[2023] EWHC 500 (Ch)
Case No: PT-2021-LIV-000035

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LIVERPOOL
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

In the Estate of Nirmalathevie Naidoo

Liverpool Civil and Family Courts
35 Vernon Street,
Liverpool,
L2 2BX
Date: 08/03/2023

Before :

HHJ CADWALLADER
sitting as a Judge of the High Court

- -

Between :

CHARAN-JYOTHI RAMAMURTHIE NAIDOO — **Claimant**

- and -

(1)DAVID BARTON

(2) LUCINDA JANE BARTON — **Defendants**

- -
- -

Jordan Holland (instructed by **Hill Dickinson LLP**) for the **Claimant**
Joseph Chiffers (instructed by **POCA Solicitors**) for the **Defendants**

Hearing dates: 28, 29, 30 November, 1 and 2 December 2022

- -

Undue influence – mutual wills – fraudulent misrepresentation – mistake - laches

The following cases are referred to in the judgment:
Barclays Bank plc v O'Brien [1994] 1 AC 180
Charles v Fraser [2010] EWHC 2154 (Ch)
Fry v Densham-Smith [2010] EWCA Civ 1410
Great Peace Shipping Ltd and Tsavliris Salvage (International) Ltd [2002] EWCA Civ 1407
Hammond v Osborne [2002] EWCA Civ 885
Hatch v Hatch (1804) 9 Ves 292

Hourani v Thomson [2017] EWHC 432 (QB)
NT1 v Google LLC [2018] EWHC 799 (QB)
Pesticcio v Huet [2004] EWCA Civ 372
re Cleaver [1981] 1 WLR 939
re Coomber [1911] 1 Ch 723
re Dale [1994] Ch 31
re Goodchild [1997] 1WLR 1216
Re Hey, Walker v Gaskill [1914] P. 192
Royal Bank of Scotland Plc v Etridge (No.2) [2002] 2 AC 773
Sheikh v Malik [2018] EWHC 973 (Ch)
Thomas and Agnes Carvel Foundation v Carvel [2007] EWHC 1314 (Ch)
Thompson v Foy [2009] EWHC 1076
Turkey v Awadh [2005] EWCA Civ 382
Walsh v Greystone Financial Services Ltd [2019] EWHC 1719 (Ch)
Wright v Hodgkinson [2004] EWHC 3091 (Ch)

JUDGMENT

HHJ Cadwallader *:*

Introduction

1. Nirmalathevie Naidoo deceased (hereafter "Mrs Naidoo") died on 10 February 2016. Her husband, Dr Govindarajaloo Ramamurthie Naidoo ("Dr Naidoo") died on 12 January 1999. I am told that they had 2 daughters and 5 sons. David Barton ("Mr Barton"), who was formerly known as Ramamurthie Dasaratha Naidoo) is the second eldest son and third eldest child. He is the first defendant. His wife ("Mrs Barton") is the second defendant. Charan-Jyothi Ramamurthie Naidoo ("Charan"), the claimant, is the sixth eldest child of Dr and Mrs Naidoo. He is a medical doctor, as are all his brothers save Mr Barton. No disrespect is intended by referring to some individuals by their first name in this judgment, or even by an abbreviation of their first name used in the family: this is simply for convenience.

2. This was the trial of Charan's claim, which was issued on 30 September 2021, for an order pronouncing in solemn form for the validity of Mrs Naidoo's will dated 21 July 2015 ("the 2015 Will") by which he was appointed sole executor

and beneficiary; rescission of any mutual wills agreement affecting the disposition of her estate (together, 'the 2015 Will Claims'); and rescission of certain transactions undertaken during her life by Mrs Naidoo, or Mrs Naidoo and her husband, during their lives.

The trial

3. The trial took place from 28 November 2022 to 2 December 2022. Mr Barton, who is serving a term of imprisonment, attended remotely throughout, save on 30 November and 1 December 2022, when he attended in person to give his evidence under a production order. Otherwise, the trial took place in person.

4. At the trial, I had a number of electronic bundles of documents: the trial bundle of 2909 pages (and, separately, page 34 of the particulars of claim); the 'supplemental bundle' of 25 pages; the 'supplemental Barton bundle' of 199 pages; and the 'transcripts bundle' of 1349 pages (the impending disclosure of which was flagged up by the defendants' counsel on the morning of the second day of trial, but which was only produced on the fourth day).

5. I also had the benefit of skeleton arguments and written closing submissions from counsel for the claimant and for the defendants, and a paginated chronology for closing submissions from the claimant. I also had a joint authorities bundle, and several separate case reports in addition.

6. The claimant gave evidence himself and further relied on the evidence of Helen Stopforth (a companion of Mrs Naidoo), Faye Lowery (the solicitor concerned with the preparation and execution of the 2015 Will), and Nina Ferris (the solicitor conducting the claim on behalf of Charan, who gave evidence of what

she had been told by a friend of Mrs Naidoo, Enid Aylmer). They were all cross-examined, apart from Ms Ferris.

7. The defendants each gave evidence and were cross-examined, and called no additional witnesses.

8. After the trial, with permission, the defendants filed the 'Naidoo supplemental bundle 7.12. 22'of 80 pages on 7 December 2022. This prompted supplemental written closing submissions from counsel for the claimant dated 8 December 2022, addressing that bundle, for which I had also given permission.

The issues

9. In submissions, the claimant's case was helpfully divided into 4 categories of relief:

(1) **the 2015 Will Claims** mentioned in paragraph 2 above;

(2) rescission of the transfer of 25,000 ordinary shares in Choiceclassic Ltd ('Choiceclassic') from Mrs Naidoo to Mr and Mrs Barton on 14 April 1992, and of the transfer of 6000 ordinary shares in the same company from Charan to Mr Barton on the same date, and consequential orders ('**the Choiceclassic Claims**');

(3) rescission of the purported agreement between Mrs Naidoo and Mr and Mrs Barton on or about 18 February 2000 ('the 2000 Agreement') and consequential orders ('**the 2000 Agreement claims'**); and

(4) the rescission of 3 purported settlements made in or about 2000 by Mrs Naidoo ('the Policy Trusts') of 3 insurance policies ('the Policies') on the joint lives of Dr and Mrs Naidoo (**'the Policy Trusts Claims'**)

10. As to the 2015 Wills Claims, the mutual wills agreement was a purported agreement made between Dr and Mrs Naidoo in their purported wills dated 25 November 1998. Each of those wills appointed the spouse and Mr Barton executors, with Mrs Barton as a substitute executor, and provided that the residuary estate should pass to the surviving spouse absolutely, but if that party's spouse should fail to survive for 28 days then to Mr Barton absolutely, and if he did not survive for 28 days then to Mrs Barton. Each such will contained a declaration that it was intended to be mutual with the other (albeit Mrs Naidoo's 1998 will so provided under the heading 'Declaration relating to non-mutuality of Wills').

11. The claimant claims that the mutual wills agreement was vitiated by a common mistake on the part of Dr and Mrs Naidoo, namely the mistaken belief that entering into a mutual wills agreement would leave the survivor free to alter their will and to make alternative testamentary provision should their intention to leave their estate to Mr Barton change.

12. As to the 2000 Agreement Claims, the claimant's case is that the 2000 agreement was procured by the fraudulent misrepresentation of Mr Barton to Mrs Naidoo, firstly, that the effect of entering it would be that she would retain the beneficial interest in 1 Lulworth Rd and in the policies ('the first representation'), and secondly that she did not need to read any part of the 2000 agreement other than the signature page, and was only required to sign that in

the presence of a witness so that a judge in certain proceedings pursued by Mrs Naidoo against her nephew, Saantha Naidoo ("the Saantha proceedings') could see a witnessed version of Mrs Naidoo's signature ('the second representation'). The claim in fraud in respect of the first representation was not pursued at trial and was formally abandoned in closing, however.

13. Moreover, the claimant's case is that, if otherwise valid, the mutual wills agreement, the Choiceclassic transfers, the 2000 Agreement and the Policy Trusts were all procured by the undue influence of Mr Barton. Such undue influence is alleged to have been exercised by Mr Barton directly upon Dr and Mrs Naidoo or, in the case of the Choiceclassic transfer by Charan, either through Dr and Mrs Naidoo or, alternatively, directly.

