Neutral Citation Number: [2017] EWCA Civ 405

Case No: B6/2015/0102

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
FAMILY DIVISION (RCJ)
Sir Paul Coleridge sitting as a High Court Judge
[2014] EWHC 3340 (Fam)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/06/2017

Before :

LADY JUSTICE KING
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE MOYLAN

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Between :

Li Quan	**Appellant**
- and -	
Stuart Bray	**1st Respondent**
Maitland (Mauritius) Ltd	**2nd Respondent**
Chinese Tigers South African Trust	**3rd Respondent**
Save China's Tigers	**4th Respondent**
Ralph Edmond Bray	**5th Respondent**
Conservation Finance Limited	**6th Respondent**
The Attorney General	**7th Respondent**

Richard Todd QC and **Lily Mottahedan** (instructed by **Vardags Solicitors**) for the **Appellant**
The First Respondent appeared in person
The Second Respondent did not appear and was not represented
The Third Respondent did not appear and was not represented
The Fourth Respondent appeared in person
The Fifth Respondent did not appear and was not represented
Stewart Leech QC and **Sarah Phipps** (instructed by **Lee and Thompson LLP**) for the **6th Respondent**
Ruth Hughes (instructed by **The Government Legal Department**) for the **7th Respondent**

Hearing dates : 31 January to 2 February 2017

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Approved Judgment

Lady Justice King :

Introduction

1. This is an appeal against an order made by Sir Paul Coleridge sitting as Judge of the High Court whereby he declared that assets held within a Mauritian trust called the Chinese Tigers South African Trust ("CTSAT") were not, for the purposes of section 25 of the Matrimonial Causes Act 1973, a resource of either William Stuart Bray ("the husband") or Li Quan ("the wife"). In the light of his findings of fact the Judge further declared that CTSAT is not a post-nuptial settlement.

2. On 3 October 2013, Mr Justice Coleridge (as he then was) ordered there to be a hearing, listed initially for 10 days, to enquire into the circumstances under which CTSAT was set up and the nature of its underlying purpose. Flowing from those findings, consideration was to be given as to the availability, to either the husband or the wife, of the funds held in the trust by virtue either of variation of a nuptial settlement (if one were held to exist), or as a 'resource' available to the parties and capable of being utilised to satisfy the wife's claims within her financial remedy proceedings.

3. In the appeal before this court the wife seeks to overturn the Judge's findings of fact by way of a "reasons challenge" directed at the judgment. The issue is whether the judgment fails adequately to give reasons for the findings of fact he made, his evaluation of those facts and the conclusions he reached so as to render that judgment unsustainable. In particular, the question arises as to whether, had certain specific issues been dealt with by the Judge in his judgment, his findings would have been such that this court would set aside his order and remit the case for a fresh trial.

Representation

4. Mr Richard Todd QC and Ms Mottahedan have represented the wife following the First Appointment, at which she was represented by Lewis Marks QC.

5. The husband has been largely unrepresented and has appeared in person in both the trial and in this appeal. The husband's case however is the same as that of the charity at the heart of this litigation, SCT UK (Save Chinese Tigers), which is the sole named beneficiary of CTSAT. SCT UK was represented at trial by Mr Richard Harrison QC, Mr David Turner and Ms Samantha Ridley. On appeal SCT UK was represented by Mr David Thomas acting in person on behalf of the charity.

6. Shortly before the hearing of the appeal solicitors for the 6th Respondent, Conservation Finance Ltd (CFL), came on the record and have been represented by Mr Stewart Leech QC and Ms Sarah Phipps. The interests of CFL were protected at trial by SCT UK but upon the charity ceasing to be represented and, given CFL's need to protect its own interests as the owner of a property at Royal Mint Street, they appeared at the appeal. CFL is itself wholly owned by CTSAT.

7. Although CTSAT is a party to the case and this trust lies at the heart of the litigation, it has chosen to play no part in the proceedings and has neither filed direct evidence, nor been represented. As a consequence, both the Judge at first instance and this court have been deprived of the submissions of the party most nearly affected by the wife's application. Inevitably, the trust's failure to engage with the proceedings has caused

the wife and those representing her to be both suspicious and frustrated. This state of affairs is commonplace in financial remedy cases where an offshore trust is involved. The fact that it is routine does not make it any the less unsatisfactory and one cannot help thinking that all too often such an attitude on the part of trustees is ultimately inimical to the interests of the beneficiaries they seek to protect.

8. Finally, in terms of representation, the Court of Appeal was notified in the days leading up to the hearing that the Charity Commission for England and Wales had taken the view that the involvement of SCT UK in the proceedings falls within the definition of 'charity proceedings' under s.115 of the Charities Act 2011 and that the Attorney General is a necessary party to all charity proceedings. The Attorney General was accordingly joined as party to the appeal and has been represented by Miss Ruth Hughes.

Background

9. It should be emphasised that the summary of the history and background that follows (notwithstanding its length) merely scratches the surface of the material before this court which, in turn, was but a tiny proportion of the material before the Judge. I have attempted to provide only sufficient context to enable the reader to understand how the parties put their respective cases and, in the most general of terms, the backdrop against which the Judge made his findings of fact.

10. The husband and wife met in 1989 when they were both studying for their MBAs in Pennsylvania, USA. During the early 1990s each of the parties worked around the world developing their respective careers. The husband was extraordinarily successful in the world of structured finance transactions and the wife for her part became the global head of licensing at Gucci. In 1997 the wife left her paid employment and moved to London to live with the husband at the property at Royal Mint Street in London, which property he had bought in his name free of mortgage the previous year.

11. The husband and wife married on 1 August 2001. There are no children of the marriage. In July 2001 the husband's employment with G Bank, where he had been the Global Head of the Structured Transactions Group, was terminated. A compromise agreement was reached later in the year. The husband by the time of the marriage had accumulated substantial assets in his own name amounting to over £18 million.

12. During the latter part of the 1990s the wife became increasingly interested and knowledgeable about wildlife conservation and in particular in the conservation of the endangered South China tiger. On 6 April 2000 Save China's Tigers UK ("SCT UK") was set up as a charity by the wife, the husband and Mr David Kenyon Thomas in the UK. The purpose of the charity was to assist China with the conservation of the South China tiger. The wife had seen how ecotourism in South Africa supported wildlife, as well as local communities, and wished to approach the Chinese government to explore whether a similar model could be used in an effort to save the tigers in China. The wife hoped to replicate the successful South African model in China and, by doing so, to solve the problem of financing the restoration of the habitat in China, which was necessary in order to save the South China Tiger in its natural habitat.

13. At about this time the husband and wife became involved with two brothers ("the Vartys"). The Vartys ran a successful commercial ecotourism venture in South

Africa. By the end of 2001 the husband and wife had travelled to China with the Vartys to investigate possible tiger reserves to be based on the Vartys' model. Land was needed in South Africa for the project and agreement was reached that the Vartys would acquire land for the proposed reserve with funds provided by the husband. In January 2002 the husband provided £2.5m to the Vartys and 32,000 hectares of land was bought on behalf of the husband. The land was then leased to the Chinese Tiger Project for 99 years at a pepper corn rent and upon terms that prohibit its use for any other purpose than the Chinese Tiger Project. The tigers would be bred on the South African reserve before eventually being 'rewilded' to the new reserves in China. This land, known as the Laohu Valley Reserve (LVR), is now held by CTSAT the husband having, pursuant to an undertaking given in these proceedings transferred ownership of the land to CTSAT.

14. Matters did not go smoothly as concerns arose that the Vartys might have used funds provided by the husband in violation of their mandate. Notwithstanding these suspicions, matters progressed steadily towards a planned date in October 2002 for the signing of what was to be known as the Framework Agreement, which would provide the structure for the Chinese Tiger Project. The only parties to the Framework Agreement were to be "the China party" (that is to say the Chinese government) and "the South Africa party" (the Vartys). Part of the Framework Agreement was to govern the rehabilitation of Chinese tigers bred in South Africa to tiger reserves in China. Within weeks of the anticipated date for signing the Framework Agreement, the Vartys sought to renegotiate the terms, in particular by seeking to abandon their commitment to reserves in China, a critical but expensive element of the project. It looked as if the whole project would fail; it is common ground that the wife was "in despair" at the prospect of the collapse of the Chinese Tiger Project. Whether or not, as was the husband's case, she was "suicidal" is not to the point; what is to the point is that the husband was willing to step in to try and find another route by which the Framework Agreement, and therefore the Chinese Tiger Project, could be salvaged.

15. To this end it was decided that a South African trust would replace the Vartys in the scheme and would sign the Framework Agreement in their place. At this stage it was still envisaged that the Vartys would remain involved to the extent that they would lease their land to the newly formed trust, which was to be called the Chinese Tigers South African Trust (CTSAT).

16. Time was of the essence. The emails before the Judge, and referred to extensively during the course of the appeal, reveal the pressure that everyone involved was under. Having read the emails and heard each party's submissions in respect of the same, I am satisfied that, in accordance with the judgment and contrary to the case later run by the wife and put by her in her oral evidence at trial, the email trail shows unequivocally that the wife was not only well aware of developments leading to the agreed structure and establishment of CTSAT, but was directly and fully involved in the negotiations and decision-making: by way of example only, in an email of 1 November 2002 the wife comments:

> "This new structure (the CTSAT) is actually better. Since the Chinese Tiger SA Trust is non-profit, it is easier to solicitate [sic] donations.

> People in the West do not want to sponsor or give donations to a commercial company. . . People would have no problems giving money to the trust."

17. In another email on the same day she wrote:

> "Sorry this is so urgent . . . just when we were about to sign the tiger rehab agreement on 11 November with China. We had to quickly find a solution to the problems and decided to set up a trust - the sole beneficiary would be Save China's Tigers. We are still aiming to sign the agreement shortly, but the trust of Save China's Tigers will take over . . . the Chinese could also serve as protectors given that they do not want to make day to day decisions."

18. The initial plan that South Africa should be the jurisdiction for the trust had to be abandoned when it became clear that it was impractical due to the tight foreign exchange controls there. The corporate finance advisor to the Vartys suggested Mauritius as an alternative. On 1 November 2002 a standard trust deed was sent to both the husband and wife indicating that SCT UK, the charity set up by the wife, would be the settlor and sole beneficiary of the trust. It later became clear that under Mauritian law the settlor could not be the sole beneficiary and so the decision was reached that the husband would settle the required $10 allowing SCT UK still, as planned, to be the sole beneficiary of the new trust.

19. The draft trust document was sent to Richard Cassell, a dual qualified US and UK lawyer, then working at Bryan Cave. Bryan Cave, without instructions to that effect, amended the trust deed to include the wife and the husband (and any issue) as beneficiaries. The following day the firm was contacted by Lawrence Cole-Morgan who was co-ordinating events on behalf of the husband and wife. Mr Cole-Morgan told Mr Cassell that the "key point" was that the husband should <u>not</u> be a beneficiary and that the sole beneficiary should be the charity (SCT UK). Mr Cassell gave evidence and was cross-examined. Mr Cassell told the court that he had had a discussion with the husband telling him that, as he was not a beneficiary, and it was an irrevocable trust, the husband should assume that the funds which would go into the CTSAT would not be available for his benefit. Having received that advice, the husband instructed Mr Cassell to proceed on the basis that he (the husband) would not be a beneficiary of the newly created trust.

20. The contemporaneous email correspondence between Lawrence Cole-Morgan and Bryan Cave, written as the details of the trust document were being finalised, looked to obtain tax advice for the husband only to the extent of ensuring that he would be entitled to US tax deduction in the event that the trust would not be in a position to repay loans to him, and to ensure that the husband would not be taxed in relation to any income accruing to the trust.

21. Under Mauritian law, the trust documents not only had to have a settlor and identify beneficiaries, but also a named protector. Initially it was anticipated that the China party would be the Protector of the trust as per the wife's email referred to at [17] above. In the end the Chinese did not become the Protector, but rather the husband became the Protector. The wife's evidence was that once the Vartys had ceased to be involved in the project, the Chinese did not feel it was necessary for them to act as the Protector. The Chinese officials had, she said, confidence in the husband and wife and

the charity, and were satisfied that they would be working for the benefit of the South China tigers.

