



Civil Appeal No. 61 of 2023

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS
ORIGINAL CIVIL JURISDICTION
BEFORE THE HON. MR JUSTICE MUSSENDEN
CASE NUMBER 2018: No. 375**

Dame Lois Browne Evans Building
Hamilton, Bermuda HM 12

Date: 16/10/2025

Before:

**THE HON. CHRISTOPHER CLARKE
THE HON. GEOFFREY BELL
THE HON. DAME ELIZABETH GLOSTER**

Between:

**WILLISTON FURBERT
DAWN FURBERT**

Appellants

and

RITA FURBERT

Respondent

Appearances:

Kyle Masters and Mahogany Bean of Carey Olsen Bermuda
Limited for the Appellants
Dantae Williams and Tashae Trott of Marshall Diel & Myers
Limited for the Respondent

Date of Hearing: 15 November 2024

Date of Judgment: 16 October 2025

JUDGMENT

DAME ELIZABETH GLOSTER D.B.E., JA:

Introduction

1. This is an appeal by the defendants in the action, Williston Furbert (“Williston”) and his wife, Dawn Furbert (“Dawn”), (together “the Appellants”) against the judgment of Mussenden J (as he then was) (“the Judge”) dated 10 October 2023 (“the Judgment”). In the Judgment, the Judge held that the plaintiff in the action, Rita Furbert, the mother of Williston and the mother-in-law of Dawn (“Rita” or “the Respondent”), made a transfer of Bermuda \$500,000 (“the Disputed Payment”) to an account of the Appellants at HSBC Bank Bermuda Limited (“HSBC”) under undue influence exerted by the Appellants. This sum, which represented a portion of the proceeds of sale of Rita’s former family home, 7 Grace Lane, Pembroke (“the Homestead”) was applied by the Appellants *pro tanto* to discharge or reduce the mortgage repayments on their property, Fairwinds, 19 Pond Drive, Southampton (“Fairwinds”). The Judge granted relief to Rita by way of an award of damages against the Appellants requiring them to make “*repayment of \$500,000 as the total funds belonging to Rita that the [Appellants] applied to their mortgage as the Balloon Payment*”. However, he declined Rita’s applications for declarations that there was a constructive trust in Rita’s favour or that Rita had a beneficial interest in Fairwinds.
2. Rita invites the Court to dismiss the Appellants’ appeal and affirm the Judgment, in particular at [119] – [122] requiring the Appellants to pay \$500,000 plus interest to the Respondent. She relies on the clear evidential findings of the Judge, who found that the Respondent was a credible witness, while the Appellants were not, in addition to his finding that the evidence supported a conclusion that the Disputed Payment was made as a result of the Appellants’ exertion of undue influence over Rita.

The Judgment

3. The Judge summarised the basic, substantially undisputed, facts as follows:

“Background and Pleadings

The Amended Writ and Amended Statement of Claim (the “ASOC”)

3. *By an Amended Specially Indorsed Writ of Summons originally issued on 30 October 2018 Rita commenced the present action for: (a) Misappropriation of funds and undue influence; and (b) Breach of an accommodation agreement and promissory estoppel relating to Rita’s life tenancy in the mortgaged property.*

4. *Rita was 83 years old when she swore her Fourth Affidavit on 15 February 2022. The background to the matter is that Rita and her late husband owned and lived in the property located at 7 Grace Lane, Pembroke (the "Homestead") for a period of over 30 years. Rita owned the Homestead with her husband free and clear, meaning there was no mortgage over the Homestead. They lived there with their granddaughter Tirsite Furbert ("Tirsite") for over 30 years and Tirsite's daughter, their great-granddaughter Kaelys Furbert ("Kaelys") resided there from 2008 until it was sold on or about 15 June 2016.*
5. *In December 2012 Rita's husband died. According to Rita's claim, during 2013-2014 Williston contacted Rita to have a discussion about Rita selling the Homestead and then she, Tirsite and Kaelys moving in with him, Dawn and their children into Williston's and Dawn's home at their mortgaged property, Fairwinds, 19 Luke's Pond Drive, Southampton ("Fairwinds"). Fairwinds consisted of a main house (the "Main House") and a two bedroom two and a half bathroom apartment (the "Apartment"). There was a second apartment that plays no material part in these proceedings. There were further discussions, correspondence and meetings on the topic including a dinner at Henry VIII's Restaurant ("Henry's"), likely in or after September 2014. Rita claims that the Defendants assured her that if she sold the Homestead then: (a) Rita could live at Fairwinds for the remainder of her life, rent free; (b) Rita, Tirsite and Kaelys would share a one bedroom apartment at Fairwinds for a few years while the Defendants completed renovations to the Main House after which the three of them would move into the Main House; (c) Tirsite could reside at Fairwinds rent free for such time as necessary to allow Tirsite to purchase her own property, a condominium ("Condo") using a portion of the funds from the proceeds of the sale of the Homestead. Tirsite would only pay rent to the Defendants if she continued to live there after they moved into the Main House; and (d) In return for the accommodations as set out above, a portion of the proceeds of sale of the Homestead could be used as a balloon payment to assist with the Defendants' mortgage payments (collectively referred to as the "Accommodation Agreement").*
6. *Rita claims that in reliance of the Accommodation Agreement she moved into Fairwinds around April or May 2016, Tirsite and Kaelys moving in with her also. Then the Homestead was sold on or about 15 June 2016 and Rita received from the conveyance lawyers, a cheque of \$621,986.09 (the "Proceeds of Sale"). Rita and Dawn then attended the Bank of Butterfield & Sons Limited ("BNTB") where they met with a bank representative to deposit the Proceeds of Sale into Rita's account. Rita transferred a gift of \$20,000 to her step-daughter Cheryl Swan. Rita claims that Dawn influenced her to have \$500,000 transferred to an account of the Defendants' at HSBC Bank Bermuda Limited ("HSBC") which later, on Dawn's earlier instructions to HSBC, the whole amount of \$500,000 was applied against the Defendants' mortgage (the "Balloon Payment") with HSBC. However, Rita claims that at Henry's, she communicated to the Defendants and it was agreed that the Proceeds of Sale would be divided (in amounts to be determined by the Plaintiff) between the Plaintiff, Williston,*

Cheryl Swan and Tirsite. Rita claims that she intended for the Proceeds of Sale to be allocated as follows:

- a. *Rita would keep \$100,000 for her personal use in a joint account held with Tirsite;*
- b. *Cheryl would receive \$20,000;*
- c. *The \$500,000 deposited into the Defendants' HSBC account would be distributed as follows:*
 - i. *\$300,000 would be allocated to Tirsite to assist her with the purchase of a Condo;*
 - ii. *\$100,000 was to be allocated for Rita's continued use; and*
 - iii. *Rita would give the Defendants a portion of the Proceeds of Sale to be used as a Balloon Payment towards their mortgage (collectively referred to as the "Allocation of Funds Plan").*

Misappropriation of funds and undue influence

7. *In respect of the claim for misappropriation of funds and undue influence, Rita claims that she had trust and confidence in the Defendants in relation to her financial affairs and her general well-being. Rita claimed that she was unaware that the Defendants intended to use the \$500,000 as a Balloon Payment and she never agreed to such use. Her position was that she was depositing the \$500,000 into the Defendants' HSBC account for safekeeping and to hold on trust for her and Tirsite. The amount to be given to the Defendants was consideration for the Plaintiff to retain a life interest to reside at Fairwinds.*
8. *Rita became aware, in or around 2017, that the Defendants had put the entire \$500,000 towards the repayment of their mortgage. When she challenged Williston about this, he assured her that the Defendants would get a loan to help Tirsite to buy a Condo, such loan representing Tirsite's intended share of the Proceeds of Sale. However, they were turned down by HSBC for a loan.*
9. *Thus, Rita claims that the undue influence consisted of the following: (a) Rita was vulnerable after the loss of her husband of 57 years, thus trusting and relying on Williston and Tirsite; (b) She was in her mid-70s when she was first approached by the Defendants to sell the Homestead; (c) She placed a significant degree of trust and confidence in Williston as her only living child since Tirsite's mother died many years before. Rita also placed trust and confidence in Dawn who performed a number of tasks for her in relation to the Homestead, including attending BNTB with her to have a cheque drawn in the Defendants' favour; (d) Rita did not have the benefit of any legal advice in relation to the Accommodation Agreement nor the Allocation of Funds Plan; and (e) The Balloon Payment was solely for the Defendants' benefit and to Rita's detriment. It was unconscionable for the Defendants to induce her to sell the Homestead where she lived comfortably*

without debt to purchase a life tenancy in the Defendants' home for any money or for \$500,000.

Breach of the Accommodation Agreement and Promissory Estoppel relating to the Plaintiff's Life Tenancy in Fairwinds.

10. *In respect of this head of claim, Rita claimed that in exchange for selling the Homestead and giving the Defendants a portion of the Proceeds of Sale to be used in a Balloon Payment to assist with their mortgage payments, the Defendants agreed that Rita could reside at Fairwinds for the remainder of her life rent free. Thus, Rita was granted a life tenancy in Fairwinds by the express term of the agreement between the parties and Rita relied on the Defendants' expression in her decision to sell the Homestead. In accordance with the express terms, Rita, Tirsite and Kaelys moved into Fairwinds.*
11. *Rita is now in a position where both she and Tirsite have to pay monthly for rental accommodations. Rita now resides in Sandys and is responsible for rent in the sum of \$1,800 per month. Rita claims that the Defendants' actions and breach of the Accommodation Agreement has resulted in a loss to her, such that she sold her Homestead in reliance on the Defendants' promise that she would live with them for the remainder of her life, rent free.*

Relief Sought

12. *Thus Rita sought the following:*
 - a. *Damages by way of a repayment of \$500,000 as the total amount of funds belonging to her that the Defendants applied to their mortgage;*
 - b. *A declaration that until such time as the damages are paid that Rita has a beneficial interest in Fairwinds and the proceeds of sale of Fairwinds to the extent of the sum owed to Rita; and*
 - c. *Compensation of rent already paid and going forward for monthly rent of \$1,800 per month until the sum of \$500,000 is paid in full to Rita.*

The Defence

13. *The Defendants' case is as follows:*
 - a. *The \$500,000 transfer was voluntary;*
 - b. *Rita offered to sell the Homestead and gift \$500,000 to the Defendants; and*
 - c. *It is agreed that the Defendants had a relationship of trust and confidence with Rita.*
14. *Williston in his Defence stated that the Defendants discussed the idea that if Rita sold the Homestead they could help her manage Tirsite. He also stated that Rita wanted to assist him and Tirsite. She wanted to give a portion of*

the Proceeds of Sale to the Defendants, a portion to Tirsite and a portion to Cheryl Swan.

15. *Dawn in her defence stated that: (a) In 2016 the Defendants' mortgage amounted to approximately \$1.2 million; (b) Rita raised the idea of putting a lump sum on their mortgage in 2014; (c) She made calculations that if the Defendants reduced their mortgage by \$500,000 the monthly mortgage amount would be approximately \$5,000 per month of which the Defendants would only pay \$2,000 per month; (d) She told Rita she would need \$500,000, otherwise the figures would not work; (e) Rita said she would gift some of the money from the Proceeds of Sale; and (f) Dawn told Stacy O'Brien about the intended \$500,000 payment.*

The Trial – Evidence

16. *The trial took place with evidence given by witnesses for the parties. There was extensive documentary evidence also. For the Plaintiff's case, only Rita gave evidence. For the Defendants' case, Williston and Dawn gave evidence along with Stacy O'Brien.*

Evidence not in dispute

17. *There was evidence that generally was not in dispute although finer points are in dispute. In brief, Rita, Tirsite and Kaelys lived at the Homestead. There were discussions between the parties about selling the Homestead and moving into Fairwinds, events which did take place over time. There is a dispute as to who initiated the idea of Rita selling the Homestead and moving into Fairwinds which I will turn to later. Once the Homestead was sold the Proceeds of Sale were dispersed after Rita and Dawn visited BNTB. The Defendants' evidence is that Dawn came up with a figure of \$500,000 which should be applied to their mortgage from the Proceeds of Sale that would allow everyone to move into Fairwinds and that Rita agreed to this. The sum of \$500,000 was transferred from BNTB to an account of the Defendants at HSBC and on Dawn's earlier instructions to HSBC the Balloon Payment was executed. **A main issue in this case is whether Rita intended to gift the Balloon Payment which I will turn to later.***
18. *There is no dispute that there is no document that states: (a) that Rita agreed to gift the Balloon Payment; and (b) the terms of the agreement that Rita could live in Fairwinds with the Defendants for the rest of her life, rent free. **On cross-examination, Dawn conceded that she did not think to get the agreement of the Balloon Payment in writing or to get a legal document giving effect to it.***
19. *At some point, Rita wanted to use some funds to assist in the purchase of a Condo for Tirsite who had found one that she liked. There is a dispute about what was to be the source and amount of those funds, with Rita expecting that some funds would come from the Proceeds of Sale. The Defendants, having already made the Balloon Payment, visited the banks for a loan but were unsuccessful. Later on in December 2017, there was an altercation at*

Fairwinds between Tirsite on the one part and Williston and one or more of his daughters on the other part which included Williston's demands that Tirsite move out of Fairwinds. There is no dispute that the Defendants ordered Tirsite to move out. However, there is a dispute about whether Rita and Kaelys were kicked out, an issue which I turn will to later. On leaving Fairwinds, Rita demanded that her \$500,000 be repaid to her, however it has not been repaid to her. Rita, Tirsite and Kaelys now live in other accommodations where Rita makes a financial contribution without any assistance of the Defendants.