14. In their defence, the defendants denied the validity of the 2015 Will and Charan's appointment as executor. They asserted the validity of the Policy Trusts, and that Mr Barton was the sole beneficiary of them. They denied that the mutual wills agreement or any of the disputed transactions should be set aside on the ground of undue influence. They relied on solicitors' advice from Pannone LLP that mutual wills should be drawn up, and the involvement of Addleshaw Goddard in drafting those wills. They relied on the advice of Cobbetts Solicitors in respect of the 1999 Agreement, which was a precursor of the 2000 Agreement, and in respect of the 2000 Agreement itself. They raised the defence of laches.

Standing

15. As claimant, Charan brings these proceedings in his capacity as executor of his late mother's 2015 Will and in his personal capacity. Charan obtained a grant of probate of the 2015 Will on 3 July 2017.

Restraint order

16. The relief sought by the claimant in respect of the disputed transactions is, primarily, rescission. On 4 February 2016 Mrs Justice Lang made a restraint order in the Administrative Court under the Criminal Justice Act 1988 which, among other things, prohibited Mr Barton from disposing of, dealing with, or diminishing the value of any of his assets at all; and prohibited Mrs Barton from dealing similarly with certain specified assets. That order, or a similar order, remains in place, as I understand it. It may be that rescission, the primary remedy sought, would not involve a breach of such an order; but since rescission may be granted upon terms, and if granted at all may involve orders directing the person against whom it is granted to re-transfer assets, I can see the potential for an order of the court in these proceedings to interfere with the restraint order, or the interests underlying it, or other interests relating to the criminal conduct of which Mr Barton has been convicted. I am not clear what steps have been taken to inform the Crown or the relevant authorities of the nature of these proceedings, and it seems to me that should relief otherwise appear appropriate to be granted to the claimant, they ought to have an opportunity to be heard on that, given that they have taken no part (for whatever reason) in these proceedings until now. Although I am not clear to what extent any active thought has been given to the question, it seems to me that I ought to determine

these proceedings by this judgment as far as I can, without granting relief which might affect the Crown's position until that opportunity has been taken.

The law

17. Save in one respect, the test to be applied when considering undue influence in the context of an agreement for mutual wills, there were no substantial issues over the law.

Fraud

18. An allegation of fraudulent misrepresentation is raised in respect of the 2000 Agreement. The principles are discussed in *Chitty on Contracts*, 34th ed., 9-006 to 9-052, and so far as relevant I summarise them briefly below. There must be a statement which is false, that is, false in the sense in which the words would be understood by a reasonable person in the factual context. The statement must generally be a statement of fact, past or present, rather than a mere statement of opinion or intention (unless the maker of the statement does not hold the opinion or have the intention stated) or mere commendation. It is usually necessary that the misrepresentation should have been made either by the other party to the contract, or by his agent acting within the scope of his authority, or by a joint tortfeasor, or that the other party had notice of the misrepresentation. The person seeking relief must be the person to whom the representation was made (or their successor on death, bankruptcy and assignment). It must have been intended that the claimant should act on the representation, rather than it being aimed solely at someone else. It is essential that it should have operated on the mind of the representee, so there can be no relief if he did not know the representation had been made, or was not influenced by it, or knew it was false. But the

statement need not have been the sole inducement for the claimant to enter into the transaction. The test is whether the representee would have entered the contract had the representation not been made, rather than what he would have done had he known the truth: if he would have entered the contract anyway had the representation not been made, without making further enquiries which would have revealed the true situation, then the claim fails. The burden of proving that the claimant's decision to enter the contract was not induced by misrepresentation normally lies on the defendant. Once it is proved that a false statement was made which is material, in the sense that it was likely to induce the contract, and that the representee entered the contract, it is a fair inference of fact that he was influenced by the statement, and that inference is particularly strong where the misrepresentation was fraudulent. It is no defence to the claim for rescission that the representee might, by the exercise of reasonable care, have discovered the falsity of the statement. A misrepresentation is fraudulent if the representor knows when making it that it is false, or is reckless in making it, not caring whether it is true or false: *ibid*., 8-007.

Mistake

19. The allegation of a mistake arises in the context of the purported mutual wills agreement in 1998. Again, the applicable principles are not in dispute, and I can summarise them in the following way, based on the account in *Chitty on Contracts*, 34th ed., 8-002. Common mistake cases are ones in which both parties make the same mistake of fact or law relating to the subject matter or the facts surrounding the formation of the contract. One or both parties must have entered the contract under a positive belief which was incorrect, rather than

merely not having thought about a particular issue. For a contract to be avoided for common mistake, there has to be a common assumption as to the existence of a state of affairs, no warranty by either party that that state of affairs existed, and the nonexistence of the state of affairs must not be attributable to the fault of either party; where it is possible to perform the letter of the contract, but alleged that there was a common mistake in relation to a fundamental assumption which rendered performance of the essence of the obligation impossible, the court must construe the contract in the light of all material circumstances in order to determine whether the contract should be avoided for common mistake: *Great Peace Shipping Ltd and Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407.

Undue influence

20. The question of undue influence arises in this case in relation to the purported mutual wills in 1998, the Choiceclassic transfers, the 2000 Agreement and the Policy Trusts each of which is said to have been procured by the undue influence of Mr Barton. Counsel for the defendants argues that a more stringent test, that applicable to the procuring of the execution of a will by undue influence, applies to the purported mutual wills agreement, in contrast to that generally applicable.

21. The leading case remains *Royal Bank of Scotland Plc v Etridge (No.2)* [2002] 2 AC 773. Undue influence is an equitable remedy. The objective is to ensure that the influence of one person over another is not abused. Under the doctrine, the means used to persuade a person to enter into a transaction is regarded as an exercise of improper or undue influence whenever the consent thus procured ought not fairly to be treated as the expression of that person's free will. Equity

identified the two forms of unacceptable conduct, the first comprising overt acts of improper pressure or coercion, such as unlawful threats, the second, arising out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascended person then takes unfair advantage. In cases of the second kind, the influence one person has over another provides scope for misuse without any specific overt acts of persuasion: the relationship between two individuals may be such that, without more, one of them is disposed to agree a course of action proposed by the other. Typically, this occurs when one person places trust in another to look after his affairs or interests, and the latter betrays this trust by preferring his own interests, and abuses the influence he has acquired. The types of relationship in which the second principle falls to be applied cannot be listed exhaustively. Moreover, the principle is not confined to cases of abuse of trust and confidence: it also includes, for instance, cases where a vulnerable person has been exploited. There is no single touchstone. As Lord Nicholls of Birkenhead stated in *Etridge*,

> "Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability of the one hand and ascendancy, domination or control on the other. None of these descriptions is perfect. None is all embracing. Each has its proper place." [12].

Whether a transaction was brought about by the exercise of undue influence is a question of fact. The general principle is that he who asserts the wrong must prove it. The burden of proving undue influence rests on the person who claims to be wronged.

> "The evidence required to discharge that burden depends on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the

> ordinary motives of ordinary persons in that relationship, and all the circumstances of the case." [13]
>
> "Proof that the complainant placed trust and confidence of the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two factors the stage is set for the court in the absence of a satisfactory explanation, to conclude that the transaction can only have been procured by undue influence. In other words, proof of these two facts is prima facie evidence that the defendant abused the influence he acquired in the parties' relationship. He preferred his own interests. He did not behave fairly to the other. So the evidential burden then shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn."[14].

22. Lord Nicholls pointed out that the availability of this forensic tool in cases founded on abuse of influence arising from the parties' relationship had led to this type of case sometimes being labelled "presumed undue influence", by way of contrast with cases involving actual pressure or the like, which are labelled "actual undue influence"; but a claimant may succeed even if this forensic tool is not available to him (for example, where the impugned transaction was not one which called for an explanation).

23. Lord Nicholls further stated, at [20]

> "Proof that the complainant received advice from a third party before entering into the impugned transaction is one of the matters a court takes into account when weighing all the evidence. The weight, or importance, to be attached to such advice depends on all the circumstances. In the normal course, advice from a solicitor or other outside adviser can be expected to bring home to a complainant a proper understanding of what he or she is about to do. But a person may understand fully the implications of a proposed transaction, for instance, a substantial gift, and yet still be acting under the undue influence of another. Proof of outside advice does not, of itself, necessarily show that the subsequent completion of the transaction was free from the exercise of undue influence. Whether it would be proper to infer that outside advice had an emancipating effect, so that the transaction was not brought about by the exercise of undue influence, is a question of fact to be decided having regard to all the evidence in the case."