22. CTSAT was finally created on 18 November 2002 and on 26 November 2002 the Framework Agreement of Co-Operative Effort in Saving the Chinese Tigers (the Framework Agreement) was signed in Beijing between the National Wildlife Research and Development Centre of the State Forestry Administration of P.R. China ("China party"), SCT UK ("UK party") and CTSAT ("South Africa party").

23. The Framework Agreement established the Chinese Tiger Project with the core objective of rehabilitating "Chinese tiger cubs captive bred to China" with the tigers acquiring the ability to sustain themselves in the wild. Coupled with this was the objective of developing eco-tourism focused on the tigers. The Framework Agreement set out the role of each of the parties; substantial obligations were imposed on CTSAT, including the financing and establishment of a pilot reserve in China to support the rewilding of the Chinese Tigers bred in South Africa under the programme. SCT UK's role was focused on liaison between the two other parties, public relations for the project and fundraising.

24. From late 2002 onwards the operation of the Chinese Tiger Project was therefore governed by the Framework Agreement (although the timescales set out in the Agreement have substantially slipped). The trust deed was the governing document in respect of CTSAT. It provided, *inter alia*, for the distribution of any residual trust funds to the beneficiary upon termination of the trust. As already indicated, SCT UK was the sole named beneficiary under the trust. The SCT UK articles of association dated 6 April 2000 set out the objects and powers of the charity, all of which were directed in wide terms to the conservation and protection of "big cats in China" and include the following clause:

> "If upon the winding-up or dissolution of the Company there remains, after the satisfaction of all its debts and liabilities, any property whatsoever, the same shall not be paid to or distributed among the members of the Company, but shall be given or transferred to some other charitable institution or institutions having objects similar to the objects of the Company".

25. By December 2002 the relationship with the Vartys had completely broken down. In early 2003 litigation commenced with the Vartys. Thereafter David Leibowitz (a member of the South African bar and trustee of CTSAT between 2003 and 2007) worked on the litigation on behalf of CTSAT for the best part of a decade. The Judge found that Mr Leibowitz was totally committed to the cause, working tirelessly either without payment or at a significant underpayment. Mr Leibowitz subsequently said in written evidence at trial that:

> "[He] would never involve himself at his own expense, put [his] reputation at risk and sign agreements with the Chinese government if [he] had any inkling at any stage that CTSAT was a trust out of which the husband and wife were entitled to benefit in a personal capacity."

26. Mr Leibowitz in his evidence referred to "many many" discussions with the husband and wife and confirmed that he had had access to all the documentation relating to CTSAT or its connected companies. Nothing, he said in his written evidence, that he had seen or heard about the project, its conception, its origins and the way it developed, was other than that it was intended "solely and utterly for the benefit of the Tigers". The Judge accepted the evidence given by Mr Leibowitz.

27. The Varty litigation had naturally required both the husband and wife to file affidavits and to give evidence. The evidence contained in those affidavits was entirely consistent with the account given by the husband at trial before the Judge and entirely inconsistent with that given by the wife. The wife's case at trial was that she was largely unaware of what was going on at the time CTSAT was set up. This was not borne out by contemporaneous documents, by the evidence of Mr Leibowitz or by the unequivocal findings of the South African Judge who found the husband and wife each to be witnesses of truth within that litigation. The wife's evidence had been to the effect that CTSAT had been set up urgently to step into the Vartys' shoes and with a single charitable purpose. Ultimately, the Vartys litigation went to arbitration and an award was made against them on 30 October 2008.

28. Notwithstanding the resolution of the Varty litigation in its favour, the Chinese Tiger Project had been seriously damaged by what had occurred. The Vartys had secretly negotiated a deal with Discovery Channel to make a film in relation to their own two Bengal tigers. This film was so similar to an intended film about the re-wilding of the South China tigers that it rendered the latter no longer viable as a commercial proposition. It had been anticipated that the documentary about the Chinese Tiger Project would have been a major source of revenue, enabling CTSAT substantially to fulfil its obligations under the Framework Agreement. It therefore became all the more necessary to find alternative methods of funding in addition to that which the husband could invest in the project.

29. The husband therefore aimed to raise money utilising his considerable expertise in structured finance in order to put together investment packages to sell to external investors who would in due course, it was hoped, invest money in sustainable forestry in China. The structured finance business was conducted through a group of companies known as Conservation Finance International ("CFI") with the holding company for the group being a company called Ensor Investments Limited, owned at that time by Lawrence Cole-Morgan.

30. Ensor at one time owned a group of companies known as JAS Financial Projects, which were acquired by the husband in 2005. The role of JAS was to act as a regulatory advisor to the project and, in particular, to give advice about the structured finance projects to be put together by CFI. The husband conducted the JAS business in partnership with a man called Rumit Shah. JAS received fees for the work done for CFI and ultimately CTSAT. The fees paid by CTSAT to JAS varied considerably but were often substantial. The wife complained about the paucity of evidence in respect of this company. In oral submissions Mr Todd submitted that the fees paid were large. Mr Todd said that he could not say that the husband was being overpaid for the

consultancy work he was undertaking for CTSAT, he could only say that it was a great deal if not an excessive amount. Mr Todd accepted that this did not make CTSAT a 'resource' unless the husband was simply dipping into CTSAT via JAS.

31. Unhappily, and despite all of the efforts of the husband, an insufficient number of the structured finance proposals converted into actual investments from any of the large banks or financial institutions approached. The funding for the project was therefore augmented by way of loan and donation from the husband. One such loan was through a trust called the Li Quan Trust established on 27 August 2003, a trust of which the wife was the sole beneficiary. The husband lent the trust some £4.5 million of his own money and from there it worked its way through a series of transactions to fund the Chinese Tiger Project. The wife was, and no doubt is, suspicious of this transaction. The husband's case was that had he simply lent the money directly to CFI it might have been regarded by the US Internal Revenue Service (IRS) as having given him an equity stake in the business, and therefore become subject to the onerous regulatory regime of the IRS.

32. The husband, in addition, donated to SCT UK certain SARs ("Stock Appreciation Rights") that had been granted to him whilst he had been employed by "G" bank. The value of the SARs in due course became the central feature in litigation between G Bank and SCT UK, as owner of the SARs. The husband had wished to give the SARs to SCT UK by making a declaration that he held them on trust for the charity. In order to do this the husband was potentially required to seek the consent of G Bank. Objections raised without foundation by the bank however meant that there was a significant delay in the transfer being effected. As a consequence, the charity was unable to capitalise on a substantial fiscal opportunity which would have been afforded to them by the fact that there were, at the relevant time, takeover rumours in relation to G Bank which significantly enhanced the value of the SARs. By the time the husband made a declaration of trust on 23 March 2005 (following confirmation that the consent of G Bank was not after all necessary) the value of the SARs had declined substantially.The money raised from the subsequent disposal of the SARs was used to further the Chinese Tiger Project.

33. On 9 March 2006 G Bank made an announcement implying that the husband and his team had been responsible for tax trades which were being criminally investigated in the United States. This announcement led to the husband launching a libel action against G Bank.

34. On 17 July 2009 an overall settlement was reached between G Bank and SCT UK in respect of the SARs and the husband in respect of the libel action. The agreement resulted in £19.8 million being donated by the bank to SCT UK in relation to the SARs and £150,000 being paid to the husband in relation to the libel. The agreement with SCT UK contained a punitive confidentiality clause with damages fixed at £19.8 million in the event of breach.

35. On 23 July 2009 the council of management of SCT UK approved the donation being passed on to a linked charity, SCT HK, "for the purpose of furthering its objectives". It recorded that the proceeds should be used amongst other things to:

i) Fund grants for research of endangered and vulnerable wild cats around the world.

ii) Create commercially viable tiger reserves in China.

iii) Establish a charitable foundation for tigers in China.

36. The evidence indicates that the G Bank donation has allowed each of the three objectives to be either achieved or to be in the process of being achieved.

37. By the middle of 2010 the cracks in the marriage were beginning to show and in early April 2011 the personal and professional difficulties between the husband and wife reached crisis point. It was suggested that the wife was threatening to name G Bank as the bank who had made the donation to SCT UK and this threat, unsurprisingly, caused considerable consternation given the draconian terms of the confidentiality clause.

38. On 24 July 2012 at an SCT UK board meeting, the wife's "resignation" was accepted. The same day Farrer & Co wrote on behalf of the wife saying:

> "It is Li Quan's position that although she may have told her husband that she was resigning from the charity in the course of a quarrel (and on another occasion, threatened to resign) she has not resigned and therefore she continues to be a trustee of SCT.
>
> Li's primary concern is to ensure that SCT (i.e. the English charity) is not closed and is well funded…The work of the charity is now achieving international acclaim and this, in turn, means there is a real prospect for attracting major donations from individual and corporate donors…
>
> <u>Concerns in relation to the grant of £19.7 million made to Save China's Tigers Ltd in Hong Kong.</u>
>
> Li's concerns here relate to:
>
> - Monitoring the application of the donation against the purposes set out in the resolution of proving the grant;
> - And establishing that SCT complied with HMRC's requirements for donations to non-UK charities."

39. On 2 August the wife was removed from the SCT UK board by David Thomas, SCT UK's sole member, Mr Thomas took the action because of his concern as to the potential triggering of G Bank's right to reclaim the donation in the event that the confidentiality clause was breached by the wife.

40. On 15 August 2012 the wife issued a petition for divorce. On 18 August 2012 CTSAT wrote to the wife to inform her of her removal as a trustee.

41. On 21 August 2012 the wife filed a Form A; no variation of a post-nuptial settlement (i.e. of CTSAT) was sought by the wife at that time. A couple of days later on 24 August 2012 Farrer & Co wrote to the husband on behalf of the wife in response to a request by him that she give confidentiality undertakings. The letter said:

> "Given the passage of events and in particular Ms Quan's removal as trustee at SCT UK and your failure to address her concerns about the application of the donation of £19.75 million made to SCT UK to Save China's Tigers Limited in Hong Kong she cannot see how it would be in her interest to give the undertakings you have requested."

42. That the wife was not seeking to attack the funds in CTSAT of which SCT UK was the sole beneficiary, appeared to remain the case in the early days of the litigation. Indeed, as can be seen from the letter from Farrer's, the wife was reluctant to give the undertakings sought by the husband absent reassurance as to the application of the SAR donation to the Tiger Project.

43. At the First Appointment held on 27 November 2012 before the trial Judge the wife's position statement, as drafted by Lewis Marks QC, said as follows:

> "W's objective in these proceedings is either to establish and ensure that the funds said by H to be donated to charitable purposes are in fact going to be used for those purposes and only those purposes, or if (as she now believes or fears or suspects) the charitable purposes are being used as a cover for H to avoid (i) taxation on the "donation" and (ii) what would otherwise be his obligations to her consequent upon the breakdown of their marriage, then she would like to receive a fair share of the assets which are not truly destined for charitable purposes, so as to provide for her own needs at a level commensurate with what the parties actually enjoyed during their marriage."

Mr Marks accepted there was a philanthropic element. The question, he said to the judge, was "is that all there is?"

44. By now the wife was represented by Vardags, her current solicitors. On 30 November 2012 they wrote on instructions from the wife to the husband:

> "I am only going to reiterate that Li's objective in these proceedings does not include any attack on assets which belong to any of the charities, and on the contrary she is intending to establish which assets have been donated and to ensure that they cannot subsequently be retrieved or diverted away from the charitable objectives… Mr Marks QC's note for the First Appointment…which makes it abundantly clear what Li's concerns are, and the purpose of almost all the questions in the questionnaire is to give you the opportunity to allay those concerns…there is no conflict of interest between Li's role in the charities and her objective in these proceedings – indeed they are wholly aligned."

