halsbury's Laws, which he quoted as follows:

> *"Generally speaking, the law presumes capacity, and no evidence is required to prove the testator's sanity, if it is not impeached. A will, rational on the face of it and shown to have been signed and attested in the manner prescribed by law, is presumed, in the absence of any evidence to the contrary, to have been made by a person of competent understanding. However, it is the duty of the executors or any other person setting up a will to show that it is the act of a competent testator, and therefore, where any dispute or doubt exists as to the capacity of the testator, his testamentary capacity must be established and proved affirmatively. The issue of capacity is one of fact. The burden of proof of sanity is*

considerably increased when it appears that the testator had been subject to previous unsoundness of mind. The justice or injustice of the disposition may throw some light upon the question of the testator's capacity. The testator's suicide shortly after making the will raises no presumption of insanity if there is no other evidence of insanity. The court will not reject a will merely because it 'sounds to folly' without evidence of insanity. Parole or documentary evidence will be admitted to show that the will expresses the testator's deliberate intention; all statements of his, whether oral or written, preparatory to making his will, and his conduct generally in relation to it, are of importance to show whether in fact he was aware of the character of the act which he was performing. A rational act rationally done affords strong evidence of his capacity to make a will."

179. In terms of the capacity to contract, Mr Hindess again relies on Halsbury's Law (Vol 75, 614), which he sets out as follows:

"The test of contractual capacity is whether or not the person was capable of understanding the nature of the contract he was entering into. This depends upon whether there was understanding of the particular transaction; the degree of capacity required will therefore differ according to the nature of the transaction. Furthermore, contracts made during a lucid interval by a person who is mentally incapable of contracting at other times are valid, even if he is liable to be detained at the time. Hence, mental incapacity in relation to contract may be permanent or temporary, general or in relation only to some transactions, or in relation to some transactions some of the time...."

180. On the question of mental capacity, a leading decision is considered to be that Nourse J in *Beaney, deceased* (1978) WLR 770, where the court:

"Held, granting the declaration, (1) that the degree or extent of understanding required in respect of the execution of any instrument was relative to the particular transaction which it was to effect; that for a will

the degree of understanding required was always high but that for. a contract made for consideration or a gift inter vivos, whether by deed or otherwise, the degree required varied according to the circumstances from a low degree where the subject matter and value of the gift were trivial to as high a degree as was required for a will, where the effect of the gift was to dispose of the donor's only asset of value, thus pre-empting its devolution as part of the donor's estate under his will or on intestacy; and that, accordingly, since the claims of the plaintiffs and the extent of the property to be disposed of were not explained to the deceased, the transfer was void even if she did understand that she was making an absolute gift of the house to the defendant."

181. In relation to capacity to enter into a power of attorney, Mr Hindess referred to the decision of *Fehily*, which at paragraph 89 itself refers to the aforesaid decision in *re Beaney*. And whilst Mr Hindess quoted large extracts of *Fehily*, he did not address, in his written submissions paragraph 118 of the judgment where the court ruled:

"118 A voluntary disposition, such a will or deed of gift, is void, if the person entering into it lacks the requisite mental capacity to understand the transaction. So too is a power of attorney: Gibbons's case 61 CLE 423.

119 However, a contract entered into for consideration by a person without the mental capacity to understand the transaction is not void. It is valid and binding unless the other contracting party was aware of her incapacity (or, possibly, ought to have been aware), in which case the contract is voidable, and the incapacitated person has the right to rescind the contact: …."

"121 An IVA is not a contract, but it is closely analogous to a contract and gives rise to rights that have the characteristics of contractual rights."

"126 In my view, the essentially contractual nature of an IVA means that the same approach to mental capacity must be applied as to a contract. An IVA is not void on the grounds of the debtor's mental capacity."

182. The key point here is at para 118 of *Fehily*. A power of attorney has the same test applicable to wills, not the lower test applicable to contracts. It is void if the person lacks capacity.

183. As to the correct approach to the burden of proof on the issue of mental capacity, reference is made to *Smith (Deceased), Re,* 2014 WL 663456 (2014), where (in addition to confirming the test in *Beaney*), the court ruled (at page 24 of the Westlaw edition of the case):

"Approach to Burden of Proof
In the light of the conclusion I have reached in relation to the first issue, I apply the approach to the burden of proof identified in Gorjat v Gorjat. With the exception of Sutton v Sutton where (at §18) there is not reference to the possibility of the evidential burden shifting to the party asserting capacity, the authorities all seem to support the proposition that whilst the legal burden is on the party asserting incapacity, if that party adduces evidence to raise sufficient doubt from which incapacity can be inferred, then the evidential burden shifts to the opposing party: see also Scammell v Farmer at §24 and Bray v Pearce at §74."