20. *There was documentary evidence which included material documents as set out below.*
21. *On 1 February 2016 there was a sole listing agreement of that date for Coldwell Banker to list the Homestead for sale.*
22. *On 30 March 2016, the Defendants wrote a letter to HSBC entitled "Principal Reduction Payment" (the "Principal Reduction Letter"). It instructed HSBC to debit \$500,000 from their HSBC savings account to be credited to their mortgage on 30 June 2016. They asked HSBC to recalculate their mortgage payments after the transaction and advise them of the new monthly payment. **I should note here that Rita states that at no stage did she ever tell the Defendants that she was giving them \$500,000 of the Proceeds of Sale as a direct payment for their mortgage or for any other purpose. Also, on cross-examination, Dawn stated that when she wrote the Principal Reduction Letter she was sure that she would get the \$500,000 from the Proceeds of Sale as she had discussed it with Rita.***
23. *There is a series of email communications between Dawn and Amicus Law Chambers Ltd. ("Amicus") for the period 12 April 2016 to 22 June 2016 in relation to the sale of the Homestead.*
24. *There is a Coldwell Banker Sales and Purchase Agreement dated 13 April 2016 (the "S&PA") for the sale of the Homestead for \$685,000 with the completion date to be on or before 16 May 2016.*
25. *There is an Addendum dated 20 May 2016 which refers to an agreement dated 20 May 2016 and which amends the agreed sales price to be \$675,000 with a completion date no later than 15 June 2016.*
26. *An HSBC composite statement for the Defendants dated 1 June 2016 showed various accounts. Their total deposits was approximately \$17,000. Their mortgage account had a balance of \$1,246,190.80. The 1 August 2016 composite statement showed total deposits of approximately \$11,000. The mortgage account balance was then \$744,698.77, the balance having been reduced by the Balloon Payment.*
27. *There were several documents dated 24 June 2016 in relation to the sale of the Homestead: (a) An Amicus invoice; (b) A Completion Statement; (c) An Amicus cheque issued to Rita for \$621,986.09.*

28. On 29 June 2016 Rita signed a BNTB wire transfer/domestic payment document (the “Wire Transfer Form”). Various details were typed in which included Rita’s name as the ordering customer; the Defendants’ names as the beneficiary who will receive the funds and their HSBC account number; the amount to be transferred as \$500,000, the account to be debited which was in the names of Rita and Tirsite and Rita’s passport number. There were some handwritten entries which included Rita’s telephone number, the words “Mortgage Proceeds” written in the payment details section and Rita’s printed name, signature and date. There were some handwritten entries at the bottom of the form reserved for bank use only. **I should add at this point that Rita denied that she wrote the words “Mortgage Proceeds” on the form and she did not remember seeing those words when she signed the form. Dawn in her evidence in chief stated that she believed the bank official wrote those words on the form once the bank official had asked Rita what the transfer was for and Rita had explained that it was for the Defendants to apply to their mortgage.**
29. There was an undated BNTB bank account application form signed by Rita, for a savings account in the name of Rita and/or Williston with an initial deposit of \$100,000 sourced from an internal account with a note that the funds were proceeds received from the sale of a house. I should note here that: (a) Rita states that the handwriting on the form is not her handwriting although it is her handwritten signature, noting that the handwriting looked like Dawn’s; and (b) Dawn clarified that Williston never completed the form and thus the account was never opened.
30. There was an email from Tirsite to Dawn dated 31 August 2016 with the subject “Condo – Is this possible?” with some pictures of a Condo that she was interested in purchasing. There was a reply about half an hour later of the same date from Dawn to Tirsite stating “K – work out the payments using the mortgage calculator. Two calculations using \$75,000 deposit for 10 & 15 years”.
31. There was a BNTB mortgage and loan application form dated 29 September 2016 signed by Tirsite (“Tirsite’s BNTB Mortgage Application”) which indicated assets at BNTB of \$147,200 and liabilities of \$88,300. The form showed no other assets owned by Tirsite. There were some emails dated 19 and 20 October 2016 between Tirsite and a BNTB Officer where Tirsite was informed that her application had been approved in the amount of \$195,000 subject to some conditions.
32. There were some emails dated 15 November 2016 between Tirsite and a real estate agent, subject “Poinciana Offer” where Tirsite informed the agent that she would not be able to proceed with the purchase of the Condo at that time.
33. On 9 November 2016, Dawn sent an email to Tirsite, Daliesha and Dateja informing them that effective 1 January 2017 they would each be required

to pay \$400 per month for contribution to monthly maintenance and expenses at Fairwinds.

34. *On 6 February 2017 Dawn wrote Rita a letter (“Dawn’s Letter”) which set out Dawn’s feelings about Tirsite and Dawn’s relationship with Rita, noting that Rita had provided them with significant help.” [All bolded text is my emphasis].*

4. The Judge then went on to consider the disputed evidence which, insofar as material, I quote as follows:

“Evidence in dispute

35. *There were various main areas of evidence that were in dispute as set out below which I will deal with in turn.*

Who initiated the discussion about Rita selling the Homestead and moving into Fairwinds

What were the terms of the agreement to sell the Homestead and move into Fairwinds

What were the terms of the agreement for the distribution of the Proceeds of Sale

36. ***Upon my observations of Rita giving evidence, I found that she was a credible witness who gave her evidence in a forthright and honest manner. Her evidence about deeply caring for Tirsite and providing funding for Tirsite to purchase a Condo had sound reasoning to it and a resounding ring of truth to it as she had cared for Tirsite from the age of one years old since her daughter (Tirsite’s mother) had died. I found her to be credible and straightforward in her evidence about the material matters such that I preferred her evidence over the Defendants’ evidence.***

37. *I have considered the evidence of the Defendants and my observations of them are that they both seemed to deflect responsibility from themselves individually and then point to their spouse for responsibility. To that point, Williston’s position was that Dawn comes up with the plans and does the finances whilst he does the work. Dawn stated that she is the administrator but Williston makes the final decisions. Stacy O’Brien’s evidence was that Dawn was a strategic planner. Thus, whilst Williston’s and Dawn’s positions do not seem inconsistent on the face of it, **I found the Defendants to be defensive if not evasive when giving their evidence and thus I found them to not be credible witnesses.** An example of this is when they both stated in their witness statements in very similar words that at no point did they ask Tirsite or Rita to move out but then on cross-examination Williston conceded that he did tell Tirsite to leave. Another thread that ran through their evidence is that Dawn was doing quite a lot in respect of Rita, including decision making, which on the evidence did not involve decision making by Williston, for example in handling the listing and sale of the Homestead.*

38. *In respect of who initiated the discussion for Rita to sell the Homestead and move into Fairwinds, in Rita's witness statement and thus her evidence in chief, she stated that she did not remember when the dinner at Henry's took place but it was a few years after her husband passed away in 2012. She stated that it was at Henry's when for the first time the Defendants raised the plan and request that Rita sell the Homestead and move in with them. She was reluctant but thought about it. Thereafter, the Defendants repeated their request and there were discussions over time about the terms of Rita moving to Fairwinds and finally an agreement was reached.*
39. *The Defendants' position was that in 2014 Rita first raised the idea of selling the Homestead and moving into Fairwinds with the Defendants when Rita was having some challenges with Tirsite as a result of her health issue. They continued to talk about the idea for some time. Later in September 2014 they had dinner at Henry's when they discussed the idea more fully and Dawn explained that in order to move into the Main House, the Fairwinds mortgage would need to be reduced by \$500,000. It was then that Rita asked them to consider agreeing for Rita to come live at Fairwinds if she provided \$500,000 towards their mortgage. The Defendants took about a week or so to think about the plan when they decided that they would proceed with the plan. In January 2015 the Homestead was listed for sale on Emoo but did not sell and then on 1 February 2016 Rita entered into a Sole Listing Agreement with Coldwell Banker to sell the Homestead.*
40. *In my view, I am satisfied that the plan for Rita to sell the Homestead and move in with the Defendants commenced in 2014 which is a few years after her husband passed away. I take this view because the Sole Listing Agreement was dated 1 February 2016 and working backwards, I accept the evidence that the property was listed on Emoo for long time in 2015. Further all parties state that there were discussions over time before they reached an agreement. Thus, I find that the initial discussion, the dinner at Henry's and reaching an agreement took place in 2014. **As stated above, I found Rita to be a credible witness such that I preferred her evidence over the Defendants' evidence. I accept Rita's evidence and find as a fact that it was the Defendants who initiated the discussion about Rita selling the Homestead and moving in with them at Fairwinds. I preferred her evidence because it had a solid ring of truth to it.** Rita was living in the Homestead which had three bedrooms, it carried no debt, she had the income from the apartment and the Homestead had been her home for over 30 years. She also had Tirsite and Kaelys living with her in the comfort of the Homestead, no doubt with their own bedrooms. In my view, it was clear why she would be reluctant to move from that set of circumstances to a position where she would live in a two bedroom apartment for a few years before moving in to the Main House, to share a bedroom with two others and share the Apartment with up to six to seven adults. Thus, I accept that it was the Defendants who initiated and continued the discussions for Rita to sell the Homestead and move to Fairwinds.*
41. *In respect of the terms of the agreement to sell the Homestead and move into Fairwinds, I find as a fact that once there was an agreement to sell the*

Homestead: (a) Rita would live rent free at Fairwinds for the remainder of her life, firstly in the Apartment and then in the Main House once the tenants there vacated it. The claim that renovations were necessary to complete the Main House is not supported by the evidence as there were tenants in occupation of the Main House at the material times. I find support for this view in that Rita would make a Balloon Payment at some point in an amount to be determined thus assisting the Defendants with their mortgage thus earning the opportunity to live at Fairwinds rent free for the remainder of her life; and (b) Tirsite and Kaelys would also move to Fairwinds firstly in the Apartment but would move to Tirsite's Condo once she purchased it. I find support for this view in that soon after Tirsite moved into Fairwinds, she made efforts, with Dawn's assistance, to purchase a Condo.

42. In my view, I find as a fact that Rita's position of how the Proceeds of Sale were to be used was as Rita stated, namely that: (a) She would keep \$100,000 for herself; (b) She would gift \$20,000 to Cheryl Swan; (c) The remaining \$500,000 would be used as follows: (i) a portion, to be determined, would be used to help Tirsite purchase a Condo; and (ii) a portion, to be determined, would be used to make a Balloon Payment to the Defendants' mortgage. I find support in this view on the basis that Rita was primarily concerned with keeping some funds for herself and then assisting Tirsite to purchase a Condo. It is clear to me that she did not intend to provide \$500,000 to go towards the Defendants' mortgage as that would leave practically no funds to assist Tirsite at all for a downpayment or in any other meaningful way. In other words, out of the Proceeds of Sale of \$620,000, once Rita kept \$100,000 for herself, gave \$20,000 to Cheryl Swan and then \$500,000 to the Defendants, then Tirsite, her main priority, would be out in the cold. In my view, this allocation of funds ran totally counter to the desires and wishes of Rita to provide for Tirsite and Kaelys. Further, if a downpayment was to come out of Rita's reserve of \$100,000, then Rita would have very little money left for her own personal use, when she was clear that she wanted \$100,000 for her personal use." [My emphasis].

5. Having correctly set out the law relating to undue influence at [45] to [60]¹, and identifying the decision of *Royal Bank of Scotland Plc v Etridge (No. 2)* [2002] 2 A.C. 773 HL ("*Etridge*") as the critical decision articulating the modern application of the equitable principle of undue influence², the Judge went on to consider the evidence and to determine the issues relating to undue influence. He concluded that he was satisfied on the evidence that the Appellants had indeed exercised undue influence over Rita as the latter claimed. In summary, his reasons were as follows:

¹ The Appellants accept that the Judge correctly set out the law but contend that he wrongly applied it to the facts.

² As the Judge mentioned, *Etridge* has been cited with approval by this Court in *Lawrence v HSBC* 2020 BDA LR 36.

- (1) First, he held the case did not fall under the class of actual undue influence because he was not satisfied that there had been overt acts of improper pressure or coercion such as unlawful threats by the Appellants upon Rita.
- (2) However, he held that the case was one of presumed undue influence. He referred to the facts that, in the Amended Defence paragraph 21, the Appellants averred that the relationship between them and Rita had always been one of trust between them both before and after the death of Rita's husband; and that, in cross-examination, Dawn agreed that Rita placed trust and confidence in her and that they had a mutual relationship of trust. He said that, in applying *Etridge*, he recognised that the evidence must show that there is more than just the familial relationship to establish the relationship of trust and confidence. He concluded that there was such a relationship of trust and confidence between Williston and Dawn on the one hand and Rita on the other hand for several reasons:
 - a. He accepted Rita's evidence that she was saddened and vulnerable as a result of her husband's death; he rejected the Appellants' arguments that her husband had died in 2012 and she had moved on with another romantic interest and thus was no longer vulnerable in 2016.
 - b. He found that, although Rita did not want to sell the Homestead, her main asset and her home of 30 years, the Appellants persuaded Rita to sell the Homestead and move into Fairwinds with them for the remainder of her life.
 - c. Dawn was involved in Rita's financial affairs as they related to the sale of the Homestead. In particular, Dawn was very involved in the affairs of selling the Homestead, including listing it, arranging documentation and corresponding with the lawyers.
 - d. He found that the Appellants were aware of Rita's love and affection for Tirsite and were "*supporting Rita in her quest, as she stated, to do everything in her power to protect Tirsite.*" The Judge held that these circumstances further fortified the relationship of trust and confidence which Rita had in the Defendants.
- (3) He stated that he had carefully considered the points put forward by the Appellants that the evidence showed that Rita took care of her own finances, drove her taxi as she wanted, was in charge of her affairs and that no-one could tell her what to do. He concluded that he was not satisfied that those circumstances undermined his finding that there was a relationship of trust and confidence between Rita, on the one hand, and Dawn and Williston, on the other. He concluded that the reasons which he had given in relation to the relationship carried more significance and weight and far outweighed the

position put forward by the Appellants which did no more than highlight that Rita got on with some basics of everyday life. He concluded, applying the position articulated in *Snell's Equity*, 34 Ed. at 8-017 in relation to a situation of presumed undue influence, that the Defendants had acquired over Rita a measure of influence or ascendancy of which they then took unfair advantage.