45. On 7 May 2013 the husband resigned as protector of CTSAT and Rumit Shah was appointed in his place. The husband's case was that he did this in order that he could disclose information about the trust.

46. Litigation continued with applications being made for the joinder of CTSAT and SCT UK. On 17 July 2013, eleven months after the start of the proceedings, the wife amended her Form A to include a claim to vary CTSAT as a post-nuptial settlement.

CTSAT

47. Before turning to the proceedings it is useful to set out in broad terms the structure of and personnel who have from time to time been involved in CTSAT.

48. The terms of this Mauritian trust are very wide. As set out above a Protector is required under Mauritian law. The appointed Protector has wide ranging powers, including the power to remove or appoint trustees, determine the applicable law, withhold consent from specified actions of the trustees and request information and accounts from the trustees. The husband remained Protector until 7 May 2013 when Rumit Shah, David Leibowitz and Heinrich Funck, the general manager of AVR, took over. On 7 November 2013 all three of the Protectors gave notice of resignation to take effect on 7 December 2013 and, at the husband's request, his father Ralph Bray became and remains Protector, the husband's case being that this was to enable the former Protectors to give evidence at the trial.

49. At all times there has been a professional trustee Maitland Management (formally known as Inter-Ocean Management). Between 2003 and 2007 the wife and David Leibowitz were the additional trustees. Mr Leibowitz resigned in 2007 and the wife continued as the sole trustee (apart from Maitland) until she was removed as a trustee of the trust by the Protectors in August 2012.

50. SCT UK is the sole beneficiary under the terms of the trust. By its Memorandum of Association any income or property held by SCT UK can only be applied to promote the objects of the charity and no payments of any type can be paid to the members of the charity. The principal object of the charity is:

> "(i) The conservation and protection for the public benefit of tigers and other endangered species of big cat in China thereby preserving them from extinction."

The balance of the objects prescribe for the manner in which the objects are to be furthered. Broad provision is made to 'establish, support or aid' 'trusts, associations or institutions' in any way connected with or furthering the objects of the charity.

51. On 26 June 2013 the trust was varied by the Protectors so as specifically to exclude the husband and all his family relations from becoming beneficiaries under the trust. On 7 November 2013 (prior to their resignation taking effect) the Protectors and Maitland entered into a, now irrevocable, Deed of Declaration excluding the husband and wife as beneficiaries. The husband's case was that he had never been a beneficiary and the exclusions were intended to provide comfort to the wife and the court by reassuring them that he had no intention ever to seek to become a beneficiary. The variation of November 2013 was made in an effort to reinforce the position. The wife's case was that this was merely a device facilitated by the husband's friends to prevent her from having access to the funds held by the trust.

52. Notwithstanding the exclusions, the Judge held that the husband could 'as a theoretical possibility' seek to procure changes/additions to the beneficiaries. He went on to find that as the sole intention and purpose of the trust was 'to further the Tiger

Project via SCT UK' he did not 'find that the trustees would be likely or be expected to be guided by his wishes' (para 70(a) and (c)).

The Proceedings

53. The parties had the benefit of judicial continuity in this case. The Judge therefore case managed the matter over a period of many months. On 1 October 2013 a supplemental questionnaire running to 23 pages containing 67 questions, each with numerous parts was filed on behalf of the wife. Two days later, on 3 October 2013, the matter came on for pre-trial review before the Judge. On that occasion a large number of additional parties were joined to the proceedings, namely Maitland (Mauritius Limited), CTSAT itself, SCT UK, the then protectors of CTSAT namely Rumit Shah, David Leibowitz and Heinrich Funck and Conservation Finance Limited (the legal owners of the former matrimonial home). The Judge identified the issues which would be considered at the hearing, due to start on 9 December 2013 as:

    i) The circumstances under which the China Tiger trusts were set up;

    ii) The purpose of those trusts;

    iii) Whether those trusts were nuptial settlements;

    iv) The availability of funds within those trusts to the parties;

    v) Whether the funds within those trusts could only be utilised for tiger conservation.

54. The Judge dealt with a number of peripheral matters during the course of the pre-hearing review and the live note transcript reveals the Judge expressing his clear intention to keep a brake on the amount of disclosure and his clear view as to how the central question, namely the purpose of the CTSAT, could best be addressed in the following way:

> "It is simply not necessary, not to enable me to make a finding that the trust is or is not a post-nuptial settlement or any of the subsidiary questions. I suspect most of it will turn on a few documents and on your evidence and the evidence of your wife. I think some of these other witnesses will add some flesh to the bones and I would like to hear from them."

In respect of the lengthy supplementary questionnaire the Judge said

that, instead of replies to the questions, what was required was:

> ". . . further narrative statements to deal with the points which are, one way or another, contained within those questionnaires will simply shorten things next time and as I say, key documents are what we are looking for not every bank statement."

55. Accordingly, an order was made that the husband file a comprehensive statement:

> ". . . dealing with his financial resources, the provenance of funds which went into the various tiger conservation trusts, his relationship with those trusts, his case on the accessibility by the parties of the tiger conservation funds now and on his case where those funds within those trusts are (e.g. which companies or which trusts retained particular wealth whether this be by way of cash holding options, proportional shares or otherwise)."

56. The husband responded to that order by filing a statement which ran to over 100 pages. It was from this document that extracts were taken by the Judge, and which are now found in the Annex to his judgment, reference to which will be made later in this judgment.

57. The trial started on 11 December 2013. By 20 December 2013, far from the evidence having been completed, the husband had not yet been called to give evidence. The trial resumed on 23 June 2014, by which time the Judge had retired and he returned to finish the case. Submissions were concluded on 8 July 2014.

58. The husband was in the witness box for four days. At the conclusion of his evidence there was a discussion between the Judge and counsel as to the future progress of the trial, including the necessity for calling further witnesses. It was the agreed view of both the Judge and counsel, including Mr Todd on behalf of the wife, that the case turned on the evidence of the husband:

> "Sir Paul Coleridge: So really it comes down to my view about Mr Bray and his evidence, really, because if the others are stooges, they would say that would they not, would be your submission?
>
> Mr Todd: Absolutely, quite."

59. And then to Mr Todd in relation to whether he called certain witnesses:

> "Sir Paul Coleridge: I cannot bind myself as to what attitude that I would take if you do not call them or what view I will take of their untested evidence but, as I say, it seems to me, given the way that Mr Todd puts his case, it really stands and falls with Mr Bray.
>
> Mr Todd: It does."

60. This view, that the credibility of the husband and wife was critical to the outcome of the case, was again made abundantly clear by the Judge at an early stage in his judgment.

> "24. The core of the wife's case is that the documents whatever they may say or seem to say on their face do not tell the whole story. Thus her case must stand or fall on the oral evidence. In other words the more the documents do not support the wife's case the more Mr

> Todd QC, on her behalf, asserts, and is driven to assert, that that is inevitable because the husband with his expertise, has set up and organised the structures precisely with the intention of making actions untraceable and the structures impenetrable. The absence of documents is part of his strategy of leaving no paper trail."

61. And at [57]:

> "Once again my function is to "examine the true nature of the arrangement" embodied in CTSAT not forgetting that the relevant transaction in this case is embodied in a "formal written document."

62. It can be seen from my summary above that the contemporaneous documentation surrounding the setting up of CTSAT and the corroborating affidavits and judgments from the Varty litigation together provided powerful support for the husband's case. The wife therefore had to satisfy the Judge that (contrary to what appeared to be her position as stated on her behalf in the early stages of the litigation) the husband had had, throughout, an ulterior motive in setting up CTSAT, namely to preserve his own assets and in particular, it was alleged by the wife, to protect himself from the US tax authorities (the IRS) until such time as he was able to renounce his US citizenship. The Judge was, putting it crudely, clearly of the view that the case became "his word against hers", a view that seems to have been accepted by both the husband and wife at trial.

63. The Judge, having observed her in the witness box over the course of three days, formed a very poor view of the wife. He held:

    i) That the wife had been beside herself with grief and anger at the way that she had been, as she saw it, unjustifiably removed from SCT UK. In support of this conclusion he referred to a number of angry and intemperate emails sent by the wife.

    ii) That initially her preoccupation was to ensure the continuance of the work with the tigers and that the suggestion that CTSAT had or might have had other purposes "crept in later" and the application to vary CTSAT later still.

    iii) The Judge did not accept the attempts of the wife to distance herself from her evidence in the Varty litigation against the backdrop of the finding by Mr Justice Kriegler, the South African Judge, who had found:

    > "With regard to the filming claim, Ms Quan played a more prominent role than her husband…Ms Quan had been actively and intimately engaged in the planning and development of the various facets of the envisaged financing of the scheme…in this witness box she displayed the almost missionary determination that had characterised her pursuit of her dream…it is also claimed that however partisan she might be, she is truthful."

    The Judge noted that many hours were spent by the wife (with professional help) in compiling her affidavit in the Varty litigation.

iv) That the wife's evidence was "wildly inaccurate" in places particularly in relation to their standard of living. The Judge concluded:

> "36. …I am driven to find, overall, that she is an unreliable witness upon whom the court cannot rely. This is specially so when deciding where the truth lies about the underlying purpose of the CTSAT and any discussions which took place at the time of its creation.
>
> 37. The wife is a very intelligent person but she has become blinded by her desire for revenge and this has led her to fabricate where she thinks it will assist her case."

64. The Judge, in contrast, regarded the husband's evidence as: "at every stage clear, detailed and consistent (both internally and by contrast with the evidence in the Varty litigation)". The Judge regarded the husband's grasp of the history of the case and knowledge of the documents as being 'extraordinary and encyclopaedic' and in particular that:

> "He was in the witness box for four days, three of which consisted of rigorous and searching cross examination by Mr Todd QC. It could not have been more thorough. Over and over again the husband's knowledge of the detail of the transactions leading to the establishment of CTSAT and other structures supporting the Tiger Project was tested and found to be sound. His evidence was at every stage clear, detailed and consistent (both internally and by contrast with the evidence in the Varty litigation). He took great pains over the answers and made minor corrections as appropriate. He also agreed with the wife wherever possible."

His ultimate finding in relation to the husband was:

> "39. At the end of the day his passion for the Tiger Project was as evident as it was the wife and the longer he gave evidence the more convinced I became that he was telling the truth and doing his best to assist the court in arriving at the right answer. In contrast with the wife's evidence, I found his evidence bore all conventional hallmarks of honesty and accuracy."

The Judge concluded:

> "42. Accordingly I am driven to the inevitable conclusion that where he and the wife differ in their recall and evidence especially over whether there were discussions at the time of the creation of CTSAT to the effect that was for their benefit as well as the tigers' his recollection is to be preferred and relied on."

65. The Judge whilst not descending to detail recorded that:

> "65. I have read and heard a mass of evidence about the thinking behind the establishment of CTSAT, the means by which, and reasons why it was created in the form it was and why it was formed in Mauritius. I have read (and re-read) and heard lengthy and detailed submissions too. All arguments have been canvassed and from every angle."

66. The Judge did not thereafter specifically answer each of the 5 questions posed in the order of 3 October 2013 set out at para. 53 above. In his judgment he dealt with the central questions rather differently but, in my view, to the same effect. The Judge posed three questions of law (para. 66) as a route to determining whether CTSAT was capable of being a postnuptial settlement. He then went on to identify (para. 67) three factual questions which underlie the three legal questions:

    a) "Is the husband ultimately capable, one way or another, of procuring changes to CTSAT to enable the parties to benefit from it?

    b) Is there evidence to demonstrate past, present or future benefit to one or other of the parties from CTSAT?

    c) In the end what was or were the intention or intentions underlying the creation of CTSAT……."