184. In the present case it is clear that Wanda has the first burden of proof, in relation to any allegation of lack of capacity in 2009 when the second mortgage was executed and in 2013 when the power of attorney was executed. However, this burden may shift if she adduces evidence to raise a sufficient doubt from which capacity may be inferred, such that the burden then shifts to the opposing parties.

185. Applying the law to the facts of this case, it would appear that Wanda has not satisfied the first hurdle of challenging capacity in 2009. No evidence of

incapacity in 2009 was produced. Further, that even accepting that Mr Dowling told Wanda that he did not sign, the evidence appears to support Rosemarie and the Bank's case that he did sign. The signature on the loan application appears to be his. Wanda, in correspondence said that she was securing a hand-writing expert to prove that the signature on these documents was not Mr Dowling's. No such evidence was ever produced and so the court is left to consider the evidence before it, which supports Mr Dowling in fact signing the 2009 loan documents, as a matter of fact.

186. However, applying the same test to Wanda's allegations as to Mr Dowling's mental capacity after his massive stroke in 2011, his permanent hospitalization after this point and the signing of the power of attorney in 2013, the outcome of the review is different. Here Wanda does adduce evidence to raise sufficient doubt from which incapacity can be inferred, such that the evidential burden shifts to the opposing party, namely to Rosemarie and to HSBC who both wish to rely on the PoA.

187. The evidence supporting Wanda's case on Mr Dowling's mental capacity after his stroke in 2011 is as follows:

    a. Wanda's oral testimony as to Mr Dowling's behaviour his statements (eg he owned all the houses on his street), his demeanour and his actions.

    b. Wanda's testimony, corroborated by her daughter and not denied by Rosemarie, that Rosemarie herself observed that:

        "... that no court on this planet, would give credence to anything he stated because his brain had suffered damage after his stroke that affected his ability to speak coherently and sensibly all of the time..."

    c. The medical evidence, in particular the reports from the hospital including the following:

i. Bermuda Hospital Mini-Mental Stat Examination

"The dementia patient: "evaluation form" dated 18 October 2011.

This has a score of 17 out of 30 indicating moderate Alzheimers disease.

ii. Bermuda Hospital Board Case Notes. 20 Oct 2011. 3:30pm. Neurology Consultant

This note addresses the observations of the neurologist and concludes that "the chance for recovery is poor"

iii. 9 Dec. 2:10pm

There is another detailed description of his position with a conclusion by the Neurologist that *"... Patient is now 2 months p. event and still has ... a poor prognosis for recovery."*

iv. Bermuda Hospital Board Physiotherapy Aide Treatment Log dated Feb 2013

This comments that the "Patient continually refuses to participate in any rehabilitation exercises. Always shouting and using profanity towards staff.

d. Mr Dowling's recorded statement in October 2012 that he did not sign any of the 2009 loan documents. I do not add this ground, as evidence that Mr Dowling did not sign, but as evidence that Mr Dowling appears to be confused at this time, which raises a question mark (only) as to his capacity.

188. Having established that the burden of proof has shifted to them, the Defendants have called no evidence as to Mr Dowling's mental capacity, despite the court raising the issue with them at the pre-trial review stage. In the premises, the

Defendants have not established that Mr Dowling had capacity to sign the Power of Attorney. As a result of this conclusion, I rule that the PoA is unenforceable.

189. If I am wrong in concluding that there has been a shift in the burden of proof and that the Defendants failed to establish that Mr Dowling had sufficient mental capacity to execute the PoA in 2013, I would still have found that at that time of the 2013 PoA, Mr Dowling was subject to the undue influence of his step-daughter Rosemarie, for the reasons stated below.

190. If the Power of Attorney is void or if it simply cannot be relied upon, then any documents signed on the basis of this PoA, such as the 2016 refinancing documents, are void as against Mr Dowling and his estate.