- (4) Then, following the sequential approach, as stated in *Perwaz v Perwaz* [2018] UKT 325 (TCC) at [71] – [72], he asked himself the question whether, given that he had concluded that there was a relationship of influence existing prior to the Disputed Payment, a transaction had occurred which called for an explanation, thereby giving rise to an evidential presumption in Rita's favour that it had been brought about by undue influence. He correctly summarised the law relating to whether a transaction calls for an explanation by reference to citations from *Thompson v Foy* [2009] EWHC 1076 Ch at [101], *Snell's Equity* at 8-032 and *Etridge* at [22] ff. He then went on to conclude, on the evidence that the transaction did indeed call for an explanation, that accordingly the evidentiary presumption of undue influence arose and that it was for the Appellants to rebut it.
6. It is important for my analysis to set out the precise factual findings which the Judge made in this respect, in particular in relation to specific aspects of Rita's evidence. I have already quoted [42] above in this respect, but the following paragraphs are also relevant to my analysis in relation to what I regard was the legal result following the Disputed Payment:

“68. Fifth, I turn to the transaction of the transfer of the \$500,000 from Rita's account to the Defendants' HSBC account which was later applied to the Defendants' mortgage. In my view, I prefer Rita's evidence that she transferred the \$500,000 to the Defendants' HSBC account because at BNTB, Dawn had urged her to do so for safe keeping for later disposition to assist Tirsite to purchase a Condo and to assist the Defendants with a Balloon Payment, amounts to be determined. On cross-examination, Rita maintained that she and the Defendants were on good terms at that point and she saw nothing wrong with putting the money into the Defendants' HSBC bank account, as Dawn had all the paperwork in relation to the Homestead in any event. She denied that she gave the \$500,000 to them. She stated that she trusted them and had told them not to screw her over. Once she discovered that the \$500,000 was not in the HSBC account she did not ask them about it right away but she did raise it with them at a later stage at the Apartment once she realised the Defendants could not qualify for financing to help Tirsite. Rita's evidence had a resounding ring of truth and logic to it, whilst to my mind, Dawn's evidence was overwhelmingly self-serving in that she seemed determined to reduce the Fairwinds' mortgage whilst maximizing income from the occupants at Fairwinds and continuing to enjoy her quality of life. This included delaying moving into the Main House with the result that six to seven adults

would continue to live in a two bedroom two and a half bathroom apartment. In my view, Dawn indeed was the strategic planner, driver and the administrator, who had devised a plan to reduce their not so insignificant mortgage, reduce their monthly payments and continue to enjoy her quality of life.

69. I must consider the question whether the transaction calls for an explanation, per Snell's Equity by way of considering the specific facts of the case and per Thompson looking at it in its context and to see what its general nature was and what it was trying to achieve for the parties. **Rita's evidence was that the transfer of the \$500,000 was at Dawn's insistence for Dawn to hold for safekeeping and a later disposition, some to help Tirsite to purchase a Condo and an as yet undetermined amount to help with a Balloon Payment to the Defendants' mortgage. The Defendants state that the transfer of the \$500,000 was, with Rita's full knowledge and agreement, for the purpose of applying it to their mortgage with a view that it would lower the monthly mortgage payments and it was the sum that would make the plan work of all of them moving into the Main House.**
70. The amount of \$500,000 represented approximately 80% of the Proceeds of Sale of Rita's main asset the Homestead. In my view, this clearly was not a small gift by any means which Lindley LJ had in mind in the leading authority of Allcard v Skinner. In my view, the purported gift cannot be reasonably accounted for on the ground of their relationship or other ordinary motives on which ordinary men act. Looking at the evidence objectively, a reasonable person might very well conclude that an elderly mother of an ordinary son could come to live with him and his family without any financial contribution whatsoever or if a financial contribution was necessary, then a minimal monthly contribution to cover some basic expenses.
71. **However, the gift of 80% of the Proceeds of Sale was so large that it constituted, similar to Lord Scarman's view in Morgan's case, a disadvantage to Rita sufficiently serious to require evidence to rebut the presumption that it was procured by the exercise of undue influence.** That is, Rita was left with no funds to help Tirsite. Further, the Defendants were always aware that Rita wanted to give some funds to Tirsite to enable her to purchase a Condo. Despite that knowledge, once Tirsite had interest in a Condo, Dawn instructed her to work on the basis of having \$75,000 for a downpayment and a 10 to 15 year mortgage. However, the Defendants at that stage did not have access to \$75,000. Later, when Tirsite had an interest in another Condo, the Defendants applications to the banks for funding for Tirsite were rejected as they did not qualify for funding. To make matters worse, if the \$75,000 was to come out of the \$100,000 that Rita reserved for her own personal use, then Rita would have been at an even more serious disadvantage of having only approximately \$25,000 to \$30,000 for her own use out of the Proceeds of Sale. In my view, the transaction calls for an explanation and thus the presumption of undue influence arises on the facts of this case and it is for the Defendants to rebut it." [My emphasis.]

7. The Judge then went on to consider whether the presumption of undue influence had been rebutted stating at [72] that “*Per Pedro*³, it is necessary to show that **the gift** was made after full, free and informed consideration.” [My emphasis]. After analysing the evidence, he concluded that the Appellants had not rebutted the presumption of undue influence. Again, for the purposes of this Court’s analysis it is important to set out certain of the precise factual findings which the Judge made in this respect:

“73. It is not in dispute that Rita did not have independent legal advice. In *R v HM Attorney General for England and Wales*, the Privy Council stated that the receipt or not of legal advice is not dispositive of the question of undue influence. In the extract from *Duress, Undue Influence and Unconscionable Dealing* it gives support to the position that where Rita did not receive any advice at all before entering into the transaction, it will ordinarily be difficult to rebut the presumption of undue influence. In my view, there are myriad legal issues which arose in the plan espoused by the Defendants, to which they say Rita agreed, involving selling Rita’s main asset the Homestead, gifting \$500,000 to the Defendants, having no funds left to support her main priority, that is Tirsite and Kaelys, the Defendants’ agreement to support Tirsite in purchasing a Condo and finally, that in return for such gift, Rita would have a right to live at Fairwinds for the remainder of her life rent free. In my view, there is no evidence to show that Rita was a person with legal experience or previous dealings in these types of transactions. Further, Dawn was fully aware of the details of the sale of the Homestead and the Proceeds of Sale **and even if Rita had agreed to the gift of \$500,000, there would simply be no funds left to assist Tirsite - and if Tirsite used \$75,000 of Rita’s reserved funds then there would be minimal funds left for Rita for the remainder of her life. Yet, Rita was given no advice whatsoever about this and she was not even advised to seek advice before making the gift. In my view, the absence of legal advice supports the position that Rita was not acting after full, free and informed consideration.**

74. I turn now to a balanced consideration of the evidence in determining whether Rita made the transaction after full, free and informed consideration. **I refer to the findings of fact that I have made about who initiated the plan and how Rita wanted to use the Proceeds of Sale. As stated, in my view, Rita wanted to have some funds for herself, then make some funds available to assist Tirsite in purchasing a Condo and then finally some funds would go to the Defendants to make a Balloon Payment on their mortgage.**

75. In my view, the Defendants have not rebutted the presumption for several reasons. **Their position is that Rita fully understood the nature of the gift of the \$500,000 before entering into it.** They rely on various pieces of evidence to support this contention, namely: (a) It was Rita’s idea; (b) Dawn made various calculations and settled on the figure of \$500,000 to make the plan work. This required a significant reduction in the mortgage and

³ *Pedro et al v Pedro and HSBC Bank Bermuda Limited* [2019] Bda LR 66 - a decision of this Court.

consequently the monthly mortgage payments in order for the family to move into the Main House; (c) The plan was explained to Rita at Henry's and thereafter Rita agreed to the plan; (d) The documentary evidence shows this; and (e) After the altercation when Rita, Tirsite and Kaelys were moving out, Rita stated "I want my money back".

76. Rita stated that she did not write "mortgage proceeds" on the Wire Transfer Form and had not seen the words on it in any event when she signed it. Dawn recalled that the bank official may have written in the words after hearing a reply from Rita. **After careful consideration of this evidence, I found Rita to be credible on this point and I preferred her evidence. Thus, I am not satisfied that the words were written as a result of anything Rita stated or that the words were written in Rita's presence. Thus, this contention that the words "mortgage proceeds" shows that Rita knew and fully understood what she was doing fails to rebut the presumption.**

77. I turn now to Dawn's role. The evidence showed that Dawn had calculated the amount of \$500,000 as the figure that would make the plan work as she said for everyone. The question that is raised in my mind is for whom has the plan worked? In my view, Dawn was focused on reducing the mortgage thus reducing the monthly mortgage payment. Thus, she was concerned to ensure that the Defendants had only to make minimum financial contributions after the rental income of the Main House was taken into consideration. The evidence also shows that Dawn was focused on maintaining a certain quality of lifestyle that she enjoyed for herself and her family. However, as already stated, the calculation left no funds to achieve Rita's goal of funding Tirsite's purchase of a Condo, which was a priority over any Balloon Payment for the Defendants. The situation became more muddled after the \$500,000 was applied to the mortgage because Tirsite wanted to purchase a Condo. Faced with having no funds whatsoever out of the Proceeds of Sale to support Tirsite, the Defendants were in the wholly embarrassing and unfortunate position of having to be rejected by the banks for any funds to support Tirsite. To my mind, their applications to the banks showed that they knew they had an obligation to secure funds for Tirsite's potential purchases. The question then begs, if they knew of their obligation, then why would they not keep funds aside and available to assist Tirsite. Surely, it would be far easier to have ready funds to assist Tirsite and as all of it would not be used for Tirsite, then some would be left for Rita to make a decision about the amount to be gifted to the Defendants as a Balloon Payment. **Having given consideration to those points, I am not satisfied that Rita knew and understood that the transfer of the \$500,000 was going to be applied to the mortgage and thus I am not satisfied that the gift was made after Rita's full, free and informed consideration.**

78. I now turn to Dawn's Letter dated 6 February 2017 to Rita. In that letter, Dawn recognised that Rita had not been speaking to her for some time which she surmised was because of an email that Dawn had sent to Tirsite. Dawn expressed that Rita had taken Tirsite's side. Also, Dawn acknowledge that Rita had helped the Defendants significantly such that they would look out for Tirsite and Kaelys. For that they were very appreciative and grateful,

and they will ensure that Rita does not regret it in the long run. Rita's evidence was that the Defendants had done everything but look out for her, Tirsite and Kaelys. Thus, the Defendants' position is that this part of Dawn's Letter shows that Rita fully understood that she was transferring the \$500,000 to the Defendants to apply to their mortgage to make the plan work of all of them living in the Main House.

79. On cross-examination that the \$500,000 was the significant help, Rita maintained that Dawn was not thanking her for the \$500,000 because she had not given them \$500,000 as a gift. However, she had purchased groceries and water for the Defendants. However, it is clear to me that there is no mention of the Balloon Payment in Dawn's letter. In my view, Dawn may very well have been talking about the Balloon Payment as the significant help because by that time Dawn did know that it had been applied to the mortgage and the monthly payments had been reduced. However, that does not mean that Rita accepted that the Balloon Payment was the significant help being referred to in Dawn's Letter – as Rita stated throughout her evidence, she had helped the Defendants in various ways throughout their marriage, including the recent buying of groceries and water at Fairwinds. **Thus, I am unable to attach any weight to Dawn's statement about Rita's significant help as supporting the position that Rita fully understood that the \$500,000 was paid to the Defendants' mortgage.**
80. I now turn to Rita's demand to Williston on the night of the altercation that she wanted her money back. This occurred when Williston had told her to leave Fairwinds. Rita's evidence is that Dawn said that she could give her the money the next day. Dawn denied that she said that. However no funds were ever forthcoming. The Defendants rely on Rita's demand to show that Rita fully understood that she had gifted the Defendants the Balloon Payment but wanted it back as she felt she had been kicked out of Fairwinds. **On cross-examination Rita maintained that she wanted her money back because she knew she had not given the Defendants the \$500,000 although she was going to give them something as a Balloon Payment for their mortgage but she never got the chance to give them anything because she got kicked out of Fairwinds in December 2017, over a year later. In my view, Rita's demand made sense in all the circumstances that she provided, namely that as she had never given the Defendants the Balloon Payment then she wanted that money back.** Further, her priority was to ensure that Tirsite secured a Condo and then she would think about what money she would give to the Defendants for them to make a Balloon Payment. Thus, I reject the Defendants position that Rita demanded the funds back because she knew that she had given it to them but was sore about Tirsite having to move out of Fairwinds, she moving out also. **Thus, I find no reliance on this point to support the Defendants' position that Rita made the transfer after full, free and informed consideration.**
81. I now turn to the Defendants' conduct after Rita, Tirsite and Kaelys moved out of Fairwinds. In my view, the Defendants have paid scant attention and concern to them. Rita had moved from her Homestead with practically no financial issues to a position where, after leaving Fairwinds, she was living

with some else and paying rent or making a financial contribution. Meanwhile the Defendants have benefitted from the reduction in their mortgage at Fairwinds, have moved into the Main House, have continued with their lifestyle including travel, cruises and a luxurious 25th anniversary celebration. Further they have made no attempts to assist Tirsite which was a priority for Rita. Tellingly, they have tried to secure funding to pay back the Balloon Payment amount to Rita without success, the explanation being that once Rita made her claim that they wanted to pay her back. **To that point, I am inclined to accept Rita's position that she never agreed to transfer \$500,000 to the Defendants to be applied to their mortgage which is the reason why the Defendants made some effort to try to fund a repayment. In my view, the combination and totality of these events and circumstances that benefit the Defendants to the detriment of Rita and Tirsite lead me to question the credibility and veracity of the Defendants' evidence such that I attach little weight to it. Thus, I find that their conduct does not show that Rita made the transfer after full, free and informed consideration.**

82. Having given the relevant evidence as a whole a balanced consideration bearing in mind all the circumstances of the case, in my view, the presumption of undue influence has not been rebutted.

83. In light of all the reasons stated above, I am satisfied that Rita **made the transfer of \$500,000 under undue influence by the Defendants**. On that basis, I am satisfied that I should grant the relief sought in respect of that claim." [My emphasis.]