67. The Judge held that:

    a) As already recorded at para. 52 above, the husband could procure changes to the beneficiaries of CTSAT but the trustees would be unlikely to agree;

    b) That "there was no evidence as to past present or future benefit to the parties from CTSAT";

    c) "At the time CTSAT was established it was with only one intention and it had only one sole purpose, namely to further the Tiger Project via SCT UK". The Judge found that there were no conversations at the outset, or subsequently, which took place and established an intention to benefit the husband and wife, or either of them, and there was, he concluded, no ulterior/secondary purpose as the wife now sought to suggest. That case is, he said:

    > "….in forensic parlance, a late invention by the wife. CTSAT was always, and is, only for the Chinese tigers. Accordingly it is not a post-nuptial settlement which can be directly invaded by court order."

68. The Judge set out the law in respect of post nuptial settlements. There is no dispute as to his analysis or that he was correct in reminding himself (para. 57) that his function was "to 'examine the true nature of the arrangement' embodied in CTSAT, not forgetting that the relevant transaction was in this case embodied in a 'formal written document'". Having set out the law and the answer to his questions, the Judge concluded that CTSAT is not a post nuptial settlement and is therefore not capable of being 'invaded by court order' (para. 70(c)).

69. The Judge expressed the view that whilst it does not apply in the present case, a settlement which is non-nuptial at its inception can itself later become "nuptualised" if there was, in fact, a flow of benefit to the parties during the marriage from the trust. That conclusion is in part the subject of a Respondent's notice filed on behalf of SCT UK. For the purposes of this appeal, given the Judge's overall findings of fact, it is not necessary to consider whether as a matter of law a settlement, non-nuptial at inception, can subsequently become 'nuptualised'.

70. The wife's alternative case was that, pursuant to the *Thomas v Thomas* [1995] 2 FLR 668 line of cases, the court could assume that the trustees would respond favourably to a request by the husband for funds to be released to him from CTSAT in order to satisfy any order the court might make in her favour. The Judge held that CTSAT could not be regarded, in the section 25 Matrimonial Causes Act 1973 sense, as a 'resource'. This conclusion might be thought to have been inevitable when considered against the backdrop of the findings the Judge made about CTSAT's original and ongoing purpose and that the parties had never been beneficiaries. In *Thomas,* Glidewell LJ, in articulating the principles to be applied in such applications, said at 677H-678G:

> "If on the balance of probability the evidence shows that, if trustees exercised their discretion to release more capital or income to a husband, the interests of the trust or of other beneficiaries would not be appreciably damaged, the court can assume that a genuine request for the exercise of such discretion would probably be met by a favourable response. In that situation if the court decides that it would be reasonable for a husband to seek to persuade trustees to release more capital or income to him to enable him to make proper financial provision for his children and his former wife, the court would not in so deciding be putting improper pressure on the trustees."

The Judge held that the assets of CTSAT are for the Chinese Tiger Project and that it would be wrong to make a lump sum order against the husband in the hope and expectation that funds would be provided by CTSAT in order to satisfy the same.

71. Having set out his findings and conclusions that CTSAT was "only for the Chinese Tigers" and was neither a post-nuptial settlement nor a "Thomas" resource the Judge went on:

> "74. As I accept the veracity of the husband's evidence and in order to provide a fuller narrative of the events surrounding the creation and funding of the tiger project I have annexed an abbreviated version of the husband's December 2013 statement to this judgment. This will enable another court to understand the full context of my findings should it be necessary."

72. The Judge then attached, by way of an Annex, some 18 pages taken from the lengthy statement the husband had filed, pursuant to the Judge's order of 3 October 2013, in which he set out in detail the funding of and events leading up to the formation of CTSAT.

The Barrell Application

73. The judgment was delivered to the parties on 24 July 2014 and on 4 September the wife submitted to the court a so called *Barrell* Application (*Re Barrell Enterprises* [1973] 1 WLR 19; [1972] 3 All ER 631). The application was accompanied by 43 pages of submissions inviting the court to "exercise its *Barrell* jurisdiction to rewrite the judgment". The Judge's invitation to the husband and SCT UK for their responses was met with a further 53 pages in response. The application formulated in this way went far beyond that of a party seeking clarification or amplification of reasons, a form of application not uncommonly made following the decision in *English v Emery Reimbold & Strick (Practice Note)* [2002] EWCA Civ 605; [2002] 1WLR 2409.

74. The Judge regarded the use of the *Barrell* jurisdiction by the wife as a misuse of the procedure. Having read both the lengthy closing submissions filed by the parties and the *Barrell* submissions, the Judge's view was that they amounted to either "a reiteration of points or evidence previously made, or reliance on new points and other evidence". The charity's (SCT UK) response, he said, provided a more or less "point by point repudiation of the wife's further note and in so doing similarly reiterated many of the points and much of the evidence previously made or provided new justifications for previous arguments".

75. The Judge therefore declined to amend or rewrite his judgment. He emphasised that he had throughout been aware of the implications of the findings he had made and indeed it had "caused me to approach the husband's case in particular with considerable caution". He said:

> "The findings were reached, I remind myself, after very careful consideration of the evidence and arguments before, during and after the time when the hearings took place in December 2013 and June and July 2014. Indeed, on the contrary, I am fortified in my findings and conclusions by the consideration of the further notes".

Finally he observed that:

> "to have descended into the kind of detail which the wife now seeks would hugely increase the length of this judgment on these preliminary issues for no useful purpose".

76. On behalf of the wife Mr Todd in this appeal complains that the Judge did not deal with the *Barrell* application properly and should have dealt with his submissions specifically and in detail so as to 'rewrite the judgment'.

77. In *Robinson v Ferensby* [2003] EWCA Civ 1820 May LJ said in relation to applications to reconsider a judgment:

> "Once a judgment has been handed down or given, there are obvious reasons why the court should hesitate long and hard before making a material alteration to it. These reasons have been rehearsed in the cases to which I have referred and I need not elaborate them further. The cases also acknowledge that there may very occasionally be circumstances in which a Judge not only can, but should make a material alteration in the interests of justice. There may for instance be a palpable error

> in the judgment and an alteration would save the parties the expense of an appeal. On the other hand, reopening contentious matters or permitting one or more of the parties to add to their case or make a new case should rarely be allowed. Any attempt to do this is likely to receive summary rejection in most cases. It will only very rarely be appropriate for parties to attempt to do so. This necessarily means that the court would only be persuaded to do so in exceptional circumstances, but that expression by itself is no more than a relatively uninformative label. It is not profitable to debate what it means in isolation from the facts of a particular case."

78. Subsequently in *In re L (Children)(Preliminary Finding: Power to Reverse)* [2013] UKSC 8; [2013] 1 WLR 634 SC the Supreme Court held that a Judge's power to recall and reconsider his or her judgment is not restricted to 'exceptional circumstances' and that the question of whether a Judge should exercise the discretion to recall a judgment will depend on all the circumstances. Relevant to the present case Baroness Hale said:

> "44. Furthermore, if a Judge were entitled to change his mind, a party would presumably be entitled to invite him to do so. No doubt most Judges would do their best to have no truck with the invitation. But could the party be prevented from pressing for the exercise of the jurisdiction on the basis that, in his first judgment, the Judge had failed to weigh certain evidence sufficiently or at all? In effect the Judge would be invited to hear an appeal against himself. There is a distinction between an appeal and a variation for cause. This is the principle underlying the basic rule that an order is final once sealed.
>
> 45. The point does not arise in this case and it was not fully developed in the arguments before us. The arguments outlined above are so finely balanced that we shall refrain from expressing even a provisional view upon it. In our view the preferable solution would be to avoid the situation arising in the first place."

79. The issue as identified by Baroness Hale has not been developed in this appeal where the focus of the oral submissions has been on the judgment itself. It would therefore be wrong for this court to express a view. I would however venture to suggest that if (following full argument) it is held that a party may invoke the *Barrell* jurisdiction on the basis that the Judge has failed to weigh certain evidence sufficiently or at all, it is nevertheless the case that such an application will only rarely be allowed and should not to be regarded as being routinely available to a disappointed party.

Costs and Case Management

80. Before considering briefly a number of topics which, Mr Todd submits, demonstrate the wholesale inadequacy of the Judge's judgment, I would wish in common with the Attorney General, to express my dismay at the course this case has taken. Its progress has been unstoppable; not only are the costs phenomenal (on paper the wife's costs in respect of the appeal alone are £340,000) but all attempts by the courts (including myself) to control the extent and breadth of the 'investigation' have been in vain. The

original trial was listed for 10 days. The Judge did his best to focus the minds of the parties. Mr Todd himself accepted that the issues with which the Judge was concerned turned substantially on the oral evidence of the parties. The case ultimately lasted for 25 days with 33 lever arch files in the bundle. The judgment, as already noted, was met with a *Barrell* application accompanied by many pages of closely typed submissions.

81. When the matter came before Briggs LJ and me in relation to the extent of permission to appeal we, in our short judgment, implored the parties to concentrate on settling the case rather than either pursuing the appeal or continuing the litigation in the High Court. We noted (that which every practitioner knows) that with skilled specialist advice and a genuine desire to resolve matters, even the seemingly 'unsettleable case' can be settled. The Attorney General during the course of this hearing, urged the parties to mediate or in some way to find a resolution to the case. Mr Todd has indicated that an offer has been made on behalf of the wife and hopes that, even now, a settlement can be reached.

82. The Court of Appeal made detailed case management orders which did little to stem the tsunami of paper; the 'concise chronology' which had been ordered was not only not agreed, but 64 pages long; the wife's skeleton argument (when the correct font size was applied to it) was 10 pages longer than ordered; the authorities bundle (which was referred to exactly once in three days) exceeded the number of authorities permitted by half again, and the 6 appeal bundles allowed became 10 even before the 2,300 pages of transcripts made their appearance. It was no surprise to the court when 'additional material' was filed on behalf of the wife and made the subject of a *Ladd v Marshall* application to adduce fresh evidence. The application was refused.

The Law

83. In order to succeed in her challenge to the Judge's unequivocal findings of fact, the wife must undermine the Judge's findings in relation to credibility, findings of primary fact and the evaluation of those facts. Mr Todd acknowledged that the Judge's findings would be, as were described when permission to appeal was under consideration, "difficult to dislodge" and as posing a "formidable obstacle" .

84. Mr Todd therefore rightly does not underestimate the enormity of his task particularly where, as in this case, the outcome turned substantially on the judicial assessment of the credibility of the parties. The Judge reached his conclusions following a 25 day hearing where each of the two principal protagonists was in the witness box for a number of days. Three experts were called and eight supporting witnesses gave evidence. Costs have been incurred in excess of £3.5m. Mr Todd submits that the court should now set aside the judgment of a Judge as experienced in this field as Coleridge J and remit the case back to the High Court for a fresh hearing.

85. Notwithstanding Mr Todd's general recognition of the prodigious task facing the wife if she is to succeed in overturning the Judge's findings, I for my part, think it still helpful briefly to consider the current approach to such appeals starting with the well-known case of *Piglowska v Piglowski* [1999] 1 WLR 1360 and ending at the Supreme Court decision in *DB v Chief Constable of Police Service of Northern Ireland* [2017] UKSC 7 which was handed down on the second day of this appeal. (*DB v Chief Constable* was not cited in argument. However, given that it merely underlines what is accepted by the parties to be the existing jurisprudence, I have not felt it necessary to invite additional submissions in relation to the judgments in the case).

86. The starting point then must always be Lord Hoffman in *Piglowska v Piglowski* at 1372:

> "…….First, the appellate court must bear in mind the advantage which the first instance Judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the Judge's evaluation of those facts. If I may quote what I said in *Biogen Inc. v. Medeva Plc.*[1997] R.P.C. 1, 45:
>
> "The need for appellate caution in reversing the trial Judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous Judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the Judge's overall evaluation."
>
> The second point follows from the first. The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the Judge gave in this case but also of a reserved judgment based upon notes, such as was given by the district Judge. These reasons should be read on the assumption that, unless he has demonstrated the contrary, the Judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2). An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the Judge by a narrow textual analysis which enables them to claim that he misdirected himself.