24. The shift in the evidential burden of proof mentioned above depends upon the claimant's establishing that the complainant reposed trust and confidence in the other party, or that the other party acquired ascendancy over the complainant and, secondly, that the transaction is not readily explicable by the relationship of the parties. Where the transaction is not readily explicable by the relationship of the parties, then the greater the disadvantage to the vulnerable person, the more cogent must be the explanation before the presumption will be regarded as rebutted [24]. The disadvantage must be sufficiently serious to require evidence to rebut the presumption that in the circumstances of the parties relationship it was procured by the exercise of undue influence [24]. This involves an examination of the context of general nature of the transaction to determine what the parties were trying to achieve: *Turkey v Awadh* [2005] EWCA Civ 382 at [32].

25. When considering independent advice to relieve from undue influence a person who is competent to form an opinion of their own, Lord Nicholls [60] adopted the observations of Fletcher Moulton LJ in *re Coomber* [1911] 1 Ch 723, 730 as follows:

> "All that is necessary is that some independent person, free from any taint of the relationship, or of the consideration of interest which would affect the act, should put clearly before the person what are the nature and the consequences of the act. It is for adult persons of competent mind to decide whether they will do an act, and I do not think that independent and competent advice means independent and competent approval. It simply means that the advice shall be removed entirely from the suspected atmosphere; and that from the clear language of an independent mind, they should know precisely what they are doing."

26. In considering the scope of the responsibilities of a solicitor who was advising a wife providing security for the debts of a husband, it is not irrelevant to note

that Lord Nicholls stated that as a general proposition the scope of the solicitor's duties is dictated by the terms of his retainer and that in cases of the kind then under consideration the retainer stemmed from a bank's concern to receive confirmation from the solicitor that the solicitor had brought home to the wife the risks involved in the proposed transaction. So the solicitor ought to explain why he is involved at all, that the bank would rely upon his involvement to counter any suggestion of undue influence, and obtain confirmation that she wished him to act. The content of the advice would obviously depend on the circumstances of the case but typically, as a core minimum, he should explain the nature of the documents and the practical consequences if she signs them; he should point out the seriousness of the risks involved; he should state clearly that she has a choice and that the decision is hers alone, and explain the nature of the choice; he should check whether she wishes to proceed. The discussion should take place face-to-face, in the absence of the husband, as the person against whose undue influence the exercise is designed to protect. Non-technical language should be used, the solicitor's task is an important one, and not a formality. The solicitor should obtain from the bank any information he needs.[64-67].

27. In *Pesticcio v Huet* [2004] EWCA Civ 372 at [23] Lord Justice Mummery stated:

> " In my judgment, the judge correctly directed himself on the law and its application to the facts found by him, against which no appeal has been brought. It is the case, as held in *Inche Noriah v Omar* [1929] AC 127 at 135, by showing that the transaction was entered into 'after the nature and effect of the transaction had been fully explained to the donor by some independent qualified person.' The participation of a solicitor is not, however, a precaution which is guaranteed to work in every case. It is necessary for the court to be satisfied that the advice and explanation by,

> for example, a solicitor, was relevant and effective to free the donor from the impairment of the influence on his free will and to give him the necessary independence of judgment and freedom to make choices with a full appreciation of what he was doing."

So it is not enough that they should know precisely what they are doing: their choice needs to be an exercise of their free, or independent, will, unimpaired by the undue influence. Thus, if the defendant were able to show that the person influenced received competent, independent, advice (for example from a lawyer) which explained the nature and consequences of the transaction, and was given by a party with full knowledge of the relevant circumstances, this may be sufficient to rebut the presumption of undue influence. The lawyer need not advise his client whether or not to enter the transaction, because they may have personal reasons to do so. The role of such advice is not to show that the substance of the transaction was approved by the adviser, it is rather to put some distance between the client's decision-making and the potential influence, so as to give the client the space to make a sufficiently independent decision: see *Snell on Equity*, 33rd ed., 8-033.

28. The mere fact that legal advice is obtained cannot suffice, unless it is proper to infer that it must have led to a decision based upon full, free and informed thought: *Wright v Hodgkinson* [2004] EWHC 3091 (Ch) at [125].

29. For the purposes of an undue influence claim, the trust and confidence involved need not relate specifically to financial affairs (*Thompson v Foy* [2009] EWHC 1076 at [100] per Lewison J), and in fact even trust and confidence need not be proved if the facts justify the finding of the relevant relationship, for example, by establishing vulnerability or dependence (*Sheikh v Malik* [2018] EWHC 973 (Ch).

30. No wrongdoing is required: a claimant may succeed even where the conduct of the influencer has been incapable of criticism: *Hammond v Osborne* [2002] EWCA Civ 885 at [32], referring to *Allcard v Skinner* (1887) 36 Ch D 145; and *Pesticcio v Huet* [2004] EWCA Civ 372 at [20].

31. When it is a case of setting aside a contract, rather than a gift, if B enters a contract with A as a result of X's undue influence, and X was not acting as B's agent, then B will only be entitled to set aside the contract if B, at the time of the entry into the contract, had actual or constructive notice of X's undue influence: *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 195 – 196 and *Etridge* at [34] – [43] and [139] – [150].

Mutual wills

32. One of the issues in this case is whether the 1998 wills were mutual wills and, if so, what were the criteria to establish that the mutual wills agreement should be set aside for undue influence: in particular, was the test that discussed above, under the equitable jurisdiction, or was it the test applicable to the vitiation of wills by undue influence, and how different were they.

33. I can take the general principle as to the nature of mutual wills from *Theobald on Wills*, 19th ed., 1-019. "The term "mutual wills" is used to describe joint or separate wills made as the result of an agreement between the parties to create irrevocable interests in favour of ascertainable beneficiaries. It has been explained in the following terms:

> "The doctrine of mutual wills is to the effect that where two individuals have agreed as to the disposal of their property and have executed mutual wills in pursuance of the agreement, on the death of the first ('the first testator') the property of the survivor ('the second testator'), the subject

> matter of the agreement, is held on an implied trust for the beneficiary named in the wills. The survivor may thereafter alter his will, because a will is inherently revocable, but if he does his personal representatives will take the property subject to the trust" The agreement is enforced after the death of the first to die by means of a constructive trust. There are often difficulties as to proving the agreement, and as to the nature, scope and effect of the trust imposed on the estate of the second to die, but questions as to how the trust might be applied in practice, and as to its precise terms, did not and ought not to prevent the finding of mutual wills, if it was otherwise appropriate to do so. Such questions should be determined as between the beneficiaries, or failing such agreement, by a further application to the court.
>
> The revocable nature of the wills under which the interests are created is fully recognised by a probate court; but in certain circumstances equity protects and enforces the interests created by the agreement despite the revocation of his will by one party after the death of the other without having revoked his will, i.e. the survivor's property will be affected by the trust imposed so as to give effect to the agreement."

34. What that means depends upon the terms of the agreement. In *re Cleaver* [1981] 1 WLR 939, at 945, Nourse J cited with approval the following passage from the judgment of Dixon J in the decision of the High Court of Australia in *Birmingham v. Renfrew* (1937) 57 C.L.R. 666:

> "The purpose of an arrangement for corresponding wills must often be, as in this case, to enable the survivor during his life to deal as absolute owner with the property passing under the will of the party first dying. That is to say, the object of the transaction is to put the survivor in a position to enjoy for his own benefit the full ownership so that, for instance, he may convert it and expend the proceeds if he choose. But when he dies he is to bequeath what is left in the manner agreed upon. It is only by the special doctrines of equity that such a floating obligation, suspended, so to speak, during the lifetime of the survivor can descend upon the assets at his death and crystallise into a trust. No doubt gifts and settlements, inter vivos, if calculated to defeat the intention of the compact, could not be made by the survivor and his right of disposition, inter vivos, is, therefore, not unqualified. But, substantially, the purpose of the arrangement will often be to allow full enjoyment for the survivor's own benefit and advantage upon condition that at his death the residue shall pass as arranged."

35. What is required is a contract enforceable at law: *re Dale* [1994] Ch 31. It does not have to include a specific term that the testators should not revoke their will, as long as it is clear that the wills are to be mutually binding (the submission of

counsel for the claimant to the contrary in his written closing submissions appears to be wrong): *re Goodchild* [1997] 1WLR 1216, 1225 C-G. The agreement may be in the will, or may be proved outside the will*: Re Hey, Walker v Gaskill* [1914] P. 192 at 194. The trust to which it gives rise arises outside the will: *Thomas and Agnes Carvel Foundation v Carvel* [2007] EWHC 1314 (Ch).