8. The Judge then went on to consider what he described as Issue 2, namely Rita's claim for breach of the Accommodation Agreement and claim for promissory estoppel relating to Rita's "life tenancy" in Fairwinds. He dismissed the claim *inter alia* on the grounds that, having accepted Rita's case of undue influence, it was not open to her now to pursue the case of promissory estoppel or breach of the Accommodation Agreement; see [96] of the Judgment. There is no appeal by Rita in relation to that aspect of the Judge's decision. For the purpose of my analysis it is, however, relevant to quote the Judge's findings at [95]:

"95. I refer to my findings on the facts and in the section of undue influence above. In my view, there are several significant points to consider as follows: (a) I have found that there was undue influence by the Defendants on Rita; (b) Rita had not yet determined what amount of the Proceeds of Sale she was going to give to the Defendants as a Balloon Payment for their mortgage; and (c) Rita was evicted before she made the decision of what amount to gift the Defendants for their Balloon Payment. In these peculiar circumstances, I am of the view, that Rita had not cemented or perfected the Accommodation Agreement with the Defendants by voluntarily providing them with any Balloon Payment for their mortgage. It is as if the agreement has been held in abeyance until she had firstly assisted Tirsite with purchasing her Condo and then secondly, and more importantly, determined the amount of a Balloon Payment to the

***Defendants and executed the same.** To my mind, the agreement would be enforceable once Rita had provided the funds, of whatever amount she had chosen, to the Defendants as a Balloon Payment for their mortgage, subject to Tirsite having received her financial assistance from the Proceeds of Sale. On that basis, I am of the view, that the Accommodation Agreement has not been breached.” [My emphasis.]*

9. The Judge then went on to consider what he described as Issue 3, namely Rita’s claim⁴ that, if the Court found in favour of her undue influence case and awarded Rita damages of \$500,000, then, as a result: the \$500,000 was held on constructive trust for her benefit; Rita had a beneficial interest in Fairwinds to the extent of the amount of the unpaid damages; and was accordingly entitled to a declaration of a beneficial interest in Fairwinds as claimed in paragraph 2 of the prayer to the Statement of Claim.
10. Once again, it is important for the purposes of my analysis, to set out the conclusions which the Judge made in this respect, by reference to paragraphs 113ff of his judgment:

“Analysis
Beneficial Interest

113. *In my view, as I have already stated, there was an agreement between the parties for Rita to live at Fairwinds for the remainder of her life rent free. **I have already found that this was in exchange for Rita gifting the Defendants a sum of money yet to be determined and which has not yet happened.** Upon careful consideration of all the evidence, in my view there is no evidence to support Rita’s claim that there was an agreement that she was to have a beneficial interest in Fairwinds. As a starting point, there is no documentary evidence or other express statement of any party that Rita was to obtain or be granted a beneficial interest in Fairwinds.*

114. *Further, in my view, there are no facts upon which I can rely to draw an inference that there was an agreement that Rita was to obtain a beneficial interest in Fairwinds. On the contrary, I refer to the evidence that Rita wanted to do several things with the Proceeds of Sale in an order as follows: (a) keep some for herself (b) give some funds to Cheryl; (c) give some funds to Tirsite to assist her in purchasing a Condo; and (d) **give some funds in an amount to be determined to the Defendants to put on the Fairwinds’ mortgage.** There is no mention of Rita obtaining an interest in Fairwinds. To that point, I find that Rita was intending to give the Defendants some funds as part of the agreement that she live in Fairwinds for the remainder of her life rent free but without obtaining any interest in Fairwinds. Thus, per Lloyds Bank Plc and Ainsworth, I dismiss the claim for a beneficial interest in the property.*

115. *I agree with Mr. Masters that Rita’s claim of having a beneficial interest as a result of the damages claim found in her favour, is more akin to a tracing claim which is a post-judgment application.*

⁴ See paragraph 100 of the Judgment.

Constructive Trust

116. ***In my view, at the time when Rita transferred the \$500,000 to the Defendants' Bank account, she failed to satisfy the requirements of the "three certainties" as set out in Lewin on Trusts and cited in Pedro. To that point, the intention has to be "gathered from the language used" in order for the Court to execute that intention. Simply put, Rita's evidence at trial was about why she transferred the \$500,000 to the Defendants, in particular that she trusted them and she was going to disperse the money as she wished later on. In my view, Rita did not communicate her intention or set it out in any words to anyone. To that point, she denied that she wrote the words "mortgage proceeds" on the Wire Transfer Form. Thus, there is no evidence of the "certainty of words" – or in this case Rita's thoughts being expressed.***

117. *In my view, there is also no evidence of certainty of objects as Rita's plans for the \$500,000 was that some be used for Tirsite's Condo and an amount, yet to be determined, was to be used as a Balloon Payment for the Defendants. Those plans were not expressed at the time of the transfer. In any event, at the time of the transfer, Dawn took the transfer to mean that she could apply the \$500,000 to the Defendants' mortgage. In light of these reasons, in my judgment, I am not satisfied that I can gather from the language used that Rita manifested an intention that the \$500,000 be held on trust by the Defendants for her.*

118. *In light of these reasons, I deny Rita's applications for: (a) a declaration that the \$500,000, is being held by the Defendants by way of constructive trust in Rita's favour as a result of her manifest intention at the time of the transfer; and (b) a declaration of a beneficial interest in Fairwinds as set out in paragraph 2 in the prayer in the SOC.*

Conclusion

119. *I have found that Rita made the transfer of \$500,000 under undue influence by the Defendants. Thus, I grant the relief as follows:*

- a. *Damages to Rita by way of repayment of \$500,000 as the total funds belonging to Rita that the Defendants' applied to their mortgage as the Balloon Payment.*

120. *I have declined the applications for declarations that:*

- a. *There is a constructive trust in Rita's favour; and*
- b. *Rita has a beneficial interest in Fairwinds.*

121. *I grant the relief sought that the Defendants pay statutory interest."* [My emphasis.]

The Appellants' grounds of appeal and their principal arguments in support of such grounds

11. The Appellants' grounds of appeal, and their principal arguments in support of such grounds, which were further developed by Mr Kyle Masters on their behalf in oral argument, may be summarised as follows.

Ground 1 - failure properly to consider relevant evidence

12. The Appellants contended that the Judge failed properly to consider key documentary and witness evidence in the context of the totality of the evidence, when reaching the conclusion that the Disputed Payment was the result of Dawn's undue influence over Rita. In particular, the Appellants submitted:

- (1) *The evidence of Stacy O'Brien:* The Judge failed properly to consider the evidence of Stacy O'Brien ("Stacy"), who was the only witness with no financial interest in the claim. The Judgment contained only two fleeting references to her evidence, one simply confirming that she was a witness for the Appellants [16] and another providing support for the Court's conclusion that Dawn was a "strategic planner" [37]. As a result, the Judge failed to consider material and relevant evidence regarding Rita's personality and the motives of the parties when entering into the arrangements leading up to the Disputed Payment. The following key pieces of Stacy's evidence (none of which were undermined in cross-examination) were relevant to the question of undue influence and the Judge's analysis, but none were considered in the Judgment:

- a. that Rita had spoken with Stacy about her plan to sell the homestead and move in with Dawn and Williston and that she was excited about this;
- b. that Rita told Stacy that she planned to give Dawn and Williston a portion of the proceeds of the sale of the property when she and Dawn arrived at the Bank in June 2016 (before being directed to a Banking officer to make, inter alia, the Disputed Payment);
- c. that Rita was a strong-willed person who would '*not allow someone to make her do something that she did not want to do*' ;

- (2) *Dawn's Letter:* The Appellants submitted that the Judge failed properly to consider Dawn's Letter when assessing whether the transaction called for an explanation (see the Judgment at [68]) or whether the presumption that the Disputed Payment was procured by Dawn's undue influence could be rebutted (see Judgment at [77]). They submitted that, save for providing some consideration as to the "meaning" [sic] of Rita helping Dawn and Williston *significantly*, the Judge failed to analyse Dawn's Letter at all when assessing

other parts of the claim. They referred to the fact that, at [77] of the Judgment (which I have already cited above), the Judge embarked on an analysis relating to the question as to whether there had been a rebuttal.

They submitted that Dawn's Letter provided reasonable responses to Rita's claim and the Judge's conclusion; that the letter had the benefit of being written at a time when the parties were not in litigation; that it also confirmed Dawn's evidence about these events; and that, crucially, all matters raised in Dawn's Letter ran contrary to the Judge's conclusions, and established a number of matters inconsistent with his conclusions, viz:

- a. Dawn and Williston never intended for Rita to contribute to any of the household bills. Tirsite was only going to be required to pay after they moved into the main house, allowing the fair inference to be drawn that the reason for the balloon payment was connected with the need to be able to pay the mortgage without Tirsite and Rita's assistance.
 - b. Rita intended to provide a 'down payment' for Tirsite's condo, not the entire amount, and that Dawn and Williston were always intending to 'go to the Bank' for Tirsite's condominium;
 - c. Dawn and Williston went to the bank to seek approval for the mortgage for Tiriste's condominium as planned, even though Rita had expressed a view that they did not have to do it 'right now'. That provided a counter narrative to Rita's case that Dawn and Williston went to the Bank to try to make-up for the missing \$500,000, which the Court appears to have accepted.
 - d. Dawn and Rita agreed to delay the move into the main house in order to allow Tirsite time to pay off debts discovered during the process of Tirsite applying for the mortgage. That explained the timing of the move.
- (3) *The bank wire transfer slip:* The Appellants submitted that the bank wire transfer slip signed by Rita and marked "*mortgage proceeds*", was not given fair consideration by the Judge, in particular at [76] of the Judgment. They submitted that Rita's version of events required the Judge to accept that the Bank (or some other person) inserted the words '*mortgage proceeds*' after she signed the form agreeing to transfer \$500,000.00 to a third party. Apart from generally preferring Rita's version to Dawn's, the Judgment gave no explanation as to why this documentary evidence was not accepted. There was no basis to believe that a Bank would alter a transfer form after the fact. But the Judge did not provide any reasoning as to how the words appeared. In circumstances, the Judge failed to engage with this point with the result that the Court of Appeal could consider that the findings of the Judge were plainly wrong.

- (4) *The fact that Tirsite had applied for a mortgage in September 2016.* She was a joint account holder with Rita and claimed to have \$147,000 in cash available to her. That would have included the sum held back by Rita in her plan. The Appellant submitted that such evidence permitted the inference to be drawn that Tirsite knew that she had those funds available to her to assist with the mortgage. That was consistent with Dawn's evidence that Rita and Tirsite knew about the plan for Dawn and Williston to assist her with the mortgage and that Rita would provide the down payment.
- (5) *Dawn and Williston were not in need of funds prior to the Disputed Payment.* The suggestion that the Disputed Payment was driven by Dawn's desire to have a lavish lifestyle had to be considered in the context of the goal of the parties. At the time of the Disputed Payment, Dawn and Williston were up-to-date with their mortgage payments and had been in good standing with the Bank, as confirmed by the relevant bank statements.
- (6) *Conclusion on Ground 1:* Accordingly, the Appellants submitted that each of the above matters provided a counter narrative that warranted consideration before such evidence was dismissed. In accordance with the decision in *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] EWCA Civ 1413, the Judge was bound to address these matters and to explain why he did not accept them, if such was the case.

Ground 2: The Learned Judge failed properly to apply the test for undue influence.

13. The Appellants contended that the Judge failed properly to apply the test for undue influence. They submitted that:

- (1) In *Etridge* Lord Clyde held at [93] that the primary question for the Court in any undue influence claim was whether:

“[a]t 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 was no undue influence. In the former case, whatever the relationship of the parties and however the influence was exerted, there will be found to have been an actual case of undue influence.”

- (2) The case of *Thompson v Foy* [2009] EWHC 1076 Ch at [99 (vii)], cited with approval in *Pedro et al v Pedro and HSBC Bank Bermuda Limited* [2019] Bda LR 66 (“*Pedro*”), further assisted in that it stated that:

“The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, 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” .

- (3) The Judge held that there was presumed influence. The Bermuda case of *Wong, Wen- Young v Grand View Private Trust Company Limited et al* [2022] SC (Bda) 44 Com (22 June 2022) provides as follow regarding the test for presumed undue influence at [450]:

“It is clear beyond serious argument that the presumption will typically only arise when a claimant can establish a prima facie case of undue influence because of:

- (a) the existence of a relationship of trust and confidence; and*
- (b) an impugned transaction which is (absent a satisfactory explanation) otherwise indicative of a risk of undue influence being exercised by the 'dominant' party over the vulnerable putative 'victim'.*

- (4) The Judge correctly set out the law at [45]-[60] of the Judgment. In particular, at [52] Judge confirmed that there must be:

"...an additional factor, such as an illness leading to dependency, or a background of trust and confidence in relation to the family's financial affairs, if a relationship of influence is to be found." (per Snell's Equity at 8-031).

- (5) But when the Judge came to consider whether there was a relationship of trust and confidence as between Dawn and Will, on the one hand, and Rita on the other, as required in the legal sense, the Judge cited factors in support which were clearly not 'additional' (see (65] of the Judgment). Thus, the Judge incorrectly relied upon:

- a. the fact that Rita's husband died years before the sale of the property which was not a vulnerability that was special or specific;
- b. the fact that Dawn and Williston convinced Rita to move in with them after the sale of the latter's property; that was not a 'fact' at all; it was a matter in dispute; Dawn and Will's evidence has been that Rita proposed the sale; the Judge's ruling in this regard appeared to have had no appreciation of this fact; in any event, when considered in the broader context that fact was not an additional factor capable of founding influence;
- c. the Judge's finding that Dawn assisted with the sale of Rita's property: “staging” the property and taking instructions to list it at a price set by Rita on 'emoo' could hardly be considered managing Rita's financial affairs;

- d. Rita's love and affection for Tirsite, and the acknowledgement by the Appellants of that fact, was also not a factor that could properly be considered a foundation of a relationship of influence.
- (6) The Judge also wrongly applied the law in other respects. At [66] the Judge dismissed the facts that Rita *'took care of her own finances'*, drove her own taxi, and that *'no-one could tell [Rita] what to do'*, as highlighting the fact that *'...Rita got on with some basics of everyday life'*, finding that such matters did not outweigh those cited above when considering the relationship between the parties. The Judge did not attempt to reconcile his finding that Rita managed her own financial affairs with his earlier conclusion that, because Dawn had been involved in Rita's financial affairs in relation to the selling of Rita's property, that founded a relationship of influence. There was no evidence that Dawn or Williston had access to (or were co-beneficiaries with) Rita's accounts. They were not. It could not be the case that Dawn's involvement amounted to a relationship of influence, whilst Rita's self-management of her financial affairs did not counteract that influence.
- (7) The Judge made no findings of fact about Dawn's actions at the bank which might have demonstrated that, even if there had been a relationship of influence, how Dawn took advantage of it to procure the making the Disputed Payment. This was a requirement of the Judge's analysis. This Court in *Lightbourne-Lamb v Brightside Enterprises Ltd* (2024) CA (Bda) 9 Civ confirmed that *"... in order to address the question of undue influence it is necessary to determine exactly what occurred at the relevant time."* [94].
- (8) The Judge wrongly concluded, as a result of the matters set out above, that there was a relationship of ascendancy acquired over Rita by Dawn and Williston of which the Appellants took advantage. But he did not say how, as required by *Lightbourne- Lamb*. At [68], the Judge provided his analysis of the Disputed Transaction. But this analysis started and ended with accepting Rita's allegation that Dawn urged Rita to pay the funds into her and Will's bank account for safekeeping at the time of the Disputed Transaction. The Judge did not engage with the fact that this was a highly improbable thing for Rita to do or consider Rita's otherwise strong personality in the context.
- (9) The documentary evidence confirmed that the cheque representing the entire proceeds of sale of Rita's property was first deposited into Rita's own bank account and that, subsequently, a \$20,000 cheque was made out to Rita's step-daughter, Cheryl. A further wire transfer was prepared and approved by Rita for the \$500,000 to be paid into Dawn and Williston's HSBC account. The Judge did not engage or otherwise assess the evidence from Dawn which raised the fair question as to why money would be transferred out of an account Rita controlled (without Dawn and Will) into an account she did not control at all for

'safe keeping'. Rita's explanation that she trusted Dawn and Williston to keep the money safe was accepted by the Judge without assessing why Rita believed it was safer to pay money out of her account and into the hands of a third party. The frailty of this finding was further compounded by the Judge's acceptance that Rita both trusted Dawn and Williston but also implored them 'not to screw her over'. It could not be credible for a witness to hold both positions and the Judge's acceptance of this as evidence in support of a relationship of trust and confidence could not be sustained

- (10) As established by the independent evidence of Stacy O'Brien, Rita was strong-willed and independent. The Judge confirmed this position at [66] of the Judgment. Rita's own pleadings confirmed that she was '*more than capable (and remains more than capable), comfortable and content to take care of her own needs*'. This evidence was not disputed by Rita.
- (11) The personality of the parties was an important and relevant factor in assessing undue influence. The Judge's findings (limited as they are) on the issue of personality in this case should be contrasted with those of the victim in *Pedro* at [192] - [205]. Put shortly, there was no evidence that Rita was anything other than a person who was strong willed and capable of making her own decisions. She was not of limited capacity or a person who had relied on her husband or others previously for particular matters. The Judge failed to engage with this point adequately and, as a result, his findings were unsafe.