87. In *Re B (A child)* [2013] 1 WLR 1911, para 53 Lord Wilson said:

> "53 As Baroness Hale JSC and Lord Kerr of Tonaghmore JSC explain in paras 200 and 108 respectively, this is traditionally and rightly explained by reference to good sense, namely that the trial Judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges. Consequently, where a trial Judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable Judge could have reached, that an appellate tribunal will interfere with it. This can also be justified on grounds of policy (parties should put forward their best case on the facts at trial and not regard the potential to

> appeal as a second chance), cost (appeals on fact can be expensive), delay (appeals on fact often take a long time to get on), and practicality (in many cases, it is very hard to ascertain the facts with confidence, so a second, different, opinion is no more likely to be right than the first)."

88. In this appeal there has been a real sense of 'island hopping' as we have been taken (by Mr Todd and responded to by Mr Leech) to "a document here and a document there" within the bundles, which bundles, as already noted, are themselves only a small proportion of the documents which were before the Judge. Of particular resonance therefore are the words of Lewison LJ in *Fage v Chobani UK Ltd* [2014] EWCA Civ 5:

> "[114] Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial Judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc* [1977] RPC1; *Piglowska v Piglowski* [1999] 1 WLR 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23 [2007] 1 WLR 1325; *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33 [2013] 1 WLR 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58 [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include
>
> i) The expertise of a trial Judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
>
> ii) The trial is not a dress rehearsal. It is the first and last night of the show.
>
> iii) Duplication of the trial Judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
>
> iv) In making his decisions the trial Judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
>
> v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
>
> vi) Thus even if it were possible to duplicate the role of the trial Judge, it cannot in practice be done".

89. Mr Todd specifically challenges the Judge's adequacy of reasoning and failure to deal with certain specific topics. Longmore LJ was faced with similar submissions in

Aerospace Publishing Ltd v Thames Water Utilities Ltd [2007] Bus LR 726; [2007] EWCA Civ 3. At [70] he stated:

> "In a complex factual case such as the present it will often be comparatively easy for an appellant to allege that a judgment is imperfectly or inadequately reasoned on one aspect or another and even to persuade this court, on an unopposed permission application, that that is arguably so. Appellants must, however be aware that there is no obligation on a Judge to give a particular response to every submission made (judgments in this country are quite long enough already) and that, unless it becomes apparent in the course of the appeal that a serious injustice has been done, appeals on the ground of inadequacy of reasons in complex factual disputes are likely to fail."

90. Finally in respect of challenges of this type, Lord Kerr's very recent observations in *DB v Chief Constable of Police Service of Northern Ireland* [2017] UKSC 7 must be kept in mind*:*

> "*Review by an appellate court of findings at first instance*
>
> 78. On several occasions in the recent past this court has had to address the issue of the proper approach to be taken by an appellate court to its review of findings made by a Judge at first instance. For the purposes of this case, perhaps the most useful distillation of the applicable principles is to be found in the judgment of Lord Reed in the case of McGraddie v McGraddie [2013] UKSC 58; [2013] 1 WLR 2477. In para 1 of his judgment he referred to what he described as "what may be the most frequently cited of all judicial dicta in the Scottish courts" - the speech of Lord Thankerton in Thomas v Thomas [1947] AC 484 which sets out the circumstances in which an appeal court should refrain from or consider itself enabled to depart from the trial Judge's conclusions. Lord Reed's discourse on this subject continued with references to decisions of Lord Shaw of Dunfermline in Clarke v Edinburgh & District Tramways Co Ltd 1919 SC (HL) 35, [1919] UKHL 303, 36-37, where he said that an appellate court should intervene only it is satisfied that the Judge was "plainly wrong"; that of Lord Greene MR in Yuill v Yuill [1945] P 15, 19, and that of Lord Hope of Craighead in Thomson v Kvaerner Govan Ltd [2003] UKHL 45; 2004 SC (HL) 1, para 17 where he stated that:
>
> "It can, of course, only be on the rarest occasions and in circumstances where the appellate court is convinced by the plainest of considerations, that it would be justified in finding that the trial Judge had formed a wrong opinion."
>
> 79. Lord Reed then addressed foreign jurisprudence on the topic in paras 3 and 4 of his judgment as follows:
>
> "3. The reasons justifying that approach are not limited to the fact, emphasised in Clarke's case and Thomas v Thomas, that

the trial Judge is in a privileged position to assess the credibility of witnesses' evidence. Other relevant considerations were explained by the United States Supreme Court in Anderson v City of Bessemer (1985) 470 US 564, 574-575:

'The rationale for deference to the original finder of fact is not limited to the superiority of the trial Judge's position to make determinations of credibility. The trial Judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial Judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial Judge that their account of the facts is the correct one; requiring them to persuade three more Judges at the appellate level is requiring too much. As the court has stated in a different context, the trial on the merits should be "the 'main event' ... rather than a 'tryout on the road.'" ... For these reasons, review of factual findings under the clearly erroneous standard - with its deference to the trier of fact - is the rule, not the exception.'

Similar observations were made by Lord Wilson JSC in In re B (A Child) [2013] 1 WLR 1911, para 53.

4. Furthermore, as was stated in observations adopted by the majority of the Canadian Supreme Court in Housen v Nikolaisen [2002] 2 SCR 235, para 14:

'The trial Judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial Judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged.'"

80. The statements in all of these cases and, of course, in McGraddie itself were made in relation to trials where oral evidence had been given. On one view, the situation is different where factual findings and the inferences drawn from them are made on the basis of affidavit evidence and consideration of contemporaneous documents. But the vivid expression in Anderson that the first instance trial should be seen as the "main event" rather than a "tryout on the road" has resonance even for a case which does not involve oral testimony. A first instance judgment provides a template on which criticisms are focused and the assessment of factual issues by an appellate court can be a very different exercise in the appeal setting than during the trial. Impressions formed by a Judge approaching the matter for the first time may be more reliable than a concentration on the inevitable attack on the validity of

> conclusions that he or she has reached which is a feature of an appeal founded on a challenge to factual findings. The case for reticence on the part of the appellate court, while perhaps not as strong in a case where no oral evidence has been given, remains cogent.

91. I approach my task therefore with the words of the Supreme Court of Canada as quoted by Lord Kerr ringing in my ears:

> “'The trial Judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial Judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged.'"

The Appeal

92. The key issue for the Judge was to determine the circumstances in which CTSAT was established and its purpose. The Judge was also considering (as identified by the original questions set out at para. 53 above) whether CTSAT was a nuptial settlement and whether the parties, or either of them, could have access to the funds/assets held by the trust.

93. In answer to that question the Judge ,as already set out, had concluded that:

> “[70(c)] At the time CTSAT was established it was with only one intention and it had only one, sole purpose, viz. to further the Tiger Project via SCT UK. The husband’s evidence (supported by copious documents, the other witnesses and the parties’ subsequent exhaustive and exhausting work and actions) establish this to my entire satisfaction. There were no conversations at the outset or subsequently which took place which establish an intention to benefit them or either of them and there was no ulterior/secondary purpose as the wife now seeks to suggest. That case is, in forensic parlance, a late invention by the wife. CTSAT was always and is, only for the Chinese Tigers. Accordingly it is not a PNS which can be directly invaded by the court.”

94. It should be said at the outset that it might reasonably be argued that the judgment lacked the detail that may have been expected after a trial of this length; the judgment has been variously described as ‘succinct’ or, more pejoratively, as ‘sparse’. Although done in order to “provide a fuller narrative of the events surrounding the creation and funding of the tiger project” it was ultimately neither helpful nor appropriate for the Judge to have attached the ‘Annex’ to his judgment containing excerpts from the husband’s long narrative statement, which statement included reference to a number of issues which were in dispute between the parties.

95. Whilst understanding the logic of the Judge’s approach, his judgment must in my view stand or fall on the findings in the judgment proper. That which is set out in the Annex cannot properly be regarded as ‘findings’ informing this or any other court, being merely ‘context’ against which to consider the judgment itself.

96. The question is therefore whether the clear findings of fact made by the Judge (which findings in my judgment undoubtedly answer the questions posed for resolution) can stand, notwithstanding the brevity of the judgment and the unconventional Annex, or whether this is one of those rare cases where the judgment must be set aside and remitted for rehearing.

97. Mr Todd's grounds of appeal are lengthy and discursive but in fact his complaints can be put quite simply:

    i) The Judge failed to give adequate reasons for his findings – a reasons challenge;

    ii) The failure to do so was reflected in the fact that he analysed inadequately certain critical topics which should have informed his central findings;

    iii) Had he properly conducted this exercise he would have found that CTSAT was at least in part for the benefit of the parties from inception and therefore a post-nuptial settlement;

    iv) That under the *Thomas* approach the assets of the trust were a resource which could be called upon by the husband.

98. The reality is that if Mr Todd fails in his endeavour to undermine the Judge's essential finding of fact that CTSAT's sole and continuing purpose was charitable and to facilitate the Chinese Tigers Project, then his grounds of appeal in relation to post nuptial settlements and *Thomas* resources fall away.

99. Mr Todd relied on four categories of documents and eight 'issues' in support of his submission that the judgment was not only inadequately reasoned but was wrong in its conclusion. I do not propose to deal with each individually as, in my judgment, many of them take his case no further being largely a rehearsal of lengthy submissions made by the wife in closing submissions and in support of her *Barrell* application. With respect to Mr Todd they amount to a sophisticated and excursive submission that the wife does not accept the Judge's assessment of the parties as witnesses of fact.

100. I am entirely satisfied that all the parties accepted that the fundamental question to be answered, namely 'what was the purpose of CTSAT', would largely turn on the oral evidence of the principal protagonists, namely the husband and wife. The judgment reflects that agreed position and was as a consequence written with a 'less is more' approach.

101. In ordinary circumstances this would, in my judgment, have been likely to result in the dismissal of the appeal (even had permission been given in the first place). However, partly because of the resulting lack of detailed analysis of the complex factual backdrop, but largely because of the Judge's use of the Annex, it seems to me that it is necessary to 'stress test' the Judge's uncompromising findings as to credibility which informed his critical findings of fact, by considering in a little detail the following matters which became the focus of Mr Todd's lengthy oral submissions:

    i) The Judge's failure specifically to deal with the so called *Reisman* emails. Connected with this is whether CTSAT was set up as some form of tax shelter for the husband, who was wishing to expatriate from the United States and who, it was contended, in order to avoid punitive exit penalties and substantial

investigation by the IRS, sheltered his wealth in CTSAT whilst intending that ultimately he and the wife would benefit;

ii) The Judge's failure to deal with the "Smoking Gun" email;

iii) That certain key witnesses, in particular Mr Thomas and Mr Shah, 'declined to submit to cross-examination' and that the Judge wrongfully rejected the evidence of a Mr Stephen Cross;

iv) The acceptance by the Judge of the conclusions found in a report prepared by BDO on behalf of the husband;

v) The Judge's failure to deal with the fact that the husband had considered the sale of the South African land.

102. Mr Leech, in written and oral submissions, asserts that the Judge's conclusions were overwhelmingly supported by the weight of the evidence, including evidence not referred to specifically in the judgment but referred to by him in general terms as demonstrated in the following passage written by the Judge in response to the *Barrell* application:

> "78. In deference to the industry of all Counsel I re-read and re-considered the draft judgment in the light of the three notes and have reached these further conclusions."
>
> i) The use of the *Barrell* jurisdiction in these circumstances and in the fashion employed by the wife is quite simply wrong and not the purpose of that process. That process is designed to allow the court to look again at particular findings or conclusions where some particular fact or evidence has obviously been omitted, overlooked or has changed since the hearing. It does not afford a party the right to invite the court to start again from scratch and "have another go" at finding for them based on an entire re-arguing of the case. If that were a permissible approach it would result in litigation without end as one *Barrell* application would inevitably follow upon another and then another. 99 pages of further submissions says it all.
>
> ii) The implications of the potential findings to all the main parties are, and always have been, patently obvious to all and have caused me to approach the husband's case in particular, with considerable caution. They have been in the forefront of my mind since the first occasion when the case came before me.
>
> iii) However, there is nothing that I have read in the wife's latest supporting note which causes me to revisit any of the findings or conclusions (legal or factual) which I made or amplify any of my reasoning. The findings were reached, I remind myself, after very careful consideration of the evidence and arguments before, during and after the time when the hearings took place in December 2013 and June and July 2014. Indeed, on the contrary, I am fortified in my

findings and conclusions by consideration of the further notes.

iv) To have descended into the kind of detail which the wife now seeks would hugely increase the length of this judgment on these preliminary issues for no useful purpose."