Undue Influence

The Law on Undue Influence

191. A leading authority on the issue of undue influence is *Gorjat v Gorjat* (2010) EWHC 1537 (Ch). In addition, referring to the legal test of capacity in respect of an *inter vivos* transaction being the case of *Re Beaney*, this case also addresses in detail the law relating to undue influence. This case held (pagination references are to the Westlaw edition of the judgment):

> ***Page 44***
>
> *"Finally, at common law, the burden of proving lack of mental capacity lies on the person alleging it. To put the matter another way, every adult is presumed to have mental capacity to make the full range of lifetime decisions until the reverse is proved. Section 1 (2) Mental Capacity Act 2005 which came into force after the decision which is under consideration in this case, put the presumption of mental capacity on a statutory footing. This evidential burden may shift from a claimant to the defendant if a prima facie case of lack of capacity is established: Williams v Williams [2003] WTLR 1371 at 1383.*

Miss Rich on behalf of the Claimants submits that the Claimants have discharged the burden of showing a prima facie case of lack of capacity and the accordingly, the positive burden of proving that Jean had capacity shifted to Lucrecia. Mr. Waterworth on the other hand, submitted that the Claimants had not advanced a case which was sufficient to cause the evidential burden to shift and described the exercise as sterile in this case. He also submitted that what was necessary was for the Claimants to make out a case that Jean lacked capacity to a sufficient degree to call into question the validity of the transaction in question. He said that it was not enough to bring capacity into question generally. He emphasized that the lack of capacity must be material and relate to the transfer of the Credit Suisse accounts into joint names. In my judgment, this is inevitably correct. However, evidence, as to a person's mental capacity both before and shortly after the transaction in question may well shed light on that person's capacity at the relevant time."

Undue Influence

In the light of the fact that Lucrecia was Jean's spouse, the transfer of the funds in Jean's Credit Suisse accounts into joint names with Lucrecia is presumed to have been a gift. That gift will be invalid if it were procured by undue influence. The law in relation to undue influence is comprehensively discussed in the speeches in the House of Lords in Royal Bank of Scotland v Etridge (No 2) [2002] 2 AC 773. Lewison J summarized the principles relevant to the facts in Thompson v Foy [2009] EWHC 1076 (Ch), in the following way at paragraph 99:

- *"i) the objective of the doctrine of undue influence is to ensure that the influence of one person ("the done") over another ("the donor") is not abused;*

- *ii) If the donor intends to enter into a transaction, but the intention was produced by means which lead to the conclusion that the intention thus procured ought not fairly to be treated as the expression of the donor's free will, the law will not permit the transaction to stand;*

- *iii) Broadly, there are two forms of unacceptable conduct. The first comprised overt acts of improper pressure or coercion such as unlawful threats. The second form arises out of a relationship between two person where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage;*

- *iv) The principle is not confined to abuse of trust or confidence. It also extends to the exploitation of the vulnerable;*

- *v) Disadvantage to the donor is not a necessary ingredient of undue influence. However, it may have an evidential value, because it is relevant to the question whether any allegation of abuse of confidence can property be made, and whether any abuse actually occurred;*

- *vi) Whether a transaction has been brought about by undue influence is a question of fact;*

- *vii) The legal burden of provision undue influence rests on the person alleging it. The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relation, the extent to which the transaction cannot readily be accounted for by the ordinary*

motives of ordinary persons in that relationship, and all the circumstances of the case;

- *viii) If the claimant proves (a) that the donor placed trust and confidence in the donee or that the donee acquired ascendancy over the donor, and (b) that the transaction calls out for explanation, the claimant has discharged an evidential burden, which will also enable an inference of undue influence to be drawn, and thus satisfy the legal burden, unless the donee produces evidence to counter the inference which would otherwise be drawn;*

- *ix) This is simply a question of evidence and proof. At the end of the day, after trial, there will either be proof of undue influence or that proof will fail and it will be found that there is no undue influence. In the former case, whatever the relationship between the parties and however the influence was exerted, there will have been found to have been an actual case of undue influence. In the latter there will be none;*

- *x) Proof that the donor received advice from a third party before entering into the impugned transaction is one of the matters a court takes into account when weighing all the evidence. The weight, or importance, to be attached to such advice depends on all circumstances. In the normal course, advice from a solicitor or other outside adviser can be expected to bring home to a donor a proper understanding of what he or she is about to do. But a person may understand fully the implications of a proposed transaction, for instance, a substantial gift, and yet still be acting under the undue influence of another. Proof of outside advice does not, of itself, necessarily show that the subsequent completion of the transaction was free from the exercise of undue influence.*

Whether it will be proper to infer that outside advice had an emancipating effect, so that the transaction was not brought about by the exercise of undue influence, is a question of fact, to be decided having regard to all the evidence in the case;

- *xi) The nature of the advice required is that someone free from the taint of undue influence should put before the donor the nature and consequences of the proposed transaction. It is not necessary for the adviser to recommend the transaction. An adult of competent mind is entitled to enter into a financially unwise transaction if he or she wants to."*