Ground 3⁵: The learned Judge erred in law when he failed properly to consider the extent to which the Disputed Payment could not be readily accounted for by the ordinary motives.

- 14. Under these heads, the Appellants submitted that the Disputed Payment had a very clear and reasonable explanation. In support of these grounds, they submitted as follows:

- (1) *Thompson* confirmed that the question of whether a transaction calls for an explanation cannot be answered by an objective view of the transaction in isolation, providing at [101]:

"Fifth, in order to determine whether a transaction is explicable in terms other than undue influence, it is necessary to look at it in its context and to see what its general nature was and what it was trying to achieve for the parties."

- (2) Snell at 8-038 confirms:

"The conclusion that the transaction calls for explanation is not based simply on the objective, general features of the transaction: it can be

⁵ The Appellants also addressed ground 7 under this head.

reached only once the specific facts of the case have been considered, and no explanation can be found as to why B should have chosen to enter into the transaction, except that his or her intention was procured by undue influence.”

- (3) At [69] of the Judgment, the Judge accepted the test as set out in *Thompson and Snell*. However he failed to consider the broad basis on which the need for the balloon payment arose. The starting point was to provide comfort to Rita that Kaelys would be cared for by Dawn and Williston in the event that Rita was unable to do so. Tirsite was not working and had suffered acute mental health challenges making it very plausible that these matters would be on Rita's mind as Kaely's primary caregiver. The Judge was wrong not to include these specific facts of the case in his assessment as to whether there was an explanation other than undue influence.
- (4) At [70] the Judge applied an 'objective' test, hypothesizing whether a mother should be expected to contribute financially when she came to live with an 'ordinary' son. But the test was subjective. Dawn and Williston were not considering whether Rita alone would come to live with them; they were including (and did include) Tirsite and Kaelys, too. This changed the costs and required the move from the apartment into the main house, which had the knock on effect on finances discussed above. The Judge was wrong to embark on this analysis and, in any event, misdirected himself on a material issue of fact in the process.
- (5) The analysis at [71] relating to Rita's other intentions required the Judge to ignore Dawn's Letter. As set out above, the failure to engage with this evidence renders decisions made without reference to it *'plainly wrong'*.
- (6) The undisputed fact is that Rita, Tirsite and Kaelys did live at the Appellant's property, without contributing to the monthly mortgage (albeit that Rita had obviously contributed the significant balloon payment), in accordance with the agreements set out in Dawn and Williston's evidence. This fact was overlooked during the court's analysis of this matter despite, this evidencing the veracity of Dawn and Williston's evidence on this issue.
- (7) The Appellants' evidence was that the Disputed Payment was significant because that was the amount required to allow all parties to move into the main house without financial hardship. In the context of what the parties were attempting to achieve, it was clear that the Disputed Payment had a very clear and reasonable explanation; accordingly it was not open to the Judge to find that there was no other explanation except that Rita's intention was procured by undue influence.

Ground 4: The Judge took into account irrelevant considerations when reaching conclusions about undue influence.

15. Under this head the Appellants contended that the Judge took into account irrelevant considerations. In particular, they submitted:
 - (1) At [81] the Judge took into account '*... [the Appellants'] conduct after Rita, Tirsite and Kaelys moved out of Fairwinds...*' as part of his analysis of whether the presumption that there was undue influence had been rebutted. The parties moved out of the Appellant's home in December 2017, some 18 months after the disputed Transaction. It is not clear how the actions after the transaction can support the conclusion that there was undue influence before.
 - (2) The Judge clearly took into account the fact that, after being notified of Rita's claim in 2018, Dawn and Williston went to the bank to secure funding to pay back the Disputed Payment: see the Judgment at [81]. It was drawn to the Judge's attention that the fact that Dawn and Williston made attempts to repay the debt after being notified of the claim was subject to without prejudice privilege. This initial objection could be seen in the Transcript Bundle, Tab 4 pages 8-10. Following, the objection, counsel for the Appellants wrote to counsel for Rita explaining that the latter had solicited answers from Dawn which were the subject of "*without prejudice discussions*". Prior to closing submissions, counsel for both parties made submissions about this (Tab 6 of the Transcript Bundle). The Judge was invited to put the without prejudice material out of his mind or, alternatively, to treat it no differently from any other person who tries to make attempts to settle a dispute before coming to Court. Crucially, the Judge confirmed his understanding of the evidence was that whatever the comments were, there was no admission of liability by Dawn. The Judgment, however, suggests that the Judge wrongly did infer an admission of liability from these matters.
 - (3) In *AZ v BY* [2023] EWHC, 2388 (TCC) [124], the court considered that an adjudicator who had seen without prejudice material could not be objective. The same should apply here. In line with *AZ*, the Judgment has left an "*inevitable question mark*" over whether the Judge was biased in making his decision. If the Judge considered that the "without prejudice" material was at the front of his mind when coming to his decision he should have decided whether he should have dismissed the matter on the account of his bias. It is likely he would have. The Judge fully considered the "without prejudice" information when making his Judgment and he was biased in his decision. On this basis, the Judgment is unsafe and cannot stand.

Ground 5: Rita's Fund Allocation Plan in her pleading contradicts her evidence and, in any event, both are inherently improbable.

16. Under this head the Appellant submitted as follows:

- (1) In Rita's Fourth Affidavit, she explains her Fund Allocation Plan for the proceeds of sale and how she planned for the funds to be allocated; however this plan was different from her pleading [3/25/7]. The Judge concluded that the allocation of funds plan as set out in Rita's witness evidence was the plan [42] but did not deal with the contradiction that arose from her pleading.
- (2) It was incumbent upon the Judge to consider and determine for himself which of these versions of the evidence satisfied him and why he was able to reject the other with Rita's credibility intact. The Judge did not make any findings about this topic.

Ground 6: The learned Judge failed to consider that Rita always intended to gift Williston and Dawn a portion of the Net Proceeds.

17. Under this head the Appellant submitted as follows:

- (1) Not unlike the contradictory nature of the Fund Allocation Plan, Rita's evidence on the issue of the balloon payment was troublingly inconsistent. The Judge did not address the inconsistency at all, simply preferring one version of the evidence over another without dealing with the clear contradiction.
- (2) In her Fourth Affidavit [4/40/38] Rita stated "*Whilst I told the Plaintiff's I would assist them with a Balloon Payment towards their mortgage, I never agreed for the entirety of the BD\$500,000 to be deposited into their HSBC mortgage account*". In her reply witness statement [11/223/52] Rita gives contradictory evidence "*The truth of the matter is that I never intended to make a payment on Williston and Dawn's Mortgage.*" This was also in contradiction to Rita's case [1/4/7(b)(ii)] where it was accepted that she did intend to provide a balloon payment.
- (3) The Judge did not deal with these inconsistencies the Judgment. Accordingly, this Court is entitled, applying *Simetra*, to conclude that the findings relating to whether there was an agreement to make a balloon payment or not are plainly wrong and worthy of reconsideration.
- (4) Further, and alternatively, on the assumption that Rita always intended to provide the Appellants with a portion of the proceeds from the sale of her property, and in the event that this Court were not with the Appellants on the primary grounds of appeal, it was not in the interest of justice for the Judge to

have ordered that the entire Disputed Payment be returned. The evidence did not allow for the Court to reach that conclusion.

18. For all the above reasons, as further developed in oral argument, the Appellants submitted that the Judgment should be set aside.

The Respondent's principal arguments in support of the Judgment

19. As stated above, Mr Dantae Williams, of Marshall Diel & Myers, appeared on behalf of Rita, the Respondent, and sought to uphold the Judgment on the basis of what he submitted were the clear evidential findings of the Judge. In summary, he submitted that, in the context of all the evidence available to the Judge and having observed the parties give evidence at trial, it was unsurprising that the Appellants were found not to be credible witnesses and the impact of such a finding underscored all the evidence advanced by them. Further, as stated at [82] of the Judgment, Mr Williams submitted that it was clear that the Judge had "*given the relevant evidence as a whole a balanced consideration bearing in mind all the circumstances of the case...*"
20. Since, to a large degree, the Respondent's detailed arguments are reflected in my analysis, it is not necessary to rehearse them further.

Analysis and determination

The resulting trust issue

21. The Respondent did not file a Respondent's Notice of Appeal. There is thus no appeal against the Judge's refusal to grant a declaration in Rita's favour (see [116] – [120] of the Judgment) that the Appellants held the Mortgaged Property, i.e. Fairwinds, on an implied or constructive trust in her favour in the sum of \$500,000; see for example paragraph 16 of Rita's supplemental submissions in the Supreme Court dated 13 September 2023 where this claim is put forward. In summary, the basis for the Judge's refusal to conclude that there was a constructive or implied trust in Rita's favour, was that, at the time when she transferred the \$500,000 to the Appellants' bank account, she had failed to satisfy the requirements of the "*three certainties*" as set out in *Lewin on Trusts* and cited in *Pedro*.
22. Notwithstanding that, it is clear to me that, in the light of the Judge's various relevant findings in relation to the Disputed Payment, his analysis based on the hypothesis of an asserted constructive trust misses the point. My reasons are as follows:
 - (1) At [17] the Judge said that "*A main issue in this case is whether Rita intended to gift the Balloon Payment which I will turn to later.*" In my view the clear import of the entirety of the Judgment, although he did not expressly so state, is that he concluded that Rita not only did not intend to gift the \$500,000 to the

Appellants but also that she had made **no effective gift** of the Balloon Payment (viz. the \$500,000) to the Appellants.

- (2) As he stated at various places in the Judgment, the Judge clearly accepted the evidence of Rita and preferred it to that of the Appellants, whose evidence he rejected as self-serving, evasive and not credible; see for example [36, 37, 40] of the Judgment.
- (3) Thus, he accepted Rita's evidence that, when she made the Disputed Payment of \$500,000 to the Appellants, Rita had not yet decided how much, ultimately, she would gift to Tirsite or the Appellants out of the \$500,000; see, for example:
 - a. [6] where he stated Rita's case in this respect, which he found proved;
 - b. [22] where he refers to the fact that at no stage did she ever tell the Appellants that she was giving them \$500,000 of the Proceeds of Sale as a direct payment for their mortgage or for any other purpose;
 - c. [28] where he refers (a) to Rita's denial that she wrote the words "*Mortgage Proceeds*" and that she did not remember seeing those words on the Wire Transfer Form when she signed it - evidence which he clearly accepted; and (b) to Dawn's evidence that the bank official had written those words on the form once the bank official had asked Rita what the transfer was for an Rita had explained that it was for the Appellants to apply to their mortgage - evidence which he clearly rejected;
 - d. [42] where he finds as a fact that Rita's position as to how the Proceeds of Sale were to be used was as Rita stated, namely that she had not determined at the time of the Disputed Payment what portion of the \$500,000 was to be paid to the Appellants and that she did not intend to provide \$500,000 to reduce their mortgage⁶.
- (4) Moreover, and importantly, at [68] the Judge held that he preferred Rita's evidence that:

"she transferred the \$500,000 to the [Appellants'] HSBC account because at BNTB, Dawn had urged her to do so for safekeeping for later disposition to assist Tirsite to purchase a Condo and to assist the [Appellants] with a Balloon Payment, amounts to be determined"

⁶ There is a slight discrepancy between paragraphs 6 and 42 of the Judgment because in [42] the Judge does not deal with Rita's assertion that, in addition to the \$100,000 to be kept in a joint account of hers with Tirsite, she was planning to allocate or retain a further \$100,000 out of the \$500,000 deposited into the Appellants' HSBC account for her own benefit. This does not matter because the critical fact is that the Judge found that Rita had made no decision, and therefore there was no certainty, as to what the allocation of the \$500,000 was to be.

and “that in cross-examination she denied that she gave the \$500,000 to them”.

In this context he clearly rejected Dawn’s evidence because he said that:

“Rita’s evidence had a resounding ring of truth and logic to it, whilst to my mind, Dawn’s evidence was overwhelmingly self-serving in that she seemed determined to reduce the Fairwinds’ mortgage whilst maximizing income from the occupants at Fairwinds and continuing to enjoy her quality of life.”

- (5) Likewise, he clearly rejected the Appellants’ evidence that the transfer of the \$500,000 was with Rita’s full knowledge and agreement, for the purposes of applying it to their mortgage; see [69] where he said:

“Rita’s evidence was that the transfer of the \$500,000 was at Dawn’s insistence for Dawn to hold for safekeeping and a later disposition, some to help Tirsite to purchase a Condo and an as yet undetermined amount to help with a Balloon Payment to the Defendants’ mortgage. The Defendants state that the transfer of the \$500,000 was, with Rita’s full knowledge and agreement, for the purpose of applying it to their mortgage with a view that it would lower the monthly mortgage payments and it was the sum that would make the plan work of all of them moving into the Main House.”