103. Mr Leech further complains that in 'island hopping' through the documents and other evidence during the course of submissions in the appeal, those representing the wife have presented to the court an incomplete picture and put an unfounded interpretation on those issues upon which they seek to rely in support of the appeal.

104. Mr Leech's overarching submission is that it would be 'remarkable' if a 'litigant who has been thoroughly discredited were allowed to expend this much court time and yet more hundreds of thousands of pounds of money on a re-run, but with the benefit of a dress rehearsal'.

(i) Tax Shelter and the Reisman emails

105. It was part of the wife's case at trial that the husband was using CTSAT as a tax shelter in order to protect his assets from the attentions of the IRS. The wife was, and is, a Belgian national and it is common ground that during the course of the marriage the husband sought and achieved expatriation and thereby renounced his American citizenship. The husband's case was that he wished to be free of the considerable regulatory requirements of the IRS which went with being an American citizen. It was also undoubtedly the case that at the time CTSAT was set up, Lawrence Cole-Morgan wrote to Richard Cassell indicating the need to ensure that the husband suffered no adverse tax consequences as a consequence of setting up CTSAT. The evidence was that Mr Cassell was not asked to advise the husband in relation to expatriation or US tax. Mr Stephen Cross (whose evidence is dealt with below) told the court that he 'presumed' that various transactions were motivated by a desire to avoid US tax on the part of the husband. Not only did the Judge find Mr Cross to be a wholly unreliable witness, but he is not, in any event, a US tax expert, did not file a witness statement and could produce no direct evidence of the husband's motivation.

106. Mr Cross (as Mr Leech put it) 'set a hare running' about US tax law and the provisions of *Heroes Earnings Assistance and Relief Tax Act of 2008* (HEART Act 2008) in relation to the impact of a person having assets in excess of $2m in the event that they wished to expatriate. When asked about it in his evidence, Mr Cassell gave unchallenged evidence that he had not advised the husband in respect of any expatriation matters and that the tax implication of a person having assets of £2m at the point of expatriation depended upon the circumstances of the taxpayer in question.

107. That the husband was using CTSAT as a tax shelter was relied upon heavily in the wife's skeleton argument and yet there was no direct evidence to that effect and no expert evidence on US tax law before the court. No application was made by those representing the wife pursuant to *Part 25 Family Proceedings Rule 2010* for the instruction of a US tax expert. At the time CTSAT was set up no tax advice of the type referred to by the wife was obtained by the husband, although he had sought tax advice in respect of the risk of unintended consequences following the setting up of CTSAT as set out in Lawrence Cole-Morgan's email referred to above.

108. The wife in her own evidence suggested that the husband had to reduce his assets prior to giving up his US citizenship. She said that in relation to the G Bank donation he (the husband) was "not exactly sure whether he needed to pay US tax or not, so, for safety reasons, he transacted through the charity". Her suggestion was therefore, as was pointed out by Mr Leech, that the husband had parted company with approaching £20 million without the benefit of tax advice, just in case he would have to pay US tax on his expatriation. At one stage the wife went as far as to suggest that the husband's involvement with the Chinese Tiger Project was "an elaborate cover for a huge and rather sophisticated tax saving scheme and that he was really not particularly interested in tigers but much more interested in saving tax".

109. Mr Todd wisely refrained from submitting that the Judge's failure to deal with the wife's wholly unsubstantiated and increasingly wild allegations to the effect that the husband was not interested in the Chinese Tiger Project and that his whole investment was an elaborate tax evasion scheme, was fatal to the judgment. He did, however seek to link two emails written, on 18 and 19 August 2002, by Ms Suzanne Reisman, (a lawyer who was and is a close friend of the wife and who acted for SCT UK in 2002 at a time when she was employed by Bryan Cave) in support of his case. Mr Todd submitted that, together, the emails provided evidence that the husband was using the Chinese Tiger Project as a tax shelter for his benefit.

110. Ms Reisman filed a witness statement in which she not only made no reference to the emails upon which the wife subsequently relied, but made it clear that she had not given the husband any tax advice. The two emails in question, it is common ground, were written at a time when Ms Reisman had ceased employment with Bryan Cave LLP and wished to be able to continue to live in the United Kingdom. Consideration was being given as to whether or not this could be achieved by her going to work for SCT UK. The email chain relied upon by Mr Todd is incomplete in that the first email in the run, which was written by the wife to Ms Reisman, has been deleted.

111. On 12 December 2013, at the conclusion of the first part of the trial, the Judge ordered the disclosure of the complete run. The missing email has not been produced by the wife and the context therefore remains obscure. The first email available is from the husband to Ms Reisman and refers only to the possibility of Ms Reisman being employed by the charity. The response to the husband's few lines is an extremely lengthy email from Ms Reisman, initially responding to his suggestion that she works for the charity. She then proceeds to write at great length about 'options' and 'structure', talking about "expanding on any of these issues to the extent that Deloitte has not done so". The email deals with "foreign grantor trusts" and "grantor trusts" and it speaks about "trusts in the event of the wife's death".

112. Mr Todd submits that the failure of the Judge to deal with this email is fatal to the judgment and that, had he dealt with it, he would have found that it was clear evidence in support of the wife's contention that the husband was motivated solely by tax considerations.

113. With respect to Mr Todd, whilst it may well have been desirable for the Judge to have dealt with this email, if only because the wife places heavy emphasis upon it, it cannot begin to carry the weight or the implications advanced on behalf of the wife. Not only is the email trail incomplete, but Ms Reisman was not called to give evidence. It follows that the Judge did not have before him the evidence which was clearly available, which would have told him exactly what Ms Reisman was talking about. Mr Leech suggests it could have been "a pitch" by Ms Reisman for a job in the

charity. In any event, Ms Reisman cannot have been speaking about CTSAT, about which the Judge was primarily concerned as, at the time of her writing the email, (19 August 2002), it was thought that matters were proceeding to the signing of a Framework Agreement as between the Vartys and China and there was no anticipation or expectation that CTSAT would be set up. Mr Todd suggests as an alternative that it may be in relation to the Li Quan Trust, about which, he submits, the Judge should have been suspicious and have regarded as part of the husband's tax planning; but that trust was not set up for a further 12 months and it was, in any event, the husband's case that the Li Quan Trust did indeed involve tax planning and was used as a tax efficient route to transfer monies into CTSAT for the benefit of the Tiger Project.

114. During the course of the hearing the Judge referred to these emails as "straws in the wind". Mr Leech submitted that it would have been "bizarre" if, having heard and accepted the husband's evidence and having heard nothing from Ms Reisman herself, he had accepted the interpretation of the emails the wife seeks to advance. I agree with Mr Leech's submission.

115. Mr Todd took the court through a further series of emails written by Ms Reisman, in relation to a dispute which had arisen between the husband and the wife about the appointment of a man called "Sandy" as a business advisor. In a number of the emails the husband makes references to "the Family Business" and asserts that two important points of the Family Business were "communications and finance". Mr Todd prays in aid these emails submitting that they 'unequivocally' support the wife's present contention that it was always the husband's intention that they, as a couple, could benefit from the assets held by CTSAT – the Family Business. Mr Todd submitted that the emails were evidence establishing that not only had that always been the position, but that it was being acknowledged to be so in emails as recently as 2010.

116. In my judgment, the very opposite is true. Mr Leech drew the attention of the court to the balance of the relevant emails. Reading to the end of the trail reveals the husband writing on 23 July 2010:

> "…I understood that his (Sandy's) principal job is to advise Family Businesses. In order to do that well he has to understand the whole Business. My family consists of Li and me. Our family business is the Chinese Tiger project. That Family Business (i.e. the charity's Tiger Project) includes communication, financing, sponsorship, tiger management, reserve management, political lobbying, scientific research among many other things. "

117. That clear enunciation by the husband that the "Family Business" <u>is</u> the Chinese Tiger Project, in my view, not only undermines Mr Todd's submission but, in turn, must inform the interpretation of a further email heavily relied upon by Mr Todd and referred to in these proceedings as the "Smoking Gun" email dated 31 October 2011.

(ii) The "Smoking Gun" email

118. At 14:35 on 31 October 2011, following the untimely death of a close mutual friend, the wife wrote an email to the husband. The wife sought reassurance from the husband as to her financial position in the event of the husband's premature death saying:

> "In the worst scenario that something happens to you, I would need a pittance to carry me for some time to be able to stand on my feet again. Further, there is the bigger issue of the tigers that we need to allow for sometime before they can be returned to China completely in that event."

119. The husband replied two hours later, in an email. Having referred to personal assets he went on:

> "The shares in Royal Mint Studios, with the associated long-term lease of 66D Royal Mint Laohu Value Reserve, the Dutch Econcern debt, the Chinese forestry plantation, and the cash left from the big donation to SCT are all held by CFI. CFI is legally held by CTSAT for the benefit of the tiger project established by the Framework Agreement signed by SCT UK, CTSAT and NWRDC in November 2002. The only trustees of CTSAT are you and Inter-Ocean Management in Mauritius (http://www.inter-oceanmgt.com/en/). Any legal documents entered into by CTSAT require the signature of all the trustees (that includes you). In the event that everything is wound-up, whatever remains ends up in the Li Quan Trust. I do not get anything."

120. The husband then set out for the wife the contact details of people who were familiar with the legal structure and assets. It is to be noted that these are the same firms who had established CTSAT on the footing that the husband and wife were not to be beneficial owners of any of the assets in CTSAT or of its subsidiary companies.

121. The "smoking gun" email has assumed considerable significance in the case. Mr Todd submitted that the failure of the Judge specifically to deal with it, if not fatal to the judgment, significantly undermines it. This single email, he submits, shows that the husband anticipated assets being released, if not to himself, then to the wife via the Li Quan Trust upon the winding up of CTSAT.

122. The husband in his oral evidence at trial said that the reference to the Li Quan Trust at the conclusion of the email was a simple error on his part. Mr Harrison (who then represented SCT UK) submitted that this was obviously correct; in the event that CTSAT was wound up, everything would inevitably go to SCT UK as the sole beneficiary of CTSAT, and thereafter, in accordance with the terms of the CTSAT trust document, there would be no funds to go to the Li Quan Trust (or anywhere else). Further, Mr Harrison had argued, when the email was read as a whole it was quite clear that the husband was seeking to emphasise that he had no interest whatsoever in any of the assets within CTSAT.

123. During the course of Mr Todd's closing submissions at trial the Judge expressed the view that the wife, in her email, was asking about two things (i) what was going to happen to her and (ii) what was going to happen to the tigers. The Judge said that he understood that Mr Todd was inevitably going to invite him to attach considerable significance to the emails but expressed the view that it was necessary to be careful about "what they really say". The Judge, Mr Leech reminded the court, clearly had the emails in mind when giving judgment and referred in terms to the wife's submission that the court should look at the "whole of the evidential picture, especially the emails".

124. The Judge clearly did not regard this single email amongst the numerous contemporaneous documents to the contrary as critical, weighing up the totality of the evidence against the backdrop of his assessment of the husband's credibility; it is implicit that he accepted that the husband had made a genuine mistake when referring to the Li Quan Trust in the email. Such a finding is consistent with the husband's own emphasis in the email that he himself would not be entitled to anything and also with the fact that SCT UK was the sole beneficiary of the trust. It is unfortunate that the judge did not specifically refer to the 'Smoking Gun' email but Mr Todd was right in conceding that failure to do so was not fatal to the judge's judgment.