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"Applying Hammond v Osborn [2002] WTLR 1125, the Court of Appeal held that the court would interfere with a transaction in circumstances of presumed undue influence on the ground of public policy (rather than on the ground of a wrongful act by the done) unless it could be shown that the donor had made the transfer after full, free and informed consideration. The requirement of proof that the donor knew and understood what he was doing had not been met. Chadwick LJ explained the issue in the following way at paras [25] to [27]:

[25] Hammond v Osborn was a case in which the donee, Mrs Osborn, was given all of the deceased's investments, an amount equivalent in value to some £395,000. She had not asked for the gift. In the course of his judgment, Sir Martin Nourse said this at para [32]:

"Even if it is correct to say that Mrs. Osborn's conduct was unimpeachable and that there was nothing sinister in it, that would be no answer to an application of the presumption. As Cotton LJ said in Allcard v Skinner, the

> *court does not interfere on the gournd that any wrongful act has in fact been committed by the donee, but on the ground of public policy with requires it to be affirmatively established that the donor's trust and confidence in the donee has not been betrayed or abused."*

[26] That passage was adopted by Arden LJ in Re Davidge, Jennings v Cairns [2003] WTLR 959, [40]. She said:

> *"the fact that the conduct of a person exercising influence in unimpeachable is not by itself an answer to a claim in undue influence, though the presumption of undue principle can be rebutted in many ways."*

[27] The circumstances that the donor is vulnerable – in the sense that the relationship between the donor and donee has potential for abuse- and that the gift is one which is not to be explained by the ordinary considerations by which men act lead, as a matter of public policy, as Sir Martin Nourse pointed out in Hammond v Osborn, to the need for the done to show that the donor really did understand and intend what he was doing. That is why it is necessary to show that the gift was made after full, free and informed consideration. A gift which is made without informed consideration by a person vulnerable to influence, and which he could not have been expected to make if he had been acting in accordance with the ordinary motives which lead men's actions, needs to be justified on the basis that the donor knew and understood what he was doing."

I accept Mr. Waterworth's submissions in this regard that there must be influence which has been abused. The influence therefore, must be improper or undue. However, a presumption of undue influence can arise from a relationship of trust and confidence where one person has acquired

a measure of ascendancy over the other or one of the parties is vulnerable and reliant and where the transaction is not readily explicable by ordinary motives. In such circumstances, it must be proved that the donor knew and understood what he was doing. The legal burden of proving undue influence lies on the person alleging it but as I have already mentioned, once a relationship of ascendancy and a transaction which calls for explanation because of its very nature or the surrounding circumstances are proved, the onus shifts to the done to counter the inference of undue influence and prove that the transaction was entered into freely. Whether a transaction has been brought about by undue influence is a question of fact."

Undue Influence: The Facts

192. Wanda's primary case is that her step-father Mr Dowling did not sign the 2009 loan documents. Her alternate case is that if he did sign them, he did so acting under the undue influence of his step-daughter Rosemarie.

193. Wanda's evidence is that the first loan was only for $101,000. The second loan was for more than twice this ($205,000). Wanda suggested in her testimony that the renovations to the house should have cost around a quarter of the total loan and that Rosemarie used most of the loan proceeds for herself.

194. Wanda says that Mr Dowling was a person of limited intellectual abilities (but assuming for this purpose, not lacking in mental capacity) and easily exploited. Further she says that Mr Dowling was vulnerable and confused after the loss of his wife. She says that knowing all this, Rosemarie exerted undue influence over him to sign the loan documents, for her exclusive benefit, and exploited Mr Dowling.

195. Wanda's testimony, supported and corroborated by independent witnesses (by independent I mean people who had nothing to gain), is that during Mrs Dowling's life, Mr Dowling was accustomed to let his wife do the heavy-lifting,

in terms of their family's business. He trusted her implicitly and this trust led to their successful acquisition of their family home.

196. Furthermore, Wanda's evidence is that Mr Dowling was crushed, by his wife's death. That following this, he was lost and vulnerable. This evidence was not contested, or not seriously contested and I accepted it. Wanda's case is that Rosemarie exploited this vulnerability.

197. Wanda says that in her lifetime, her mother:

> *"was always concerned for her husband because she did everything for him, including taking care of any business transactions because he was not that way inclined… but I know beyond a shadow of a doubt that neither Quinton nor Mary would ever do anything against each other's wishes…'*

198. The evidence of the closeness of Mr and Mrs Dowling, their loving and trusting relationship and their view of wanting all three children to inherit equally, was corroborated by Mrs Dowling's sister's testimony (Mrs Joyce Lee) and also the testimony of Mrs and Mrs Dowling's friend (Mrs Aspinall-Haggstrom) which was not seriously challenged by any of the parties, including Rosemarie and which testimony I accepted as truthful and factual.