- (6) I also refer to [75,76,77, 80 and 81] of the Judgment and in particular at [80] where the Judge accepted Rita’s evidence that she had never given the Appellants the \$500,000 for the purposes of reducing their mortgage:

*“On cross-examination Rita maintained that she wanted her money back because **she knew she had not given the Defendants** the \$500,000 although she was going to give them something as a Balloon Payment for their mortgage but she never got the chance to give them anything because she got kicked out of Fairwinds in December 2017, over a year later. In my view, Rita’s demand made sense in all the circumstances that she provided, namely that as she had never given the Defendants the Balloon Payment then she wanted that money back.”*

- (7) The critical point is that the Judge accepted Rita’s evidence that, at BNTB, Dawn had urged her to transfer the \$500,000 to the Appellants’ HSBC account “for safekeeping” and for implementation at a later stage of Rita’s intention to make future gifts to Tirsite and the Appellants respectively out of the \$500,000 in as yet unascertained amounts. And he rejected Dawn’s evidence that Rita knew and intended that the sum would be applied in payment of the Balloon Payment in reduction of the Appellants’ mortgage.

- (8) Against the above background, one has to consider what the Judge meant at [117], when, in dealing with the so-called “Constructive Trust” point, he said:

*“117. In my view, there is also no evidence of certainty of objects as Rita’s plans for the \$500,000 was that some be used for Tirsite’s Condo and an amount, yet to be determined, was to be used as a Balloon Payment for the Defendants. Those plans were not expressed at the time of the transfer. **In any event, at the time of the transfer, Dawn took the transfer to mean that she could apply the \$500,000 to the Defendants’ mortgage.**”* [My. Emphasis]

- (9) The statement which I have bolded – if and insofar as it was intended to mean that Dawn positively thought she was *entitled* to apply the \$500,000 in the reduction of the Appellants’ mortgage -would have been wholly inconsistent with the Judge’s previous (a) acceptance of: Rita’s evidence (as summarised above) that Dawn had urged her to put the funds into the Appellants’ HBSC account for “*safekeeping*” and that Rita had not intended to make, and had not made, a gift of the \$500,000; and (b) rejection of Dawn’s evidence that Rita knew and agreed that the \$500,000 would be so applied, which finding necessarily carried the implication that Dawn knew at the time that Rita had *not* so known and agreed to the application. In my judgment, however, the Judge, in the context of his conclusion that there was no *express or constructive trust*, was saying no more than that Dawn simply took the view that, since she had the \$500,000 in the Appellants’ account, she could apply it in reduction of their mortgage. He was not expressing any conclusion that she was, or thought she was, entitled so to do. Even if she had thought that, there would have been no basis for her to have held that view.

23. One can understand why the Judge came to the (correct) conclusion that no *express trust*⁷ had been established on the basis that:

- (1) as the Judge had held, there had been no communication of any intention on the part of Rita to make a gift or declare a trust at that time over the \$500,000 - not least because (as he had held) she had no intention to make a gift at that time; and
- (2) there had been no statement, and no communication, as to what beneficial interests each of Rita, Tirsite and/or the Appellants were respectively to have in what particular proportions of the \$500,000, because, as he had likewise found, Rita had yet to decide what amount of the \$500,000 she wanted to gift to Tirsite and the Appellants respectively and what amount she wanted to retain.

⁷ Paragraph 116 of the judgment is headed “*Constructive Trust*”. But in paragraphs 116 ff the Judge addressed the question as to whether the three certainties (of words, subject matter and objects) necessary for the creation of an express trust were established. He does not appear to have addressed the situations in which a constructive trust might have arisen.

24. However, where in my judgment the Judge went wrong⁸ was not to conclude that, on the facts as he had found them, the correct legal analysis was that the Appellants held the \$500,000 on a *resulting* trust in favour of Rita. In circumstances where there had been a voluntary payment of the \$500,000 by Rita to the Appellants for safekeeping, with the result that the Appellants took the legal title to the funds, but there had been no effective gift of, or imposition of an express trust on, those funds or any part thereof, a *resulting* trust arose in favour of Rita. The relevant passage in *Snell* (paragraphs 25 – 001) states as follows:

“Express trusts are created by the actual intention of the settlor that the person holding the legal interest in the property should take it subject to the beneficial entitlement of another. It may happen, however, that a transferor of property causes the legal interest to vest in another person in circumstances where it is unclear whom the transferor intends to have the beneficial interest in it. Here, by operation of law, a resulting trust may arise for the benefit of the transferor. It gives effect to a default presumption about the intention of a person in making a gratuitous transfer of property: although he has transferred the legal interest, he would generally not intend the transferee to take the property beneficially. The name “resulting” describes the effect of the trust in causing the beneficial entitlement to the property to spring back to the person who transferred it. Since it arises by operation of law it may take effect informally.

There are two main situations where resulting trusts may arise: where there is a gratuitous transfer of property and where an express trust of property fails to dispose of the beneficial interest in property.” [My emphasis.]

25. Further, at paragraphs 25 – 015, 25– 019 and 25 –022, *Snell* states:

“25 – 015

Resulting Trust on Voluntary Transfer of Property

Related to the resulting trust that arises when one person purchases property in the name of another is the trust where the current owner of property, A, makes a voluntary transfer of the property to another, B. The two kinds of transaction are fundamentally alike. Where A pays money to B for no consideration, B is immediately presumed to hold the money on resulting trust for A. When B then purchases the property, the effect of overreaching is that the trust transposes itself to the property acquired with the money. The rules for rebutting the presumption of resulting trust are similar in the two kinds of case. [My emphasis.]

25– 019

(b) Personal property.

(1) General. For property other than land, the general law about the presumption of resulting trust applies unmodified. On a voluntary transfer of personal property the transferee is presumed to hold on a resulting trust for the

⁸ It is fair to say that it would appear the Judge received no assistance from Rita's counsel in relation to such analysis, since her case was apparently presented on the basis of a remedial constructive or implied trust; see Rita's supplemental submissions dated 13 September 2023.

transferor unless the presumption of advancement applies or the transferor is proved to have had an actual intention to make the transferee the beneficial owner of the property

3.— FAILURE OF EXPRESS TRUST TO EXHAUST BENEFICIAL INTEREST PROPERTY

1. General

25 – 022

A resulting trust may arise where property has been transferred on express trusts which do not dispose of the entire beneficial interest in property, or where an express trust fails at the outset. It has been said that a resulting trust arising from the failure of an express trust arises “automatically”, irrespective of the transferor’s intention. This is apt to be misunderstood if taken to imply that the transferor’s intentions are irrelevant. The better view is that a resulting trust of this sort, like that arising from a gratuitous transfer of property, arises by operation of law in circumstances where evidence of the transferor’s actual intentions is uncertain. It gives effect to a presumption that the transferor would not intend the transferee to take the property beneficially when the original trust fails to dispose of the entire interest in the property.”

26. The critical point of this analysis is that, in circumstances where the Judge held on the evidence that, by means of the Disputed Payment, Rita had merely transferred legal title to the \$500,000 to the Appellants, but had not in fact made a gift or decided how the funds were to be divided beneficially as between Tirsite, the Appellants and herself, there was, in fact, no effective gift or transfer of any beneficial interest in the funds to the Appellants. In other words, the Disputed Payment was merely a voluntary transfer of the funds for safekeeping. I conclude that the implication of the Judge’s rejection of the Appellants’ evidence is that they were aware that Rita had not, at the time of the Disputed Transfer, decided how much they were to receive out of the Proceeds of Sale. Thus, on a proper analysis, the consequences of the Judge’s conclusion on the evidence is that, on the transfer of the \$500,000 from Rita’s BNTB account to the Appellants’ chequing account number 002 – 098952 – 011 with HSBC on 29 June 2016, the entirety of the beneficial interest in the funds were held by the Appellants on resulting trust for Rita. When, on 30 June 2016, the funds were subsequently withdrawn by the Appellants from the Appellants’ chequing account (pursuant to the Appellants’ previous written instruction dated 30 March 2016) and credited to the Appellants’ mortgage account number 010 – 659605 – 301, that was, on the basis of the facts as found by the Judge, a payment made in breach of that resulting trust.
27. Therefore, once the Judge had held on the evidence, as in my view he did, that there had been *no effective gift* of any beneficial interest to the Appellants in the \$500,000 as a result of the Disputed Transfer (because there had been no intention on the part of Rita to gift the entirety of the \$500,000 to the Appellants and they knew that fact), there was strictly no need for him to go on to consider whether any putative “gift” should be set aside on the grounds of undue influence. Put another way, the analysis of resulting trust arising from a voluntary payment with no disposition of the underlying beneficial

interest and therefore no effective gift, takes effect prior to the question as to whether the Disputed Payment should be set aside on the grounds of undue influence. The result of that analysis might arguably be that, by subrogation *pro tanto* to HSBC's rights as mortgagee (whose mortgage the payment of the \$500,000 *pro tanto* reduced), Rita obtained a charge over the Mortgaged Property to secure repayment of that sum. Such an interest would take effect as a proprietary *security* interest as opposed to a proprietary *beneficial* interest, the latter being the case which the Judge considered and rejected in the context of express and/or constructive trust.

28. Accordingly, in my judgment, Rita, if she wishes to do so, should be permitted to argue that the consequences of the Judgment, if and to the extent upheld by this Court on this appeal, are that, because, as a result of the Disputed Payment, the \$500,000 was held on resulting trust in Rita's favour in the Appellants' chequing account at HSBC as at 29 June 2016, and then paid on 30 June 2016, in breach of that trust, to the Appellants' mortgage account in reduction of the mortgage, she is indeed entitled to a proprietary security interest in the Mortgaged Property as defined to secure repayment of Rita's \$500,000. Obviously, the Appellants would be at liberty to respond to such an argument and it might well be that the mortgagee, HSBC, would also need to be a participant in such proceedings, if Rita were to contend that her subrogation rights in the Mortgaged Property ranked equally or in priority to HSBC's rights as mortgagee.
29. Indeed, the Judge seemed to envisage the possibility of some post-judgment tracing application in [115] of the Judgment when he stated:

"115. I agree with Mr. Masters that Rita's claim of having a beneficial interest as a result of the damages claim found in her favour, is more akin to a tracing claim which is a post-judgment application."

The arguments on the Appellants' appeal

30. I turn now to consider various arguments put forward by the Appellants in support of their appeal. As is apparent from the previous paragraphs of this judgment, in my opinion the real issue (or certainly the first issue) which the Judge needed to decide was whether Rita had indeed intended to make, or had made, a gift by means of the Disputed Payment. Only if he decided that she had indeed made an effective gift, was it necessary for him to go on to consider whether there had been undue influence on the part of the Appellants which procured the making of such gift. As I have stated above, in my view it was not necessary for him to do so, given his finding that no effective gift had been made and what I regard as the necessary consequential analysis of resulting trust. However, since neither the appeal, nor the case at first instance, was argued on this basis, it is appropriate that, despite my views above, I should nonetheless go on to consider the various arguments put forward in relation to the undue influence case.

31. In my judgment, despite the numerous submissions presented by the Appellants, all of which I have carefully considered, there is no basis for departing from the Judge's comprehensive conclusions that:
- (1) having heard all the witnesses, he preferred Rita's evidence and rejected the Appellants' evidence as not credible;
 - (2) there was a relationship of trust and confidence between Williston and Dawn on the one hand and Rita on the other hand, in relation to financial affairs, which went beyond a mere familial relationship and which existed for some time prior to the Disputed Payment;
 - (3) the Disputed Payment and the subsequent application of the \$500,000 in the reduction of the Appellants' mortgage liability, was a transaction that called for an explanation, given its size and the circumstances surrounding it, including the fact that Rita had no intention of making a present effective gift by means of the Disputed Payment, as she had not made up her mind as to the amounts which she was going to give to Tirsite and the Appellants, or indeed retain herself, from the \$500,000;
 - (4) accordingly, the presumption of undue influence arose in Rita's favour;
 - (5) the Appellants had failed to discharge the presumption of undue influence;
 - (6) Rita had been unduly influenced to make the Disputed Payment.

I set out my reasons for my conclusion in the following paragraphs of this judgment.

32. In *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] EWCA Civ 1413 the English Court of Appeal set out helpful guidelines as to what is required by a judge when considering the evidence. Thus at [46] Males LJ, with whom Peter Jackson LJ and McCombe LJ agreed, stated as follows:

"Without attempting to be comprehensive or prescriptive, not least because it has been said many times that what is required will depend on the nature of the case and that no universal template is possible, I would make four points which appear from the authorities and which are particularly relevant in this case. First, succinctness is as desirable in a judgment as it is in counsel's submissions, but short judgments must be careful judgments. Second, it is not necessary to deal expressly with every point, but a judge must say enough to show that care has been taken and that the evidence as a whole has been properly considered. Which points need to be dealt with and which can be omitted itself requires an exercise of judgment. Third, the best way to demonstrate the exercise of the necessary care is to make use of "the building blocks of the reasoned judicial process" by identifying the issues which need to be decided, marshalling

(however briefly and without needing to recite every point) the evidence which bears on those issues, and giving reasons why the principally relevant evidence is either accepted or rejected as unreliable. Fourth, and in particular, fairness requires that a judge should deal with apparently compelling evidence, where it exists, which is contrary to the conclusion which he proposes to reach and explain why he does not accept it.”

Accordingly in the present case, it was not incumbent on the Judge to deal expressly with every point, provided that he demonstrated that he had taken care and that the evidence as a whole had been properly considered by him. Obviously, as Males LJ states, it was important for him to identify the relevant issues, to deal with the evidence bearing on those issues, and to give reasons why he either accepted the principally relevant evidence or rejected it as unreliable. In my judgment the Judge adequately did this. I agree with his statement at [82] that he has “*given the relevant evidence as a whole a balanced consideration bearing in mind all the circumstances of the case...*”.

Ground 1

33. Under this Ground the Appellants submit that the Judge failed to consider various aspects of the evidence properly or in the context of the totality of the evidence before reaching his conclusion that the Disputed Payment was procured by undue influence.