(iii) Failure to call certain witnesses and the evidence of Mr Cross

125. Mr Todd complains that certain witnesses who he wished to cross-examine and were 'of the utmost significance to the wife's case', were not called to give evidence. In particular:

    i) Mr David Thomas: a chartered accountant who had been the charity's director from April 2000 alongside the husband and wife. Mr Thomas resigned as a director in 2012 but is now the charity's sole member and represents the charity as a litigant in person in the appeal.

    ii) Rumit Shah, also a chartered accountant, who was the husband's junior partner in JAS and Protector of CTSAT from May to December 2013. In his statement Mr Shah dealt with his role in the businesses and explained that as a result of the wife's allegations that the trust had financed her personal expenses, he had caused an audit to be undertaken which did not substantiate her allegation.

126. In his skeleton argument and amplified in submissions, Mr Todd said in respect of both Mr Thomas and Mr Shah that they had "declined" to submit to cross-examination and further that, despite a video link being arranged, Mr Lawrence Cole-Morgan also failed to attend for cross-examination.

127. Mr Leech in reply demonstrated, by reference to the transcripts, that to suggest that these witnesses "declined" to submit to cross-examination is not a fair presentation. Mr Cole-Morgan had been unable to give evidence in the first part of the hearing as his wife had just had, or was having, a baby. Vardags were informed in June 2014 that contact had been made with Mr Cole-Morgan and the remaining witnesses in order to keep them appraised of the timetable and the days upon which they may be required to give evidence. Arrangements were made to provide a video link where appropriate. In the event, as the transcript reveals, Mr Todd, in referring to Mr Thomas, (who had attended at court pursuant to a witness summons), said: "Mr Thomas actually attended court this morning under a witness summons but we physically told him, outside Court 35, that he could go as he had been released".

128. Similarly Mr Shah was available in court throughout the hearing, having been allowed to sit in to support the husband who was acting in person. Mr Shah, too, was the subject of a witness summons; he too was released by those representing the wife. So far as Mr Cole-Morgan is concerned, Mr Todd referred to Mr Cole-Morgan when he addressed the court in relation to the necessity for the Judge to read some documents and said:

> "…I am afraid your Lordship is going to have to take time for reading, but it may be that we have more time because of an

> approach to various smaller witnesses. We are not pursuing our matter in respect of a witness summons. Obviously we cannot in respect of Lawrence Cole-Morgan anyway because he is out of the jurisdiction. We are not pursuing that in any event."

129. Whilst it is clear that, given the inordinate amount of time that the parties had spent in the witness box, the court was once again under pressure of time, it remains the case that Mr Todd did not require these three witnesses for cross-examination. Notwithstanding that this was the case, Mr Todd, perfectly properly, asked the court to draw adverse inferences from their failure to attend. The Judge dealt with the submission as follows:

> "[26] Mr Todd says he would have wanted to question other witnesses who produced statements on behalf of the husband and their absence is a telling lacuna in the respondents' cases. I have read the statements as I was expected to. I must and do of course take into account that some of the makers of the statements have not been available to be questioned. However their evidence is largely repetitious of other evidence produced by the husband himself and witnesses who were called and in the end I do not regard myself as disadvantaged by their non-attendance."

130. In my judgment, even had the wife's presentation as to the reason the witnesses were not cross-examined been accurate, the Judge nevertheless took into account that Mr Todd would have wished to have questioned them and that they had not given evidence. The Judge was entitled thereafter to conclude that, given the mass of other evidence, oral and documentary, he had not been placed at a disadvantage by their absence.

131. Another major complaint of the wife is in respect of the Judge's finding as to the credibility of a witness who attended as a result of a witness summons issued on behalf of the wife, a man called Mr Stephen Cross. Mr Cross is a sometime friend of the husband. Mr Cross worked for the husband. In particular he was involved in fundraising projects and from August 2008 had been engaged full time on the G Bank litigation.

132. Following the settlement of the litigation with G Bank (by way of the donation of £19.85 million to SCT UK) consideration was to be given as to the payment of bonuses to those who had been involved in working towards its successful conclusion. The agreed evidence is that Mr Cross wanted a payment of £4 million for his work which, the court was told, is the sort of level of bonus which facilitating such a deal would merit in the private sector, but which would be exorbitant in the context of the charitable sector. As part of the discussion with the husband Mr Cross raised what he referred to as "concerns" in respect of an historic tax investigation which had been settled with HMRC some years previously and also in relation to the payment by G Bank of the donation to SCT UK. The husband dismissed Mr Cross, accusing him of attempted blackmail. Mr Cross was subsequently given an opportunity by solicitors in correspondence to particularise his allegations or "concerns" but chose not to do so. As a consequence, Mr Cross not only lost his job, but received no bonus for the work he had done on the G Bank project, unlike Mr Shah who was paid a bonus in the region of £800,000 for his contribution.

133. Mr Cross did not file a witness statement, but attended court with five files of paper. His evidence did not get off to a propitious start when he told the court on his first day that he suffered from "forgetfulness" and on the second day that he had been in a car accident and "you may find my memory is not perhaps as sharp as it should be". Just how Mr Cross's subsequent evidence should be judged has been the subject of submission and counter-submission covering many pages in each party's closing submissions at the end of the trial, in the subsequent *Barrell* application, and again in these proceedings both in writing and orally. The credibility of Mr Cross is a matter of considerable importance to the wife as the assumptions made and expressed by him in relation to the husband's motivation in setting up CTSAT were central to the wife's case that the creation of CTSAT was part of an elaborate tax avoidance scheme on the husband's part. The Judge in his judgment at [44] and [45] summarised the approach of each of the parties before setting out his own conclusion as follows:

> "[46] At the end of the day I am left with the strong impression that Mr Cross (who is unable to give direct evidence of the purpose behind transactions but can only guess or speculate based on his background in structured finance) has put the worst interpretation on events because of the sense of injustice he feels at the treatment of him by the husband. Against this background I have a distinct sense of unease in relation to his evidence and don't find it to be reliable or in the end that it takes the wife's case forward in any real way. In large part and in relation to the important issues in this case, it is speculation as opposed to recall of witnessed events."

134. I remind myself in this context of observations made by Arden LJ in *Langsam v Beechcroft LLP* [2012] EWCA 1230 at para.72, in relation to the difficulty an appellant has in challenging a Judge's finding on credibility and her observation that "it is therefore rare for an appellate court to overturn a Judge's finding as to a person's credibility".

135. I have read with care Mr Todd's written submissions and, as requested, gone to the transcripts. Even having done so, in my judgment, there is no basis upon which this Court could possibly accept that the testimony of this witness with an undoubted grudge against the husband, and who, on his own admission, suffered from "forgetfulness" and whose memory was "not as sharp" as it should be, should give rise to one of those rare occasions when the court should overturn the Judge's finding as to credibility.

(iv) *The BDO report*

136. In support of her case that CTSAT was a nuptial settlement the wife alleged that an extravagant lifestyle had been funded through CTSAT. In response to this the husband commissioned a forensic accountant's report from BDO UK to consider *inter alia* whether the husband and wife, or either of them, ever received benefits from CTSAT. The report which included an analysis of JAS concluded that all payments made had been consistent with the fiduciary duty in relation to the Chinese Tiger Project.

137. Mr Todd complains that the report was produced, without the court's formal permission and without the wife's involvement "on the eve of the second part of the

preliminary issue hearing". The report, Mr Todd submits, should never have been allowed in evidence, was self-serving and was wrongly relied upon by the Judge.

138. Mr Leech once again put the matter in context. Any suggestion of an ambush on the husband's part is wrong, submitted Mr Leech. At the hearing on 2 October 2013 the husband told the court that a firm was to be instructed to undertake an audit of CTSAT. By the supplementary questionnaire put before the Judge by the wife 'Question 65' sought disclosure of the letter of instruction and of the report, together with supporting documentation.

139. The way 'Question 65' was to be treated was dealt with specifically in an order of 20 December 2013, made by the Judge to case manage matters between the conclusion of the first part of the hearing of the preliminary issue and its resumption.

140. Paragraph 9 of the Judge's order provides as follows:

> "[9] Save as already replied to and save for justified exception, the Respondent shall serve replies to the Petitioner's attached Schedule of Deficiencies and Further Questions (as amended by the court) by 4pm on 19 May 2014. For the avoidance of doubt, the Respondent shall not reply to the Petitioner's supplemental questions 65 (iii) or (iv) (in the original supplemental questionnaire) and thus shall not disclose or make available at all the invoices collated in connection with the audit of CTSAT nor any of the supporting documents provided to the audit firm instructed in this regard and he shall not reply to the Petitioner's supplemental question 47 (in the original supplemental questionnaire) seeking financial statements for JASFH."

141. Mr Leech submits therefore that whilst no formal application was made pursuant to Part 25 Family Proceeding Rules 2010, it was anticipated and accepted that a report of this type would be prepared on behalf of the husband and disclosed to those representing the wife. On 16 May 2014 the Judge conducted a pre-trial review in respect of the part-heard preliminary issue. The anticipated report was not yet available and the Judge made this further order:

> "[7] The respondent shall have permission to disclose to Mr Mason of BDO the position statements filed in these proceedings and any extracts from the evidence concerning allegations that CTSAT assets have been used to fund the petitioner and the respondent's personal expenses, such extracts to be agreed in advance between solicitors for the Applicant and the Respondent."

A further direction was made for the wife to give notice as to whether she wished to cross-examine Mr Mason.

142. In the usual way the report, dated 13 June 2014, set out the instructions received from the husband together with the terms of reference. The terms of reference are wide. They cover the question of whether or not the parties had ever received benefits from CTSAT, whether expenses incurred by the various entities were consistent with the fiduciary duty to the Chinese Tigers Project and whether or not SCT UK expenditure (which had been identified as personal by the wife) was paid for with funds arising

from CTSAT. Mr Mason's team was further told to consider, amongst other things, the parties' use of the property at Mint Street, use of credit and debit cards and the G Bank donation.

143. Mr Leech took the court to the transcript of the resumed hearing in order to draw the court's attention to the fact that Mr Todd made no complaint about the admission of the report at the trial. On the contrary, when referring the Judge to necessary additional reading following the substantial break in the proceedings, he specifically drew the Judge's attention to the BDO report referring to it as "quite a meaty document".

144. Mr Mason gave evidence and was cross-examined. Inevitably and perfectly properly it was put to him that the report was not independent and that much of the information had been provided orally by the husband and that the report, as a consequence, simply reiterates self-serving information. Mr Mason did not accept this proposition saying that "the vast majority of the conclusions and opinions I have given have been based on my own verification or my team's verification". He went on to refer to the fact that "we have got all the detail on hundreds of spreadsheets. I have summarised what I looked at in my report in broad terms, but the detail . . . is voluminous".

145. The Judge dealt with the evidence of Mr Mason in his judgment as follows:

> "[51] . . . he carried out a very comprehensive (and very expensive) quasi audit of CTSAT to deal with the allegation made by the wife that it had been a source of funds for the parties' private expenditure. He was unable to conclude that any of the expenses had been used to fund the husband or the wife.
>
> [52] In the end the highest this point can be put is that it is possible that the parties have benefitted incidentally from staying in nice hotels when on charity business. Mr Mason found nothing untoward about that from an auditing point of view."

146. In both his *Barrell* application and his skeleton argument filed for this appeal Mr Todd seeks to refresh his submissions made in relation to the report itself in addition to his generalised objection to the fact that the court permitted Mr Mason to be called at all.

147. In my judgment, such a submission in support of his grounds of appeal is unsustainable. The wife's advisors accept that the wife was aware that the report was to be prepared. They now complain that they had not been given the opportunity of examining the source material, despite the fact that the court had made a specific case management order to the effect that there was to be no disclosure of that material, and that there had been no appeal against that case management order. The terms of reference were wide and, whilst the wife had no direct input into the preparation of the report, the authors were well aware of the nature and extent of the allegations made by the wife as an order had been made for her position statement to be served on Mr Mason. The wife's legal team were justifiably frustrated at the late service of the report and joint instruction of such an expert is always to be preferred, but the wife did not seek permission to adduce her own expert and did not object to the court admitting Mr Mason's report in evidence.