36. The burden of proving a mutual wills agreement rests on the person who relies upon it. In considering whether the burden has been satisfied, where the case turns on oral evidence of an agreement, the court will take into account the inherent improbability of the testators' giving up the right to change their will in future, regardless of any change of circumstances: *Charles v Fraser* [2010] EWHC 2154 (Ch) at [64]. In *Fry v Densham-Smith* [2010] EWCA Civ 1410 at [13] to [17] the Court of Appeal discussed many of the features which made a mutual will agreement more likely to have been made, namely the testators' being in a second marriage with children from prior relationships and pre-acquired independent assets. But it seems to me that when it is a question of a written mutual wills agreement, it is a matter of construction of that contract, in accordance with the principles generally applicable to the construction of contracts. There is no reason why it should be otherwise.

37. *Theobald on Wills*, 19th ed., states at 1 – 019, summarises the position as follows.

> "There is little authority as to how far the requirement of a legally binding agreement will be satisfied if it is void, voidable or otherwise unenforceable by reason of some supervening rule, principle or provision. The view of the present editors is this. If the agreement is void, voidable or otherwise unenforceable by reason of some common law rule, then there is not the required "contract at law" and the doctrine of mutual wills cannot operate. If the agreement is void, voidable or otherwise unenforceable by reason of

> some equitable principle, then the court is unlikely to apply the (equitable) doctrine of mutual wills for to do so would mean that equity would be speaking with two voices."

Certainly, no authority on the point has been cited to me in this case.

38. From what I have said already, the doctrine operates by the imposition of an implied or constructive trust in equity, so as to give effect to a particular kind of contract. If there is no contract, then of course there is no basis for equity to intervene. If there is a contract, but it is avoided for, for example, undue influence, then there is still no basis for equity to intervene to impose a trust.

39. But if there were some such basis, I agree with the current editors of *Theobald on Wills* that it would be unlikely to do so, since it would mean that equity would be speaking with two voices (although I suppose there would remain the theoretical possibility, in that case, of a court's holding in a particular case that the mutual wills voice should trump the undue influence voice rather than vice versa - which is one reason why I prefer to consider the question as one of the vitiation of the contractual basis, rather than as avoiding a clash of equities).

40. Counsel for the defendants submitted that where the mutual wills agreement was expressed in a will, the test for vitiation of that agreement by undue influence ought to be that applicable to the vitiation of wills for undue influence, rather than the equitable test under *Etridge*. I cannot accept that proposition. As appears from what I have already said, a mutual wills agreement is a contract first, before there is any basis for equity to intervene. Such a contract may be found explicitly in the wills, or explicitly or implicitly outside it. But either way, it is not a testamentary provision, and it lies outside the wills. It does not need to be executed in the way that a will needs to be executed. When considering whether

a mutual wills agreement is void or voidable, there seems no possible reason in principle why a distinction should be drawn between agreements expressed in the will, and those not so expressed. But such a distinction is implicit in the submission of counsel for the defendants. Moreover, the doctrine of undue influence in relation to the vitiation of wills is a common law doctrine. Counsel for the defendants belatedly and rightly accepted at trial that any mutual wills agreement in the present case did not affect the validity of any subsequent will, or its admissibility to probate. That can only have been on the basis that the probate court is concerned with the validity of a will, rather than constructive or implied trusts to which its dispositions may be subject. Given that, it is impossible to see why a test of undue influence developed for probate purposes and concerned with the validity of a will should be pressed into service to undo a contract giving rise to just such a trust, or (perhaps) the trust itself, where an equitable doctrine, apt to avoid contracts and dispositions, is already available. The point was not argued with force. The only reason I can see why it was not conceded was a desire on the part of the defendants that a more stringent test than the equitable one should be applied.

41. Counsel for the claimant seemed at times to seek, to a degree, to elide the tests in any event. One might expect there to be similarities if only because of the coincidence of their names. But as the editors of *Snell on Equity* 34th ed., 8-011 to 8-012 point out, the two doctrines must be carefully distinguished. The probate doctrine applies where such pressure has been placed on the testator as to overpower the volition without convincing the judgment, and does not permit the party challenging the will to take advantage of the evidential presumption mentioned above; the probate doctrine can be invoked by any party with standing

to challenge the will; the equitable doctrine does not render the transaction invalid, rather the transaction takes effect unless and until it is rescinded, whereas under the probate doctrine the will is void; and the equitable doctrine only applies to *inter vivos* transactions. I conclude that the probate test is to be distinguished from that in equity, and is inapplicable to the doctrine of mutual wills.

Witness evaluation

Charan

42. Charan was an honest witness, who told the truth as he saw and remembered it, made modest and reasonable concessions in cross-examination, and did not claim knowledge which he did not have. He gave his evidence in a careful and measured way, and I formed the impression that notwithstanding the emotive nature of the dispute he was doing his best to assist the court with genuine evidence. Quite rightly, he frankly admitted that he did not have first hand knowledge of many of the events on which he was cross-examined (for about 2 ¼ hours) but his account of the family history, family discussions, the people involved and their relationships was clear and, in my judgment, not overstated. In general, where his evidence conflicts with that of any other witness, I prefer his evidence.

Faye Lowery

43. Faye Lowery was the solicitor concerned with the preparation and execution of Mrs Naidoo's 2015 will. Although counsel for the defendants had confirmed that no challenge was made to the validity of the 2015 will, this witness was cross-examined (for about 15 minutes), and was plainly a witness of truth.

Helen Stopforth

44. Helen Stopforth was a calm and pleasant lady, and her evidence was plainly reliable. She spent a lot of time with Mrs Naidoo, who used to talk about the past and about her family, and in particular her son David, and her own situation. She was cross-examined for about 10 minutes, and maintained her evidence in a reasonable manner. She distinguished carefully between what she could and could not remember.

Nina Ferris

45. The evidence of Nina Ferris, who gave hearsay evidence of what she had been told by Enid Aylmer, a friend of Mrs Naidoo, was not challenged. I therefore accept it, while making due allowance for the fact that Enid Aylmer herself was not present to be cross-examined, having failed to respond to requests to sign her statement.

David Barton

46. In assessing David Barton as a witness, I have taken some care to do so, initially, independently of the impression left by the evidence of his criminal convictions and the circumstances of them. He gave his evidence in a composed way, and struck me as a man capable of some charm when he chose to exercise it. He gave a rather narcissistic impression, however. He was keen to talk up his account of the help he had given to family members, his generosity in doing so, and his abilities as a businessman. There was a degree of grandiosity: he described himself as having rescued his parents and having saved the family. Any difficulties, including financial difficulties, and including financial difficulties for which on any view he must have borne some responsibility, were always entirely somebody else's fault. A cold and ruthless streak became evident, both when he

described the point at which, as he said, his mother became an enemy to him, and at those points in his evidence where he justified his rights against his family members, saying, for example, that he did not 'take everything' from his parents but 'bought everything', for £1.75m. He wilted visibly under cross-examination (which lasted about 4 ¼ hours), becoming evasive, and finding himself unable adequately to justify many of his previous answers. I formed the view that his evidence could not be relied upon save where corroborated by other reliable material.

47. This impression is, of course, consistent with the evidence relating to his criminal convictions for dishonesty and fraud offences relating to residents in his care at Barton Park Nursing Home.

48. Counsel for the defendants did not suggest that this evidence was inadmissible, and in fact accepted that it was admissible; but I was concerned as to the status of the documents recording the underlying facts of the convictions, and in particular the summary of facts set out in the Court of Appeal's judgment in *R v Barton* [2020] EWCA Crim 575. Counsel for the claimant helpfully made more detailed submissions on the point which I did not understand to be disputed.

49. So far as relevant, Section 11 of the Civil Evidence Act 1968 provides

> "(1) In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom or of a service offence (anywhere) shall (subject to subsection (3) below) be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings; but no conviction other than a subsisting one shall be admissible in evidence by virtue of this section.
>
> (2) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the

> United Kingdom or of a service offence —
>
> (a) he shall be taken to have committed that offence unless the contrary is proved; and
>
> (b) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which the person in question was convicted, shall be admissible in evidence for that purpose."