Evidence of Stacy O’Brien

34. I deal first with the Appellants’ complaint about the manner in which the Judge dealt with the evidence of Stacy. In my judgment no criticism can legitimately be sustained about the Judge’s treatment of Stacy’s evidence. Contrary to the Appellants’ submission, she was not an independent third-party witness. In cross-examination she admitted that she considered Dawn and her to be like sisters, that she had had a close relationship with Dawn for about 24 years, and that they supported one another. She had also had a [sexual] relationship with Dawn’s brother. She had read the pleadings of both parties, as well as the witness statements, albeit at a high level.
35. Nor were the alleged omissions from the Judgment, of which the Appellants complain, of any, or any material, significance. Much of her evidence repeated, on a hearsay basis, the Appellants’ own evidence and was either undermined in cross-examination or was irrelevant to the issues which the Judge had to determine. Stacy’s witness statement did not say anything about “*Rita’s plan*” but merely stated that there was a discussion about selling the Homestead versus renting. In cross-examination she admitted that she did not remember all the intricate details of the conversation. So far as the Appellants’ complaint that the Judge did not refer to Stacy’s evidence that Rita allegedly told Stacy that she, Rita, planned to give Dawn and Will a portion of the proceeds of the sale of the property when she and Dawn arrived at the BNTB in June 2016, the reality is that

Stacy's evidence on this point added nothing. Rita's own case was that she intended to give a portion of the proceeds of the sale of the Homestead to Williston and Dawn, but that she had not, as at the time of the Disputed Payment, decided how much. In cross-examination Stacy accepted that Rita had never told her, whether at the meeting at BNTB or otherwise, how much Rita intended to give to the Appellants or that she intended that any portion of the \$500,000 should be used in reduction of the Appellants' mortgage; Stacy accepted that she was unable to speak to any intention on the part of Rita in relation "*to depositing funds into a mortgage account*" and that her evidence as to such matters had derived exclusively from Dawn.

36. Likewise, the fact that Stacy said that Rita was a strong willed person who would '*not allow someone to make her do something she did not want to do*' added little to the extensive evidence which the Judge had before him in relation to Rita's character, and the fact that he did not refer to it, in circumstances where Stacy was obviously not an independent witness, is not surprising.
37. In conclusion, in my judgment, the Judge, in accordance with the guidelines laid down in *Simetra*, was clearly entitled not to refer to these aspects of Stacy's evidence in the Judgment and to exercise his own discretion as what he regarded as relevant to his determination.

Dawn's Letter

38. I do not accept the Appellants' submission that Dawn's Letter provided "*a reasonable response*" to the Judge's conclusion that the Disputed Payment called for an explanation or that it demonstrated that Rita fully understood that she was transferring the \$500,000 to the Appellants to reduce their mortgage to make "*the plan work of all of them living in the Main House*". The letter was written in February 2017, some seven months after the Disputed Payment, and did not mention the fact of the Disputed Payment or that it had reduced the mortgage. Indeed, it was vague as to the "*help*" in respect of which the Appellants were thanking Rita. At this time Rita and Dawn were not speaking to each other and Rita did not reply to the letter. Although by this time Rita appears to have known about the application of the Disputed Payment, the Judge at [79] accepted her evidence in cross-examination that she, Rita:

"maintained that Dawn was not thanking her for the \$500,000 because she had not given them \$500,000 as a gift. However, she had purchased groceries and water for the Defendants. However, it is clear to me that there is no mention of the Balloon Payment in Dawn's letter. In my view, Dawn may very well have been talking about the Balloon Payment as the significant help because by that time Dawn [sic – presumably Rita] did know that it had been applied to the mortgage and the monthly payments had been reduced. However, that does not mean that Rita accepted that the Balloon Payment Dawn was the significant help being referred to in Dawn's Letter – as Rita stated throughout her evidence, she had helped the Defendants in various ways throughout their marriage,

including the recent buying of groceries and water at Fairwinds. Thus, I am unable to attach any weight to Dawn's statement about Rita's significant help as supporting the position that Rita fully understood that the \$500,000 was paid to the Defendants' mortgage."

39. Moreover, as Mr Williams, on behalf of Rita, submitted, the contents of the letter actually raised more points as to why the impugned transaction, namely the Disputed Payment, on the assumption that it was a gift, required an explanation. Thus, in the letter Dawn asserted that she and Williston would purchase the condo but that Tirsite had to pay off \$50,000 of her debt before the condo could be purchased and that Tirsite would be required to pay \$1,000 a month on the household bills at the Main House. Both these conditions were disadvantageous to Rita's interests and her wish to provide for Tirsite. They certainly had not been part of any previous discussion between Rita and the Defendants.
40. Accordingly, in my judgment, given the size of the Disputed Payment, both objectively and relative to the amount of Rita's assets, her wish to provide financially for both Kaelys and Tirsite, and the absence of independent advice given to Rita at the time of the transaction, the Dawn Letter goes nowhere towards rebutting the presumption of undue influence or establishing that Rita understood what she was doing and was exercising her independent judgment, free from the Appellants' influence. I conclude that the Judge's approach to the letter cannot be faulted.

Bank wire transfer slip

41. Under this head the Appellants complain that the Judge did not give fair consideration to the evidence relating to the bank wire transfer slip on the basis that Rita's version of events required the Judge:

"to accept that the Bank (or some other person) inserted the words 'mortgage proceeds' after she signed the form agreeing to transfer \$500,000.00 to a third party. Apart from generally preferring Rita's version to Dawn's, the Judgment gives no explanation as to why this documentary evidence was not accepted. There is no basis to believe that a Bank would alter a transfer form after the fact."

Accordingly, the Appellants submit that Judge did not provide any reasoning as to how the words appeared.

42. Again, I reject this argument. As the Judge rehearsed in [28], [29] and [76] of the Judgment, Dawn accepted that she saw the bank representative write "*Mortgage Proceeds*" on the slip - so it was common ground that Rita had not written the words on the slip. Moreover the Judge accepted Rita's evidence that she did not remember seeing those words when she signed the form and rejected Dawn's evidence that the words were written as a result of anything Rita's stated or that the words were written in Rita's presence. Given his repeated findings that the Appellants were not credible

witnesses, he was entitled to come to that conclusion. The phrase “*Mortgage Proceeds*” was in any event particularly inapt to describe the “*Payment Details*”, since the payment by Rita did not comprise the proceeds of any mortgage or reflect the transfer by her of monies derived from mortgage proceeds. There was no question, as the Appellants suggest, of alteration of the slip; the overwhelming likelihood is that the bank official wrote the words as the result of something that Dawn had said. In my view the Judge gave adequate reasons for concluding that such documentary evidence did not support the conclusion pressed by the Appellants, namely that Rita knew and fully understood what she was doing by making the Disputed Payment and that, as a result, the presumption of undue influence had been rebutted.

Other points

43. Other points relied upon by the Appellants under this head (namely the funds which were said to have been available to Tirsite and the assertion that the Appellants were not in need of funds prior to the Disputed Payment) likewise fall to be rejected. The complaint is that the Judge should have expressly addressed these factors in his judgment, on the basis that they provided a counter narrative to Rita’s allegations and supported the case for rejection of the presumption of undue influence. It is not necessary for me to deal with these points in detail. The evidence did not support the Appellants’ case that Tirsite had no need of funds, or that the Appellants were not in need of funds prior to the Disputed Payment, if, as they did, they wanted to live in the Main House. In particular, the evidence demonstrated that the Appellants’ financial position was that they had relatively modest savings of approximately \$17,000 and monthly mortgage payments of \$9,076.43. In those circumstances, in light of their respective monthly earnings, they would not have been able to have lived in the Main House at any point in the near future or continued to enjoy their standard of living, in the absence of the Disputed Payment and the consequent reduction in their ongoing mortgage payments. None of these points as advanced by the Appellants went anywhere close to rebutting the presumption of undue influence in circumstances where, leaving aside any proposed gifts to Tirsite and the gift to Cheryl, on the Appellants’ case 80% of the net sales proceeds of the Homestead were allegedly to be given up by Rita pursuant to an agreement whereby Rita was required to share a two bedroom house with six adults and 1 child and receive, according to the Appellants’ Re-Amended Defence, a non-exclusive irrevocable licence to reside at Fairwinds rent free for the rest of Rita’s life.
44. Accordingly, I would dismiss the Appellants’ appeal under Ground One.

Ground Two

45. Under this Ground, as I have set out above, the Appellants contend that the Judge failed properly to apply the test for undue influence, although they accept that he correctly set out the law at [45]-[60] of the Judgment in relation to the test for presumed influence.

46. First, they complain that the Judge, in concluding that there was a relationship of trust and confidence as between Rita and the Appellants, had not, or had incorrectly, identified features of the relationship between Rita and the Appellants which were “*additional*” to the familial relationship between them. They submitted that such a finding was required in accordance with the following passage in Snell’s Equity at 8 – 031:

“It is therefore clear that, in a family or marital relationship, there must be some additional factor, such as circumstances of illness leading to dependency, or a background of trust and confidence in relation to the family’s financial affairs, if a relationship of influence is to be found.”

47. The first point to make is that, as Lord Nicholls set out in *Etridge*, whether or not there is such a relationship is highly nuanced and fact-dependent:

*“8. Equity identified broadly two forms of unacceptable conduct. The first comprises overt acts of improper pressure or coercion such as unlawful threats. Today there is much overlap with the principle of duress as this principle has subsequently developed. **The second form arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage.** An example from the 19th century, when much of this law developed, is a case where an impoverished father prevailed upon his inexperienced children to charge their reversionary interests under their parents’ marriage settlement with payment of his mortgage debts: see *Bainbrigge v Browne* (1881) 18 Ch D 188.*

*9. In cases of this latter nature the influence one person has over another provides scope for misuse without any specific overt acts of persuasion. **The relationship between two individuals may be such that, without more, one of them is disposed to agree a course of action proposed by the other. Typically this occurs when one person places trust in another to look after his affairs and interests, and the latter betrays this trust by preferring his own interests. He abuses the influence he has acquired.** In *Allcard v Skinner* (1887) 36 Ch D 145, a case well known to every law student, Lindley LJ, at p 181, described this class of cases as those in which it was the duty of one party to advise the other or to manage his property for him. In *Zamet v Hyman* [1961] 1 WLR 1442, 1444-1445 Lord Evershed MR referred to relationships where one party owed the other an obligation of candour and protection.*

*10. The law has long recognised the need to prevent abuse of influence in these ‘relationship’ cases despite the absence of evidence of overt acts of persuasive conduct. The types of relationship, such as parent and child, in which this principle falls to be applied cannot be listed exhaustively. **Relationships are infinitely various. Sir Guenter Treitel QC has rightly noted that the question is whether one party has reposed sufficient trust***

and confidence in the other, rather than whether the relationship between the parties belongs to a particular type: see Treitel, *The Law of Contract*, 10th ed (1999), pp 380-381. For example, the relation of banker and customer will not normally meet this criterion, but exceptionally it may: see *National Westminster Bank Plc v Morgan* [1985] AC 686, 707-709.

11. **Even this test is not comprehensive. The principle is not confined to cases of abuse of trust and confidence. It also includes, for instance, cases where a vulnerable person has been exploited. Indeed, there is no single touchstone for determining whether the principle is applicable. Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other. None of these descriptions is perfect. None is all embracing. Each has its proper place.**
12. In *CIBC Mortgages Plc v Pitt* [1994] 1 AC 200 your Lordships' House decided that in cases of undue influence disadvantage is not a necessary ingredient of the cause of action. It is not essential that the transaction should be disadvantageous to the pressurised or influenced person, either in financial terms or in any other way. However, in the nature of things, questions of undue influence will not usually arise, and the exercise of undue influence is unlikely to occur, where the transaction is innocuous. The issue is likely to arise only when, in some respect, the transaction was disadvantageous either from the outset or as matters turned out.

Burden of proof and presumptions

13. **Whether a transaction was brought about by the exercise of undue influence is a question of fact.** Here, as elsewhere, the general principle is that he who asserts a wrong has been committed must prove it. The burden of proving an allegation of undue influence rests upon the person who claims to have been wronged. This is the general rule. The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, 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.
14. **Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof.** On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. **In other words, proof of these two facts is prima facie evidence that the defendant abused the influence he acquired in the parties' relationship. He preferred his own interests. He did not behave fairly to the other. So the evidential burden then shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn."** [My emphasis.]

48. In other words, the Judge had to look at the entirety of the facts surrounding the relationship between Rita and the Appellants. In the present case, the Judge was clearly entitled to find, on the totality of the evidence before him, that Rita's dependency on the Appellants was not simply limited to a familial relationship. I reject the Appellant's arguments that the factors relied upon by the Judge did not demonstrate something beyond the normal family relationship between a mother, her son and her daughter-in-law. The Judge was clearly entitled to take into account the following facts, which he held proved, as demonstrating something beyond the normal familial relationship:

- (1) that in cross-examination, Dawn accepted that Rita placed trust and confidence in her; not all mothers-in-law necessarily place trust and confidence in their daughters-in-law to advise them in relation to financial matters;
- (2) that Rita was indeed emotionally vulnerable as a widow, notwithstanding that her husband's death had occurred some years before the sale of the property;
- (3) that, as the Judge found, contrary to the evidence of the Appellants, it was the Appellants who persuaded Rita to sell the property on the basis that Rita would move in with them and that they would take care of Rita, Tirsite and Kaelys;
- (4) that Rita required assistance when she was living at the Homestead;
- (5) that, on the Appellants' own case, Rita sold the home because she needed assistance with Tirsite; this was supported by Rita's own evidence that she had serious concerns about Tirsite's mental health issues and that she needed to sell the Homestead because she needed assistance with Tirsite;
- (6) that, as accepted by Dawn in her cross-examination, it was she who was communicating with the real estate agents and the lawyers about the sale of the Homestead, because Rita did not have an email account and trusted Dawn to deliver her messages; likewise, it was Dawn who was listing the Homestead on Emoo and staging the Homestead;
- (7) that, as the Judge held, Rita was capable of understanding matters and took care of her life day to day, but, not least because of her age, had difficulty with larger matters and difficulties in relation to Tirsite and Kaelys in relation to which she had to rely on Williston and Dawn for help;
- (8) that the circumstances necessarily demonstrated an ascendancy in influence by Dawn over Rita, after the death of Rita's husband;
- (9) the fact that Dawn had accompanied Rita and was present at BNTB when the Disputed Payment was made by Rita to the Appellants' chequing account.

49. The Judge had the inestimable advantage of seeing the witnesses in person, and assessing their respective personalities, before coming to his conclusion as to the relationship between the Appellants on the one hand and Rita on the other. In such circumstances an appeal court will be very reluctant to overturn the findings of the trial judge: see for example *Crossfield v Jackson* [2014] EWCA Civ 1548 at [23]. Contrary to the Appellants' submissions, the Judge in my view adequately dealt with the circumstances surrounding the Disputed Payment and the other matters referred to in the Appellants' submissions under this Ground. There were more than sufficient evidential grounds for the Judge to conclude that the relationship between the Appellants and Rita was one where the former had significant influence over the latter.
50. Accordingly, I would dismiss the appeal under Ground 2.