199. Wanda's evidence (also not challenged by her sister Rosemarie), is that even on their mother's hospital bed in her final days, that:

> *"My mother wanted to know even from her fragile state that if anything happened to her whilst at Lahey she wanted me to fly to Boston to help Bob because he would be so devastated and wouldn't know what to do… My mother was more concerned for Bob than for herself…"*

200. Even Mr David Cooper's evidence supported this line, namely that Mrs Dowling did all the talking and dealt with the business issues relating to the property, not

Mr Dowling. He followed Mrs Dowling. The evidence is of someone who was easily led and easily misled, in this later instance misled by his step-daughter Rosemarie.

201. Wanda further testified that:

> *"Rosemarie Pedro took full advantage of my step-father's trusting nature and of his vulnerable state both emotionally and intellectually…"*

202. Rosemarie lived next door to Mr Dowling. Her evidence is that she was his principal caregiver and that he relied on her. In the context of the evidence heard, I find that this led to a relationship where Rosemarie had acquired a significant degree of ascendancy over Mr Dowling.

203. Wanda's corroborated evidence, which I have accepted, is that it was the individual intention of both Mr and Mrs Dowling, that all three of their children (or step-children in Mr Dowling's case), should inherit the property in equal shares. This is evidenced by the DoT but also the hand-written notes produced at the trial by Mr David Cooper. The idea that Mr Dowling would cut-off two of his step-daughters, as was suggested by Rosemarie's case, is inconsistent with the evidence, but is supportive of the allegation that Rosemarie had acquired ascendancy and was acting in a manner which took unfair advantage of Mr Dowling.

204. There are a series of transactions therefore that call out for explanation including the 2009 mortgage, the power of attorney and the third loan/facility agreement in April 2013. The Plaintiff has discharged her evidential burden enabling the inference of undue influence to be drawn.

205. Rosemarie has done nothing, or insufficient to counter the inference of undue influence. In the premises, I find that Rosemarie exercised undue influence over Mr Dowling for the reasons stated above. That undue influence led to Mr Dowling signing the 2009 Mortgage and the PoA.

Conclusion

206. I have reached the following conclusions:

a. Rosemarie held and continues to hold her interest in the Property on trust for her two sisters Wanda and Jennifer, as well as her herself in three equal portions.

b. Rosemarie had no power to enter into the 2009 Mortgage under the DoT. This fact was known or ought to have been known by HSBC.

c. Rosemarie's execution of the 2009 Mortgage was in breach of trust and ultra vires the DoT. The same would apply to the 2013 Facility.

d. The 2009 Mortgage and 2013 Facility are void and unenforceable on this ground. The Power of Attorney is void and unenforceable.

e. That in relation to the Mortgage dated 4 November 2009, the signature by Mr Dowling was procured by undue influence.

f. HSBC has a claim for monies had and received against Rosemarie in her personal capacity. Given Rosemarie's admissions, HSBC is entitled to claim the full amount of the 2009 loan and the 2013 facility against Rosemarie and to judgement on that claim against Rosemarie in her personal capacity.

g. HSBC has no remaining claim on the basis of the claim argued at trial, in relation to either the first, second or third loan facility, against Wanda or Jennifer.

h. HSBC is entitled to a claim against the one-third beneficial interest in the property belonging to Rosemarie. In the ordinary course, HSBC will be entitled to enforce against Rosemarie and this may eventually

lead to a sale of the property. HSBC's claim against the sale proceeds would be limited as aforesaid.

i. Wanda and Jennifer are entitled to a one-third portion each of the sale proceeds of the property, without regard to the 2009 Mortgage or the 2013 Facility.

j. Costs: Assuming the usual rule that costs normally follow the event, I would make an order that Wanda have a standard order for costs against Rosemarie and HSBC, on a joint and several basis, unless the parties apply to be heard in relation to costs.

207. Having considered Wanda's claim to rent or mesne profits, this claim should be mitigated or reduced by what Rosemarie, acting as Trustee, invested in the property, for the benefit of all the beneficiaries, even if she did not have a power to mortgage the property. Given however that Rosemarie has not produced sufficient evidence of the amount invested and that neither party adduced evidence of what the rent should have been, I cannot properly deal with this part of the claim. I would be minded to say that the two amounts (the money spent and the rent claimed) cancel each other out. However I make no finding in relation to this issue, save for finding that Wanda and Jennifer have a beneficial interest in two-thirds of the property.

Dated 23 August 2019

ROD ATTRIDE-STIRLING
ASSISTANT JUSTICE