The list of admissible documents is not exhaustive, therefore: *Walsh v Greystone Financial Services Ltd* [2019] EWHC 1719 (Ch) at [207] to [220]. But in any case, the prohibition on hearsay evidence in civil procedures was removed by section 1 Civil Evidence Act 1995. *Walsh v Greystone Financial Services Ltd* [2019] EWHC 1719 (Ch) is authority for the proposition that the criminal conviction of a party to civil proceedings provides a rebuttable presumption that that party committed the offences in question. To overcome that presumption, sufficient evidence must be produced to do so on the balance of probabilities. I therefore accept that reliance may be placed on Crown Court sentencing remarks, or other Crown Court documents, or judgments of the Court of Appeal (Criminal Division), as proof of the facts underlying those convictions in the case of a party to the proceedings: *NT1 v Google LLC* [2018] EWHC 799 (QB) at [88] and following. The question of what weight to give it is to be considered in accordance with section 4 of the 1995 Act: *Hourani v Thomson* [2017] EWHC 432 (QB) at [21] to [22].

50. In the present case, the trial bundle contained a copy of the judgment of the Court of Appeal (Criminal Division) already mentioned, and there was a separate bundle consisting of a transcript of a ruling of His Honour Judge Everett on the

admissibility of certain financial transactions, his ruling on the form of the indictment, his ruling on the submission of no case to answer, the written directions of law given to the jury, a transcript of submissions on the law, his summary of the evidence, a transcript of the proceedings from summing up to verdict, and a transcript of the sentencing remarks. All of these are admissible. Having regard to the matters specified in section 4 of the 1995 Act, I consider that they should be given substantial weight as evidence of the truth of the matters to which they refer. Mr Barton, in his evidence, told the court that the matter was still subject to appeal, but permission had not yet been granted. If so, it is taking a surprisingly long time. But in any event, no attempt was made to produce evidence capable of rebutting the presumption that Mr Barton committed the offences in question. In cross-examination, he accepted the accuracy of the summary by the Court of Appeal of his defence (save in relation to the false accounting charge when he blamed his bookkeeper), which did not substantially dispute any of the underlying facts on which the prosecution relied (saying, instead, that they did not amount to criminal conduct because he had acted on advice, or the victims were happy and knew what he was doing, and had been well treated). Accordingly, I accept that he was convicted by a jury at a very lengthy trial on the basis of those facts, which he did not substantially dispute. The pattern of blaming others, praising his own actions, is here seen again.

51. Mr Barton was convicted of 4 counts of conspiracy to defraud, 3 of theft and 1 of fraud, relating to conduct beginning no later than 1997 and continuing until December 2015, and consisting of manipulation and exploitation of elderly residents at Barton Park Nursing Home which the Court of Appeal characterised as involving a high level of exploitative criminality. I note that in his sentencing

remarks, His Honour Judge Everett described Mr Barton at being adept at flattery, persuasion and veiled threats, and being very good at getting people to do what he wanted, resulting in the loss by residents of many millions of pounds of their money. He described him as a despicably greedy man, a hypocrite who claimed that he was caring for the residents, when the person whom he cared for most was no one but himself, not even his family; a man with an insatiable appetite for expensive cars and for building his property empire. The learned judge remarked that he would trample over anyone who opposed him, with an especially unattractive habit of instructing solicitors to issue threats and unpleasant letters to warn off anyone whom he felt to be a hurdle to be overcome in the pursuit of his dishonest ambitions. He referred to Mr Barton's lies, evasions and boasts in giving evidence over a period of 18 to 20 days. He described the case as one of the most serious cases of abuse of trust that he suspected had ever come before the courts in this country. He said he would not believe Mr Barton on anything. He had seen little evidence of remorse from him.

52. I could not, of course see all that for myself; but what I saw in Mr Barton was in no way inconsistent with that characterisation of him, which I accept.

53. Mr Barton was sentenced to 21 years imprisonment, reduced on appeal to 17 years. Mr Barton was still serving that sentence when he appeared before me.

54. It was submitted to me on behalf of the defendants that Mr Barton's criminal conduct was irrelevant to the matters at issue in these proceedings. I disagree. The facts upon which he was convicted included the use of fairly sophisticated legal devices, including wills, contracts, spurious gifts, loans of transfers of land and other property to enrich himself at the expense of vulnerable persons who placed

their trust in him and were, to a degree, in his power. That is highly relevant to the facts of this case, as it shows evidence of character, propensity, and ability to behave in the way described, including the use of threats of legal proceedings. The point is emphasised by the evidence before me that when he was arrested, Mrs Naidoo said she felt that was exactly what he had done to her. Obviously, it also substantially undermines his credibility as a witness. I accept, of course, that the offences in question did not occur as early as the Choiceclassic transfer, but I do not see that this makes any difference, absent evidence of a subsequent change of character, of which there is none.

Mrs Barton

55. Mrs Barton gave evidence confirming the truth of Mr Barton's evidence and was cross-examined for about 15 minutes. It became clear that most of what she had to say did not lie within her direct knowledge, and was her interpretation of documents which she had seen. Her evidence was not, therefore, of particular assistance. It was unfortunate that she insisted that she had been acquitted of offences related to those of her husband when in fact, as it emerged, the charges had simply been left to lie on the file. Equally, it was unfortunate, and affected her credibility, that she asserted there was no contradiction between her evidence that Mrs Naidoo always had total control of the family business and finances, and her husband's evidence in earlier proceedings in 1997 that he had been responsible for the financial side of his parents business, and that his mother had no experience of these matters and relied upon him for them. So far as relevant, therefore, I would not be inclined to accept any evidence from her as true unless independently corroborated.

The Choiceclassic Claims

56. I should deal first with the matter of the Choiceclassic transfers of 14 April 1992, as being first in time. The claimant's case is that in or about late 1991 and early 1992, Mr Barton pressured and prevailed upon Dr and Mrs Naidoo to procure the transfer of the entire issued share capital in Choiceclassic Ltd, the company which held Barton Park Nursing Home and operated the nursing home business at the property, and which also owned a valuable Rolls-Royce car used by Dr and Mrs Naidoo.

57. Of the 65,000 issued ordinary shares in Choiceclassic, Mr Barton already held 17,500, Mrs Naidoo held 25,000, Dr Naidoo held 10,500, and Charan and Ravi each held 6000. On 14 April 1992 Mrs Naidoo transferred 24,999 shares in Choiceclassic to Mr Barton and 1 to Mrs Barton; Dr Naidoo transferred his 10,500 shares to Mr Barton; and Charan and Ravi transferred their holdings of 6000 shares each to Mr Barton too.

58. At about the same time, Dr and Mrs Naidoo, and Ravi and Charan resigned as directors, Mrs Barton was appointed a director, and Mr Barton ran it for his own benefit thereafter. This is not in dispute.

59. Despite the terms of the particulars of claim, the claimant's case was not in the end put on the basis of improper pressure or coercion (of which there was little or no evidence), rather on the basis that Mrs Naidoo was in a vulnerable position by this time, and there was a relationship of trust and confidence between her and Mr Barton, such that she and her husband relied upon him at the relevant time.

60. Dr Naidoo was seriously unwell: he had suffered renal failure in 1989 or 1990. I

have no doubt Mrs Naidoo was concerned for the future. She was, as Mr Barton accepted, her husband's primary carer. The business concerns were plainly complex and demanding, as appears from the evidence of Charan, which I accept. Moreover, the company was subject to an HMRC investigation. In fact, as appears from the company accounts, there had been significant underdeclared sales in the period to 1990. In December 1990 the directors of the company (that is, Dr and Mrs Naidoo) were treated as having borrowed an additional £544,919 from Choiceclassic, resulting in an overdrawn directors' loan account of £634,348, of which £176,264 was repaid in July 1991, while the accounts stated that arrangements had been entered into to repay the balance. As Mr Barton eventually accepted in cross-examination, his parents were under stress.

61. It was a feature of family life, as I accept, that there were various family meetings discussing what was to be done about the family affairs. Charan's evidence refers to Mr Barton's having "continually remonstrated" with their parents, and as having no conscience when it came to family transactions, as being a person who would take what he could. I accept this evidence, which is consistent with the character of Mr Barton as I have already found it to be. It was, however, a family in which ordinarily the parents from time to time made provision out of their own assets for their children. I am sure that Mr Barton was demanding in putting forward his own claims to their generosity. Furthermore, he was already involved in the family businesses. Unlike his siblings, he was not pursuing a medical career, and I accept that he was involved in the family businesses to a greater extent than his siblings. There had been a period when he was in a low mood and unqualified, and his parents wanted to keep him occupied with an involvement in family business. I think it more likely than not that at this stage both his parents

afforded him a degree of trust in his involvement in the family businesses at this stage, in the sense of letting him make his own decisions. I consider that Mr Barton himself characteristically overstated their trust in him, when in his previous witness statements in the proceedings in 1997 he stated that he was responsible for the financial side of his parents' business and that his mother relied upon him for these matters. While Dr Naidoo was alive, the impression I have formed is that Mrs Naidoo relied upon Dr Naidoo in relation to these matters, rather than upon Mr Barton, and that Dr Naidoo did not rely upon Mr Barton.