Ground 3

51. Under this Ground, the Appellants contend that the Judge erred in law because he failed properly to consider the extent to which the Disputed Payment could not be "*readily accounted for by the ordinary motives*". The gravamen of their complaint is that there were more than sufficient reasons to explain the transaction, namely the Disputed Payment, and the consequent application of such payment to reduce the Appellants' mortgage.
52. I cannot accept this argument. On the evidence as found by the Judge, there were numerous reasons to support his conclusion that the Disputed Payment called for an explanation. He dealt with this issue at [69 – 77] of the Judgment. In my view, the following features (many of which are referred to by the Judge) demonstrated that the Disputed Payment cried out for an explanation:
- (1) the relative size of the Disputed Payment compared to Rita's total assets, in circumstances where Rita additionally wished to provide for Tirsite and Kaelys, and to retain funds for herself out of the sum of \$500,000;
 - (2) the fact that, as found by the Judge, if the sum of \$500,000 had been an outright gift to the Appellants, in order to enable them to reduce their mortgage, that would have left nothing, or very little, available for Rita to provide for herself for the rest of her life and to provide a down payment for the purchase of a condo by Tirsite;
 - (3) the fact that, as found by the Judge, at the time of the Disputed Payment, Rita had not decided how much, from the proceeds of sale of \$621,986, she was going to give to the Appellants or indeed to Tirsite;

- (4) the fact that, as found by the Judge, at the time of the Disputed Payment, Rita had had no intention of making a gift of the \$500,000 and thought that she was simply transferring the \$500,000 to the Appellants' account for safekeeping;
- (5) the fact that, as found by the Judge, at the time of the Disputed Payment, Rita did not know that the \$500,000 was going to be applied in reduction of the amount outstanding on the Appellants' mortgage;
- (6) the fact that Rita did not receive any independent legal or other advice in relation to the transaction;
- (7) the fact that there was no written agreement or document recording the terms on which Rita, Tirsite and Kaelys were to live at Fairwinds or the Appellants' purported obligation to assist with the provision of a deposit to enable Tirsite to purchase a property;
- (8) the fact that the application of the Disputed Payment, in reduction of the sum outstanding on the Appellants' mortgage, was extremely advantageous to the Appellants and disadvantageous to Rita; after the transaction, when Rita, Tirsite and Kaelys had moved into a one bedroom apartment at Fairwinds, the Appellants' mortgage payments had been reduced and the tenant's monthly payments from the Main House covered the entire mortgage payments leaving the Appellants with an apparent surplus of approximately \$2500 a month; nonetheless, Rita was required to contribute to the household bills by purchasing groceries and paying for water and Tirsite was required to pay household expenses; see [81] of the Judgment;
- (9) the fact that no one but the Appellants knew of Rita's decision to make the Disputed Payment.

53. Accordingly, I would dismiss the Appellants' appeal under Ground 3.

Ground 4

54. Under this ground the Appellants complained that the Judge took into account irrelevant considerations when reaching conclusions about undue influence. In particular, they complain that:
- (1) he erroneously considered the conduct of the Appellants following the departure of Rita, Tirsite and Kaelys from Fairwinds when assessing whether the presumption of undue influence had been rebutted;
 - (2) the Judge's findings in relation to the Appellants' attempts to secure funding from the bank to repay the Disputed Payment should not have been factored into

the Judge's decision, because this information was protected by without prejudice privilege, but nonetheless the Judge relied upon it to infer an admission of liability on the part of the Appellants.

55. In my judgment, in a case of alleged undue influence, a court is not barred from looking at the conduct of the parties after the disputed transaction in order to decide whether the transaction was indeed procured by undue influence. No case was cited to support such a proposition and indeed it would be contrary to common sense if no consideration was permitted in relation to the behaviour of the parties after the transaction in question.
56. Furthermore, I reject the Appellant's argument under this head insofar as they complain about reference to conduct of the parties after the transaction and to the use of allegedly privileged material.
57. In [81] of the Judgment (already quoted in full above), the Judge said:

"Tellingly, they have tried to secure funding to pay back the Ballon Payment amount to Rita without success, the explanation being that once Rita made her claim that they wanted to pay her back. To that point, I am inclined to accept Rita's position that she never agreed to transfer \$500,000 to the Defendants to be applied to their mortgage which is the reason why the Defendants made some effort to try to fund a repayment."

58. Having read the transcript of Dawn's evidence in cross-examination on this point on 15 May 2023 and the transcript of counsel's argument on 18 May 2023, I am not satisfied that Dawn's evidence, given in cross-examination to the effect that, when, in 2018, Rita asked for her money back, the Appellants went to the bank to see what funds they could obtain to repay her, but all they could obtain was \$80,000, was protected by without prejudice privilege. There were no without prejudice discussions between the Appellants and Rita at that stage; the former were then unrepresented. Indeed, it was only during Dawn's cross-examination at trial that Rita first became aware of the Appellants' attempts to secure funding for repayment. Although without prejudice discussions did take place later in 2019 between Rita and the Appellants, and their respective legal representatives, these occurred after the facts referred to by the Judge. Accordingly, I reject the argument that the 2018 attempts by the Appellants to obtain funds were covered by without prejudice privilege.
59. In any event, there is no basis to support the Appellants' allegation that the Judge was biased or their submission that the Judgment was unsafe or unsound because the Judge referred to the Appellants' attempts to obtain funding to repay the Disputed Payment. He was entitled to take such matters into account. In my view he did not give them undue weight in his consideration of all the relevant factors.
60. Accordingly, I would dismiss the appeal under Ground 4.

Ground 5

61. Under this Ground the Appellants contend that Rita's "*Fund Allocation Plan*", as referred to in her Fourth Affidavit, contradicted her pleading and that both versions were inherently improbable.
62. In my judgment, there is nothing in this point.
63. As quoted above, the Appellants refer to paragraph 29 of Rita's Fourth Affidavit which she says as follows in relation to the Fund Allocation Plan:

"..... I then turned my mind to how I would distribute the proceeds of sale and determined that the proceeds of sale should be distributed in the following manner:

- a. I would keep \$100,000.00 for my personal use;*
- b. BD\$500,000 would be set aside and a portion of which was to be shared between Williston and Tirsite. I had not determined how much would be allocated either way.*
- c. Cheryl would receive \$20,000.00."*

64. The Appellants also refer to paragraph 7 of Rita's Reply to the Re-amended Defence which states in paragraph 7.1:

"[Rita] denies stating to the [Appellants] that \$75,000 (or any amount) of the proceeds from the sale of the Homestead would be placed in a joint account in the names of Tirsite and [Rita] to be used as a down payment for the purchase of a Condominium for Tirsite. All funds placed in the joint account were for the benefit of [Rita] to maintain her needs which the [Appellants] failed to do whilst [Rita] resided at the Apartment."

65. I do not consider that there is any serious contradiction or discrepancy between the affidavit on the one hand and the denial in the pleading on the other. As I have already set out above, at various places in the Judgment the Judge referred to Rita's evidence as to what she planned to do with the \$500,000 in the account; he accepted Rita's evidence in this respect and found as a fact, after what was careful consideration, that Rita was clear that she had not made a gift to either the Appellants or Tirsite at the time, or by means, of the Disputed Payment and that she had not made up her mind how much would be allocated to either Tirsite, Williston and/or the Appellants. He also accepted Rita's evidence that she had never told the Appellants that the \$500,000 could be applied in reduction of the Appellants' mortgage. Nothing in Rita's Reply to the Re-amended Defence, a formal document obviously drafted by counsel, undermined her evidence in this respect. The phrase "*for the benefit of [Rita] to maintain her needs*", although vague, was sufficiently broad to be interpreted as a reference to the retention by Rita of her discretion to allocate the funds as she chose. In addition, the Appellants

in their evidence always accepted that it was understood that Rita intended that funds should be provided for Tirsite.

66. Moreover, even if it could be said that there were slight inconsistencies between the pleadings and Rita's evidence, not only were such inconsistencies to be expected but they were also immaterial in the overall context of the evidence. I have no doubt that the Judge was clearly entitled, on the totality of the evidence before him, to accept Rita's evidence in relation to her contingent allocation plan and the fact that she had not yet made up her mind, as at the date of the Disputed Payment as to the respective portions of the \$500,000 which she wished to give to Tirsite, the Appellants or retain for herself. Nor, contrary to the Appellants' argument, do I consider that it was incumbent upon him specifically to address the alleged inconsistencies in the context of what was a comprehensive judgment dealing at length with the evidence relating to the Disputed Payment. At various points in the Judgment the Judge gave clear and convincing explanations as to why he accepted Rita's evidence and rejected that of the Appellants: see for example [36], [37], [40], [42], [65], [66], [68] and [76]) of the Judgment.
67. It follows that I would dismiss the appeal under Ground 5.

Ground 6

68. Under this Ground the Appellants submit that the Judge "*failed to consider that Rita always intended to gift [the Appellants] a portion of the Net Proceeds*" (i.e. of the Proceeds of Sale of Rita's property, Fairwinds). They complain in particular that:
- (1) he failed to consider certain inconsistencies in Rita's evidence in relation to the application of the \$500,000 in reduction of the Appellants' mortgage (referred to by them as the Balloon Payment), and simply preferred her version of the evidence as opposed to the Appellants' version; and
 - (2) he should not have ordered the Appellants to repay Rita the Disputed Payment in full, given that she had always had the intention to give the Appellants a portion of the Net Proceeds and to do so was not in the interests of justice.
69. The particular alleged inconsistency relied upon by the Appellants in this respect was as follows:

"In her Fourth Affidavit [4/40/38] Rita says, on oath "Whilst I told the Plaintiff's I would assist them with a Balloon Payment towards their mortgage, I never agreed for the entirety of the BD\$500,000 to be deposited into their HSBC mortgage account". In her reply witness statement [11/223/52] Rita gives contradictory evidence "The truth of the matter is that I never intended to make a payment on Will and Dawn's Mortgage." This is also in contradiction to Rita's

case [1/4/7(b)(ii)] where is [sic] accepts that she did intend to provide a balloon payment.”

70. In my judgment, on proper analysis there was no, or certainly no serious, inconsistency in the passages to which the Appellants refer. The first statement from the fourth affidavit does not suggest that Rita agreed that any amount *would be* transferred to the Appellants’ HSBC mortgage account, or that, at the time when the Disputed Payment was made at BNTB, she would do so, although she had always indicated that she would at some stage give the Appellants a sum, as yet to be determined, to assist them with their mortgage.

71. So far as the quoted passage from Rita’s reply witness statement is concerned, it has to be assessed in context. It reads as follows:

“I disagree with the suggestion in Paragraph 70 that I called Stacy with Dawn. Dawn called Stacy to facilitate the balloon payment. I do accept that it was Dawn who told Stacy about the purported agreement to make a balloon payment of \$500,000.00 to their mortgage. The truth of the matter is that I never intended to make a payment on Will and Dawn’s mortgage.”

72. This was a direct response to Dawn’s witness statement which asserted that Rita and Dawn went to the bank to make the balloon payment and that Stacy knew of Rita’s intention to make the payment on the mortgage. As submitted by Rita’s counsel, Mr Williams, Rita’s reply simply spoke to her intention, specifically that when she attended at the bank, she never intended to make a payment on the Appellant’s mortgage.

73. More importantly, even if it could be said that there were inconsistencies arising out of the written statements or pleadings, the Judge had every opportunity to assess the oral evidence given by Rita in person, on the one hand, and the Appellants in person, on the other. The alleged inconsistencies were brought to his attention in closing arguments. His assessment of that oral evidence was what was critical to his determination and upon which he clearly relied in reaching his decision. As I have previously stated, he gave clear reasons as to why he preferred Rita’s evidence to that of the Appellants. It was not, in my view, incumbent upon him specifically to address what were basically technical arguments as to arguable inconsistencies in pleadings and witness statements, which necessarily would have been drafted by counsel, albeit approved by the witnesses or parties themselves.

74. I reject the second submission under this Ground, namely that the Judge should “*in the interests of justice*” have ordered the Appellants to repay only a proportion of the \$500,000, given that, as was common ground, it had always been Rita’s intention to make a gift to the Appellants at some future stage. This Court was provided with no authority to support the proposition that, in circumstances where the entirety of a payment or gift is set aside on the grounds of undue influence, it is open to a judge to order only partial repayment of the sum concerned.

75. But even if it had been open to the Judge to make such an order, no such partial repayment would have been appropriate in the circumstances of this case. Once the Judge had concluded that the Disputed Payment had indeed been procured by the Appellants' undue influence and that Rita had not intended to apply the \$500,000 in discharge of the Appellants' mortgage (since she had not, by June 2016, determined what portion of the sum she was going to give to the Appellants), it was not for the Judge to substitute his discretion for that of Rita's, as to what he thought was the appropriate amount which Rita should give to the Appellants. That was particularly so in circumstances where Rita was under no obligation to make any gift to the Appellants and, in light of the events leading up to her departure from Fairwinds and the fact that the Appellants had not provided any financial assistance to Tirsite in her attempts to obtain a mortgage, Rita's attitude to making a gift to them might well have changed. There was no evidence before the Judge which addressed Rita's attitude at that time to the making of a gift to the Appellants.
76. Accordingly, I would dismiss the appeal under Ground 6.

Disposition

77. It follows that in my judgment this appeal should be dismissed.
78. Subject to any submissions to the contrary, which should be sent by email to the Court no later than 21 days from the handing down of this judgment, the Appellants should pay the Respondent her costs of the appeal to be taxed on the standard scale.
79. The parties are directed to liaise with each other and the Court, as to whether, and, if so, how the question as to whether the Respondent is entitled to a proprietary security interest in the Mortgaged Property, as envisaged in [28] above, should be determined and as to whether HSBC needs to be involved. Any such determination should take place in the Supreme Court, but it would be sensible for this Court to make an order for such determination and as to whether HSBC should be party thereto. Whether HSBC needs to be made a party is likely to depend on (a) whether and, if so, to what extent the mortgage has been satisfied; and (b) whether the Respondent seeks to contend that her subrogation rights in the Mortgaged Property rank equally or in priority to HSBC's right as mortgagee. HSBC should, in any event, be provided with a copy of this judgment by the Respondent's attorneys.

GEOFFREY BELL JA:

80. I agree.

SIR CHRISTOPHER CLARKE P:

81. I, also, agree.