148. Mr Mason gave oral evidence and was cross-examined on all matters within his report. It is not for this court to go behind the acceptance (by this experienced High Court Judge) of the conclusions reached by Mr Mason that, in accordance with and following a quasi-audit, CTSAT expenses had not been used to fund the husband's or wife's lifestyle.

(v) The South African Land

149. Mr Todd submits that the husband had always anticipated that the Chinese Tiger Project would come to an end and that he therefore never intended to relinquish control over CTSAT and its funds. This, he submits, is evident from his dealings with the South African land, both prior to and after the creation of CTSAT but in particular in relation to efforts which were made to sell the land.

150. Mr Todd submits that the fact that the husband was seeking to sell the land and, as Protector until after the parties separated, remained the ultimate controller of CTSAT, gave support to the submission that the husband was also the owner of the assets, including the South African land, albeit that he had leased it to CTSAT.

151. Mr Todd relies on a number of emails and letters which undoubtedly show that the husband was at various times between 2009 and 2012 actively considering selling all or part of the land in South Africa where the tigers were, and are, living.

152. In respect of the potential sale of the South African land, the husband readily accepts that consideration was given to the sale of the lands. Having failed to obtain the corporate investment to which they aspired, the husband says that the project was desperately short of funds, cash needed to be raised and this they hoped to do by the sale of all or part of the land, but with provision to enable the project to continue.

153. Mr Leech points out that Mr Todd did not refer the court to the evidence of Mr Heinrich Funck, the reserve manager, who explained in his witness statement that sale of the land would be contemplated at the right price but that it would not have meant the end of the project. Mr Funck exhibited to his statement an email from the wife making it clear that in the event of a sale, the leases would remain in place for the benefit of the project. Mr Funck travelled to London to give evidence in support of his statement, but was not required by the wife to go into the witness box.

154. Mr Leech took the court to that part of the transcript of the trial where the wife was asked about the proposed sale of the South African land and the reassurance she had given to Mr Funck by email that the Chinese Tiger Project would not be prejudiced in the event that the land was sold. In her oral evidence the wife accepted that they had been thinking of selling the land to inject more funds into the project and that the funds released would be used to fund the costs of the project. She agreed that she had said in an earlier email that they were desperate for cash and, in a later email, that there was no longer pressure to sell because of the injection of the G Bank money into the project. So far as the email to Mr Funck was concerned, she explained her email by saying that she had put in it what the husband had told her to say.

155. In the light of the oral concessions made by the wife in evidence, which were supported by her own contemporaneous email to Mr Funck, I cannot see how specific evaluation of the evidence in relation to the proposed sale of the South African land by the Judge would have impacted on the findings of the court to the detriment of the husband.

Conclusions as to Topics (i)-(v)

156. In my judgment, had the Judge either specifically dealt with or dealt with in more detail, topics such as these in his judgment it might possibly have served to deflect the wife from pursuing this appeal. There is however nothing in them individually or cumulatively which would, in my mind, serve to cause this court to fear that in having failed to do so the wife has been the victim of an injustice.

157. For the purposes of the appeal the Attorney General had the benefit of representation by Miss Hughes, whose written and oral advocacy were exemplary and of considerable assistance to the court. Miss Hughes stripped the case back down to its bare essentials, the Court having had two and a half days of intense and minute examination of documents.

158. Miss Hughes reminded the court that Munby J, as he then was, said in *Ben Hashem v Al Sharif* [2008] EWHC 2380:

> ". . . The task of the court was 'to examine the true character of the arrangement'
>
> [238] . . . I would only add that, where the relevant transaction is embodied in a formal written document, the exercise involves the familiar process of construction of the document, giving the appropriate legal effect to the words as properly construed. Where the transaction, as in the present case, is not said to be embodied in any formal document, the process is essentially one of finding the facts, a process which can legitimately involve the process of drawing inferences with a view to ascertaining what the terms of the transaction really are."

159. In this context Miss Hughes drew the court's attention to the following:

i) Here there are formal written documents identifying the object and purpose of CTSAT. Examination of the Trust Deed and the Articles of Association of SCT UK together with the Framework Agreement should be undertaken adopting the approach in *Ben Hashem,* namely by applying "the familiar process of construction of the document, giving the appropriate legal effect to the words as properly construed" doing so, she submitted, leads inexorably to the sole purpose of CTSAT being for the Chinese Tiger Project;

ii) The parties have never been beneficiaries (and are now irrevocably excluded). The Judge did not overlook the fact that the husband could, as a theoretical possibility, seek to procure changes or additions to the beneficiaries but did not find that the trustees would be likely to be guided by his wishes;

iii) For the 10 years after the Chinese Tiger Project was formalised through the Framework Agreement, the parties worked tirelessly on the project. As Miss Hughes vividly put it: "the Tiger Project consumed their lives and ultimately it consumed their marriage". There can, she reminds the court, be no denying the genuineness of the project, there are 22 South China Tigers in South Africa awaiting relocation to China once agreement can be reached as to the terms;

iv) The wife asked the court to look outside the formal trust and find that she and the husband were, and are, some form of invisible and informal beneficiaries;

v) The wife's early approach to the litigation as recorded in the letters from Farrer and Co and the position statement of Mr Marks QC, together with the fact that her original Form E sought no variation of CTSAT as a nuptial settlement;

vi) Control is not the end of it – the husband does not shy away from admitting he has very significant control but that does not mean he will benefit. The issue is access to resources, not control.

160. Miss Hughes reminded the court of the task that had been before the Judge and in that context emphasised that all the documents contemporary with the formation of CTSAT identify the Chinese Tiger Project as being the sole purpose of the trust. The wife's protestations in the witness box that she simply signed what she was told to sign and had no real involvement or understanding does not, Miss Hughes submits, stand up to scrutiny when one turns to the emails she wrote at the time which, she says, show beyond peradventure that she was actively involved in setting up CTSAT.

161. Miss Hughes emphasised that the wife's case necessarily rested on her oral evidence in order to establish this allegedly private purpose to CTSAT. There were no contemporaneous documents to support her case, which, the wife suggested, was unsurprising because it was necessary for the husband to keep his intentions secret. The evidence of the wife was, Miss Hughes reminded the court, contrary to her sworn evidence in the South African litigation. The Judge, having heard and seen the wife give oral evidence, found that the wife had fabricated her case (para. 37) and concluded (para. 70(c)) that CTSAT's sole purpose was the Chinese Tiger Project.

162. As Miss Hughes rightly submitted, it is that issue, the purpose of CTSAT, and the finding that there was no ulterior purpose to CTSAT that the wife must undermine to succeed in this appeal. As Miss Hughes put it "If the Judge was entitled to find the sole purpose of CTSAT to be charitable then there was no room for there to be a nuptial 'flavour' as CTSAT would have an exclusively 'Tiger flavour'.

Discussion and Conclusion

163. I have considered with care the topics that Mr Todd has highlighted in support of his submission that not only was the Judge's reasoning inadequate in itself, but that analysis of those topics specifically drawn to the attention of this court should lead the court to conclude that the judgment is not only inadequate, but the findings of fact wrong, and consequently the outcome unjust. Mr Todd reminds the court, and I have well in mind, the limited matrimonial assets and the impact upon the wife's claim in the event that she is unable to have her claims met from the assets held within CTSAT.

164. In my judgment this case demonstrates the danger of the sort of 'island hoping' identified by Lewison LJ in *Fage v Chabani* which is an inevitable feature in an appeal of this nature. On a number of occasions Mr Todd took the court to evidence spread through the bundles which, he submitted supported the wife's case in relation to one of the topics upon which he relied. Mr Leech in response, took the court to further documents which, he argued, wholly or substantially undermined the submission made by Mr Todd (for example in relation to the 'Family Business' emails). This demonstrates not only the importance of the court being presented with

as full and balanced a picture as possible of the evidence which was before the court of first instance, but also the necessity of the appellate court keeping in mind that the judge had (to borrow the words of Lewison LJ) "the whole sea of evidence available to him" and that it was upon that basis that Coleridge J had answered the questions posed.

165. In my mind there are three key considerations arising out of the way Mr Todd puts his case:

i) Was the basis upon which the Judge reached his decision clear and could the parties understand the basis upon which he reached his decision?

ii) Were any or all of the topics raised by Mr Todd critical to the decision of the Judge or did they fall within, what might be termed, the Judge's margin of appreciation as to what issues were critical and what peripheral to the determination?

iii) If critical, on an analysis of the evidence available, had the Judge specifically made findings in respect of the issue/issues in question, would the outcome have been different?

166. In my judgment the critical issue for determination was, as articulated by the Judge (para. 21) 'about the motives behind and the precise purpose of the CTSAT structure'. The starting point, as Miss Hughes reminded the court, was the formal written documents identifying the object and purpose of CTSAT.

167. Given that the wife sought to go behind the terms of the documents the Judge's assessment of the parties' credibility was, as was recognised at an early stage, the single most critical finding. The Judge made clear and unequivocal findings in relation to this key aspect of the case. In my judgment there can be have been no doubt in anyone's mind as to the basis upon which the Judge reached his conclusion.

168. In my judgment, in a case such as this, where there is a mass of complex factual evidence, the Judge must be regarded as having considerable latitude in deciding which of the legion of issues it is necessary for him to deal with in his judgment. Having said that, I am sure that many, if not most judges, would have gone into significantly more detail than did this Judge. Whilst economical judgments are to be applauded, it is hard to resist a submission that this judgment, if not actually short of background and of analysis of the surrounding arguments, was perilously close to it.

169. Nonetheless, I am satisfied, having heard the submissions and been taken to the documents, that the Judge's finding in respect of the critical issue in relation to the purpose of CTSAT would have been the same even had he dealt specifically, not only with those issues raised by Mr Todd and dealt with in this judgment, but with many of the other issues identified by Mr Todd. The case turned on the credibility of the parties and the Judge was entitled to reach the conclusions he did. Nothing within the areas of criticism upon which Mr Todd concentrated in this appeal to make good his submission that the judgment was inadequate would, in my judgment, entitle this court to regard it as appropriate to undermine the Judge's essential conclusions.

170. The transaction challenged was embedded in a formal document and acted upon in compliance with the same for over a decade; the Judge was entitled to conclude, having heard the wife's extensive oral evidence and taken into account the mass of other evidence, that the wife's allegations were a late invention and he was entitled

further to find that he was unable to rely upon her oral evidence when it came to deciding where the truth lay about the underlying and continuing purpose of CTSAT.

171. During the course of submissions Mr Todd sought to argue that the Chinese Tiger Project was coming to an end and that this supported the wife's case that the assets in CTSAT (largely in the form of the value of the land in South Africa) would thereafter become available for distribution to her in settlement of her claims. Mr Leech in response denied that this is the case. Even if the wife is right, and the 'rewilding' of the tigers from South Africa to China happens sooner rather than later bringing this project to an end, the assets of the trust will thereafter be used for other charitable purposes and will not be available for the benefit of the husband or wife.

172. In my judgment the wife's appeal against the Judge's finding that the sole and continuing purpose of the trust was, and is, for the benefit of the Chinese Tiger Project must fail. It follows from that conclusion that:

   i) In the light of the Judge's findings which have not, as a consequence of this appeal, been successfully challenged or undermined, CTSAT has never constituted and does not constitute a disposition which makes any form of continuing provision for either of the parties and the Judge was therefore right in concluding that CTSAT is not a post nuptial settlement;

   ii) Given the Judge's findings the Judge made no error of law when concluding that CTSAT's assets are not a *Thomas v Thomas* resource of the husband's; they are, as the Judge found, available for the Chinese Tiger Project and only for the Chinese Tiger Project.

173. I would therefore dismiss the appeal.

Lord Justice David Richards :

174. I agree.

Lord Justice Moylan :

175. I also agree.