62. I am not satisfied on the balance of probability that there was at this stage such a relationship of trust and confidence between Mr Barton and his parents, or either of them, as to lend itself to abuse by Mr Barton. I do not find that at this stage he had influence or ascendancy over them, or that they placed reliance upon him in relation to their affairs.

63. It follows that I am not satisfied on the balance of probability that Charan's transfer of this shares arose from his parents' relationship of trust and confidence with Mr Barton. Moreover, it is plain from his own evidence that he only transferred his shares because his parents told him to do so, and not out of any reliance he placed upon Mr Barton or trust in him.

64. I accept the claimant's case that Choiceclassic was a profitable company, and that it made a significant contribution to the income of Dr and Mrs Naidoo, which will have assisted them in discharging their other debts: this was Charan's evidence of how Dr and Mrs Naidoo themselves referred to it. I have not been shown evidence establishing that the company was, as is proposed, the most profitable

element of Mrs Naidoo's businesses, or the largest source of their income. I take it however that the reference to its being 'the milking cow' meant that what it produced (whether as profit or otherwise) was at least both plentiful and reliable.

65. The claimant's case is that these transfers were by way of gift. They are recorded in the list of members as having been for nil consideration. The defendants' case is that Mr Barton paid Dr and Mrs Naidoo's overdrawn director's accounts in full, that is, that he discharged the debts, in exchange for the share transfer with the company, in the sum of £390,000. Certainly the accounts show a directors' loan balance of that order of magnitude.

66. They also state that on 25 August 1994 the remaining balance of £356,931 was discharged "when the transfer of a private property from the personal names of the directors into the company was effected, at a value in excess of the balance outstanding". Mr Barton's evidence was that the property in question was 21 Oxford Rd, Southport, which he had bought in 1992 for £195,000 (as is confirmed by the completion statement and solicitor's correspondence), but which he said was valued at £356,936 in 1994, as a result of renovation works. Although he said there had been a valuation, it was not in evidence.

67. I accept that the property was transferred to the company, as appears from the Land Registry official copies and the accounts of the company (though Mr Barton accepted that he and Mrs Barton, continued to live in it, or part of it). Although I cannot be satisfied as to the value of the property on the evidence before me, I must accept on the basis of the accounts that the company accepted it (at Mr Barton's instance) in satisfaction of the debt.

68. Mr Barton relied on a curious document apparently on the headed notepaper of

Brown, Turner, Compton Carr, solicitors, of Southport, dated 4 April 1992 and signed by him alone, purporting to be an agreement that, in consideration of the transfer to him of all the shares in Choiceclassic Ltd, he accepted liability for all outstanding debts owed by that company (be it to the Inland Revenue, Barclays Bank or otherwise) and accepted responsibility for any capital gains tax resulting from the transfer. Assuming this to be a genuine document and to have contractual force, this seems to mean that Mr Barton would indemnify the relevant family members against those potential or actual liabilities.

69. The claimants argue that since individuals would never be personally liable for the debts of a private limited company, such an agreement conferred no benefit on them; and hence, the transfers of the shares were for nil consideration. However, there are circumstances (such as neglect or fraud) in which a company director can be personally liable for the unpaid tax of a company. There are circumstances in this case which make it perfectly possible that Dr and Mrs Naidoo feared they might be personally liable. The letter to Dr Naidoo from Foster Long Partnership, accountants, dated 24 April 1995, indicates that just such a liability (described as not insignificant) had been settled, and that Mr Barton had undertaken to settle it on their behalf (although it is not clear that the liability was in respect of Choiceclassic, particularly in view of the reference to Dr Sharma). I conclude that Mr Barton did undertake, whether bindingly or not, responsibility for discharging certain liabilities or potential liabilities of his parents; and that in the case of the directors' loan from Choiceclassic, actually did so.

70. The agreement mentioned above has nothing to do with any liability of Dr and

Mrs Naidoo to that company, however. Nor does the discharge of the directors' loan amount to consideration for the transfer of shares in that company: Dr and Mrs Naidoo were the substantial majority shareholders in that company, and would hardly have been pressing themselves for repayment. I think it more likely, and I find, that the consideration for the transfer included an agreement on the part of Mr Barton to pay off third party debts for which they might be personally liable in respect of that company. I recognise, of course, that the defendant's defence really only relies on the directors loan and 'various other delicate matters', but it seems to me that this finding is open to me on the statements of case, because of the reference to tax liability in the defendants' Part 18 replies.

71. Although the explanation is less than perfectly documented or clear (which is hardly surprising given the passage of time), it seems to me that it is a sufficient explanation for the Choiceclassic transfers by Dr and Mrs Naidoo to Mr Barton, and for their having required the other Choiceclassic transfers to take place.

72. The claimant relies on a letter dated 11 November 1992 from solicitors instructed by Mr Barton and written to Dr and Mrs Naidoo concerning an attempt by Mrs Naidoo to transfer ownership of the Rolls Royce owned by Choiceclassic Ltd into her sole name. It is an unattractive letter, even though Mr Barton instructed his solicitors to say that he was prepared to allow Dr Naidoo to use the vehicle as long as he wished. It is consistent with his character as I have found it to be, but it does not seem to me, however, to take the matter further in the context of the Choiceclassic transfers.

73. Accordingly, I will dismiss the claim for the rescission of the Choiceclassic transfers for undue influence.

The Mutual Wills Agreement

74. On 25 November 1998 Dr and Mrs Naidoo each made a will, as described above. Each will referred to the other, and provided that "the two Wills are intended to be in law mutual Wills". Mr and Mrs Barton allege that this gave rise to a mutual wills agreement. The burden of proof lies upon them (the suggestion otherwise in their defence is mistaken). Charan makes no admission, but it is said on his behalf that the defendants failed to particularise the basis of the allegation that the wills be mutual, so that he cannot properly address it, while pointing out the inadvisability of such an agreement for Mrs Naidoo. In view of the express terms of the wills, I reject this submission.

75. It seems to me that this is a matter of construction of the terms of the purported agreement in accordance with usual contractual principles applicable to agreements in writing. The wills are mirror wills, they were drafted by the same solicitors, they refer to each other, they contain the same provision, they were formally executed by the respective testators, and they expressly state that they are mutual. Mr and Mrs Barton therefore satisfy the burden of proof and I conclude that there was a mutual wills agreement.

76. The effect was that, before the death of the first of them to die, they could be revoked by mutual agreement. After the death of the first to die without revoking his own will, the will of the survivor becomes effectively irrevocable in equity. The survivor is bound by the agreement, and a court will refuse to give effect to any alteration or revocation to their own will. As a will is inherently revocable, the survivor may of course alter her will thereafter, but if she does so her personal representatives take the property subject to the trust, by way of a 'floating'

constructive trust: see *Theobald on Wills* 1-021. Given that Dr Naidoo was at the time expected to die first, and quite soon, at the time the effect ought to have been understood to have been that Mrs Naidoo effectively lost her freedom to change her mind, either of her own initiative or in the light of a change in circumstances or relationships. There was no conceivable benefit to her, or Dr Naidoo, or any other member of the family. The sole beneficiary of this restriction would be Mr Barton, who would be bound to take the estate of the survivor on their death.

77. The claimant seeks to set aside the mutual wills agreement, initially on the ground that it was vitiated by a common mistake on the part of Dr and Mrs Naidoo, namely the mistaken belief that entering into a mutual wills agreement would instead leave the survivor free to alter their will and to make alternative testamentary provision should their intention to leave their estate to Mr Barton change; alternatively on the ground of undue influence.

Mistake

78. The evidence that Dr and Mrs Naidoo shared the mistaken belief that the survivor could alter their will so that the alteration took effect, is as follows. In the first place, Mrs Naidoo did make further wills after the death of Dr Naidoo, in particular on 1 June 2005 of which Charan was the universal beneficiary, 30 May 2006 of which Charan and Ravi were equal universal beneficiaries, and the 2015 will of which Charan was again the universal beneficiary, each via a different firm of solicitors. That is indication that at the time she thought there was some point in doing so, but no inference can be drawn as to whether that was because she was mistaken as to the effect of the mutual wills agreement, or had forgotten

about it or its effect, or wanted to conceal it, or for some other reason. The first of those subsequent wills was nearly 7 years after the mutual wills. It is to be supposed that she did not show the solicitors her 1998 will, since there is no indication that any of them considered the question of a mutual will. There is no evidence of her having complained of it but, again, it may equally have been that she had put it out of her mind.

79. The evidence as to the genesis of the 1998 wills is as follows. Dr and Mrs Naidoo had started proceedings in 1997 against a nephew, Saantha, with which Mr Barton was helping. On 15 March 1997 they had written to Goffeys solicitors that they had given Mr Barton their full power of attorney to conduct their affairs for the rest of their lives, and Goffeys had started seeking instructions as to those proceedings from him. On 17 April 1998 Pannones sent copies of their existing wills (copies of which are not before me) to Mr Barton on their instructions. On 21 October 1998 Rachel Dobson of Pannone called someone at Addleshaw Booth about the making of mutual wills in the context of Dr Naidoo's being very ill, and there being complex litigation on foot. The telephone note of that call records reference to Mr Barton and his mobile telephone number, with a time, which suggests that it was he who had been in touch 20 minutes beforehand. I infer that it was he who initiated this, therefore. The same day Vincent O'Farrell of Pannone telephoned Addleshaw Booth to say that Addleshaws should prepare "true mutual Wills: save all to each then all to son", noting that Dr Naidoo was very ill, that he was thought to have capacity but an independent doctor was to certify it, and they were to speak to the son about it. The note states "all 3 are clients David Barton". The note states also "Dr & Mrs Naidoo direct ->2 visits". They also state "all to David with the implicit faith". The following day, Frances

Butterfield and Shara Hall of Addleshaw's met Dr and Mrs Naidoo in person. The note states "To survivor. To David absolutely -> implicit faith that will provide for parents and youngest sons." A discretionary trust appears to have been the preferred mechanism. This note makes no reference to mutual wills, but indicates there would have to be a further discussion about what was to happen if Mr Barton died first. The letter of the same day from Shara Hall confirms the meeting that day, saying that they would be in touch to discuss further in due course. On 23 October 1998 Shara Hall tried to call Rachel Dobson at Pannone but she was out of the office until the following week. On 2 November 1998 Frances Butterfield of Addleshaw's sent a letter to Dr and Mrs Naidoo enclosing the draft will and letter of wishes and the terms of engagement. It explained that after a gift of the nil rate band to each other, the balance was to be held on a discretionary trust of which it was intended that Mr Barton be the principal beneficiary. It pointed out that

> " although you are each making Wills in similar terms, each of you is free to alter the terms of your respective Will without reference to the other. It may be that this is not what you would wish and this is something we can discuss in more detail when we next meet."

This passage is the context for what followed. Although Mr Barton mentioned mutual wills during his telephone call on 21 October 1998, it had not been mentioned again until this point, and plainly had not figured in the instructions given by Dr and Mrs Naidoo.

80. On 11 November 1998 Miss Butterfield wrote again to Dr and Mrs Naidoo asking if they had had an opportunity to consider the draft wills and letters of wishes. A file note records that on the following day she spoke to Mrs Naidoo, who said that Dr Naidoo was not well again and had gone into hospital recently. It records

> " She said that they'd give further thought to the wills and they had decided that they would like to leave everything to each other on the first death, everything to their son David on the second death and if he were to die before the second of them everything to David's wife who is Lucinda Jane Nadoo [sic]. She also said that she would like the wills to be mutual. I explained what was meant by mutual in terms of wills and how restrictive it was. She said that they were quite certain that they would like the wills to be mutual and that they had no intention whatever of ever altering the provisions of the wills."

81. They spoke again on 16 November 1998 but on a different topic, and on 19 November 1998 Miss Butterfield wrote to Dr and Mrs Naidoo enclosing draft wills engrossed for execution, together with an explanatory memorandum which is missing. The letter stated,

> " **Clause 11** is a declaration that the Wills are intended in law to be mutual. This means that there is an implicit agreement between the two of you that the survivor of you shall remain bound by the terms of these Wills. Although the survivor of you remains free to alter their will, the beneficial interests of those named in the mutual Wills (namely David and Lucinda) will have priority over any other beneficiaries named in a new Will. This means that if, after the death of the first to die, the survivor changed their Will to reduce the benefit which David (or Lucinda) would ultimately receive (David or Lucinda) would be able to make a claim against your executors for the benefit they had lost. These are unusual provisions to include in a Will and if either of you has any doubt about their inclusion please let me know and I will arrange for these provisions to be deleted.
>
> Your Wills do not make express provision for any of your children other than David. I understand your implicit trust that David will act in the best interests of the family. I have therefore also drafted a Memorandum for you to sign to explain to your other children your reasons for drafting your Wills in this way."

The wills were then executed on 25 November 1998, with one of their sons, Suren, being a witness. The memorandum appears not to have been.

82. The claimant argues that the explanation of mutual wills was misleading, since it contemplated that changes to the devolution of the estates could be made in the long term. Although aware that Dr Naidoo was very ill, the letter reinforces that impression by referring to the survivors being free to change that will without

making it clear that such change would be in breach of the agreement, and failed to make it clear that mutual wills agreement was not a mere family understanding but a binding contract which would become irrevocable on Dr Naidoo's death, regardless of any subsequent change of circumstances.

83. I do not accept this. Mrs Naidoo certainly knew that the effect of such an agreement would be effectively to prevent them from changing their wills: that is why she said on the telephone they had no intention whatever of ever altering the provisions of the wills, explaining why they wanted mutual Wills despite the cautionary advice given on the telephone. The terms in which she did so indicate, in my judgment, that she understood that the effect would be permanently to bind the survivor. The explanation given in the subsequent letter was not inaccurate, and any lack of clarity not inherent in the topic would not in my judgment have dispelled the correct understanding of the central point, which Mrs Naidoo already had. That she later made different wills does not change that. Accordingly, I do not accept that the mutual wills agreement should be rescinded on the ground of common mistake.

Undue influence

84. In the alternative, the claimant claims that the mutual wills agreement should be avoided for the undue influence of Mr Barton. Certainly by the time these wills were made, Dr and Mrs Naidoo were in a vulnerable position. Dr Naidoo was extremely unwell, and both of them must have appreciated he did not have long to live. Their financial affairs were, to say the least, unsettled, and they had just embarked on substantial litigation against a family member to recover family assets. Not only was Mr Barton their son, he had been operating their business

for some time, they indicated that they had given him full power of attorney to deal with their affairs, and not only was he helping with the litigation, they were content for him to give instructions in relation to it on their behalf. They were prepared to leave the estate of the survivor of them to him alone, out of all their children, in the "implicit faith that he would provide for parents and youngest sons". This can hardly be disputed, and even Mr Barton's own evidence was that he was very close to them, and that they trusted him. His witness statement dated 17 April 1998 in the Saantha proceedings went so far as to say that he was responsible for the financial side of the business and Mrs Naidoo depended upon him to deal with financial matters. In her letter dated from 2001, referring to that litigation, Mrs Naidoo herself said, as I accept, and she left everything in her son's hand, "as I trusted him with all my heart". I find that the level of trust by this stage had become profound, as had their dependency upon him.

85. The making of the mutual wills in his favour is certainly a transaction which calls for an explanation. It is notorious to lawyers practising in the field that a decision to make mutual wills needs to be considered with great care, and will not usually be the appropriate decision, precisely because of its inflexibility, when much may change during the life of the survivor. In the present case, the effect was to leave Mrs Naidoo locked in to having to trust Mr Barton to look after the family appropriately following her death, from the point at which Dr Naidoo died, and whatever Mr Barton might do or suffer thereafter. As I have found, Mrs Naidoo understood that (and no doubt Dr Naidoo did too). The only person to benefit from that, as I have said, was Mr Barton himself. It left the rest of the family at his mercy.

86. The only inference which can be drawn is that it was Mr Barton who was responsible for his parents' giving instructions that the wills be mutual, and that unless there is a satisfactory explanation, they can only have done so as the result of his abusing their vulnerability and his influence upon them. In this context I note that the first mention of mutual wills appears to have come from him; that even after that at a meeting which he did not attend, his parents were giving instructions in which mutual wills played no part; and that it was not until a later stage, that their instructions mirrored his own.

87. There is no satisfactory explanation. In particular, neither his dealings with the directors loan from Choiceclassic, nor his assistance with the 1997 litigation (the only explanation mentioned in the letter of Pannone to Cobbetts dated 20 December 1999), nor any help he may have given his brothers, come near to an adequate explanation. True it is that without his help they would stand no chance of recovering their assets; but (as we shall see) the deal was that he should take them if recovered; the fact that he would in effect have paid for them (if it was a fact) in no way explains his not only also inheriting the survivor's entire estate whatever it might contain at their death, but also the right to prevent the survivor from changing their mind whatever might happen. It is completely out of proportion to any conceivable benefit to Dr and Mrs Naidoo, even including the benefit of having someone they then trusted look after the assets, supposedly for the benefit of the family. In cross-examination he suggested that it was to stop any claim against him in respect of the estate after the death of his parents. While that may have been part of his own motivation in promoting the idea, it hardly provides a good explanation why his parents should effectively have given up their testamentary freedom.

88. That being the case, it is for the defendants to establish that Mrs Naidoo nonetheless acted free of his undue influence in entering the mutual Wills agreement. They relied on the involvement of Addleshaw Booth. I reject Mr Barton's evidence that that firm only had his name and contact details so that he could give them directions to the house. Mr Barton was closely involved in giving instructions to Pannones, and it was that firm which gave Addleshaws the initial instructions to prepare mutual wills, before any contact with Dr and Mrs Naidoo. More to the point, while I have found that while Dr and Mrs Naidoo understood the effect of their mutual wills agreement, and that any lack of clarity in the advice which they received did not change that, there is no evidence that they received any advice directed to or capable of ensuring that their wish to enter into such an agreement was in the exercise of their own free will, rather than the result of undue influence on the part of Mr Barton. I find that they received no such advice, and accordingly that the mutual wills agreement falls to be set aside as the result of that undue influence.

89. Cobbetts gave brief advice on the mutual wills to Mrs Naidoo in the period between January 2000 and June 2001. On 4 December 2000 they had sought a copy of Mrs Naidoo's 1998 will, because she had not been able to provide one, but had provided a copy of Dr Naidoo's will. It seems she had asked Pannone for advice about this shortly beforehand, but they had said that they could not advise her on it. There is no evidence about the advice which she received, but at any rate she took no action and raised no complaint in respect of the mutual wills. I cannot see this as an affirmation of the mutual wills agreement, however. The defendants did not allege it, and I mention it only for completeness.

90. It follows that Mrs Naidoo's subsequent wills, none of which made provision for Mr Barton, were capable of taking full effect according to their terms; and in particular, that her will dated 21 July 2015, appointing the claimant her executor and sole beneficiary, which it is not disputed was her true last will, took effect according to its terms, so that the claimant, and not Mr Barton, is the beneficiary of her estate. As already noted, he took a grant of probate of that will on 3 July 2017.

The 2000 Agreement Claims

The facts

91. I take the following account of the facts relating to the 2000 Agreement, which are largely undisputed, from the claimant's skeleton argument, where they are most conveniently set out. That is in turn substantially derived from the account of Blackburne VC in his judgment given in case number CH 1997 N 169 on 18 August 2000 in the 1997 proceedings.

92. By 1996 the problems which Dr and Mrs Naidoo were experiencing with servicing the loan facilities with NatWest were acute and the bank had been demanding for some time that action be taken to repay the capital of the loan. As a result, Dr and Mrs Naidoo had entered into discussions with their son-in-law, Saantharmurthi Naidu ("Saantha") about a possible rescue package ("the Saantha Arrangement").

93. Before the Saantha Arrangement was put into effect, Mr Barton had offered an alternative solution whereby Dr and Mrs Naidoo would transfer the entirety of their assets to Mr Barton in exchange for his discharging the indebtedness to

NatWest and providing funding for the remainder of Ravi's and Charan's medical training. Dr and Mrs Naidoo chose not to proceed with that at that stage.

94. The precise terms of the 1996 Saantha Arrangement were disputed. However, Dr and Mrs Naidoo appear to have formed the impression that they would be left with no indebtedness to NatWest, their beneficial interest in 1 Lulworth Road and their beneficial interest in Horsfield Cottage (together with the business run from that property). They also believed they would retain the beneficial interest in three insurance policies assured against their joint lives ("the Policies") the previous trusts of which had been "broken" by Dr and Mrs Naidoo, Ravi and Charan (acting at his parents' direction) under pressure from Saantha. Saantha's contention was that in fact they were to retain no such interests.

The 1997 Proceedings

95. Shortly after a number of transactions which were purportedly intended to put the 1996 Saantha Arrangement into effect, Dr and Mrs Naidoo appear to have sought assistance from Mr Barton. They had initially instructed their own solicitors, Goffeys, but were then introduced by Mr Barton to Pannone, to whom instructions in the matter were transferred, and in around June 1997 a claim was issued ("**the 1997 Proceedings**"). The 1997 Proceedings sought the cancellation of the transactions made in purported pursuance of the 1996 Saantha Arrangement (the transfer of the Ardmere Complex, Horsfield Cottage and 1 Lulworth Road) together with cancellation of the sale of Rose Stud Farm. It was not in dispute, and is well evidenced, that Mr Barton conducted the 1997

Proceedings on behalf of Dr and Mrs Naidoo. Mr and Mrs Barton's case is that they were wholly funded by Mr Barton.

96. By the time the 1997 Proceedings were issued Dr Naidoo was seriously ill, as I have mentioned, and he died on 12 January 1999. Probate of his Will was extracted by Pannone on behalf of Mr Barton and Mrs Naidoo on 18 October 1999. Mr Barton was substituted for Dr Naidoo as co-claimant in the 1997 Proceedings. It is not in dispute that it was Mr Barton rather than Mrs Naidoo, who dealt with Pannone in relation to the administration of Dr Naidoo's estate.

The 1999 Agreement and the 2000 Agreement

97. Shortly before the trial was due to be heard in the 1997 Proceedings, Mr Barton and Pannone considered settlement with Saantha and his companies. Mr Barton instructed Pannone to send a Part 36 Offer to Saantha and his companies on 29 December 1999.

98. In summary, the Part 36 offer was as follows. The claimants would pay £550,0000 to one of the companies in return for 1 Lulworth Road and Horsfield Cottage free of incumbrances; Saantha and another of the companies would transfer the business at Horsfield Cottage to the claimants. The claimant would pay £1.15m to yet a third company in return for the Ardmere Complex property and business, the bungalow at 29 Park Road West. Saantha would transfer the Policies back to the claimants. A counterclaim would be dropped. This would be in full and final settlement of the claim against Saantha and his companies.

99. The next day, Mr and Mrs Barton and Mrs Naidoo entered into an agreement drafted by Pannone ("the 1999 Agreement"). It was conditional upon Saantha and his companies accepting the Part 36 Offer.

100. The 1999 Agreement provided that Mrs Naidoo and Dr Naidoo's estate would transfer what amounted to all of her assets (including her interest in 1 Lulworth Road, all of the properties that she and Dr Naidoo had formerly owned and were seeking to recover in the 1997 Proceedings, the Policies and all interest in the 1997 Proceedings) to Mr and Mrs Barton, and Mrs Naidoo would give up her right to occupy 1 Lulworth Road. She would however be *permitted* to occupy 1 Lulworth Road unless Mr and Mrs Barton formed the reasonable opinion that they needed to dispose of that property. Mr and Mrs Barton would pay Mrs Naidoo the sum of £1,000 per month and would maintain and insure 1 Lulworth Road. They would also pay any sum due to Saantha and his companies under the Part 36 Offer and be responsible for the costs of the 1997 Proceedings (albeit if the Part 36 Offer were accepted some of those costs would be recovered from Saantha and his companies).

101. Pannones rightly decided they could not act for both Mrs Naidoo and Mr Barton in relation to the 1999 Agreement. They were prepared to advise Mr Barton on it, however, and arranged for Mr Peter Stone of Cobbetts Solicitors to advise their other client, Mrs Naidoo. That was after they had already drafted it, and after they had (presumably) advised her as to the terms of the Part 36 offer with which it was linked. Their letter to Mr Stone was dated 20 December 1999, just 8 days before the Part 36 offer was made. They sent him the pleadings, instructions to leading counsel to advise in consultation in February 1999,

instructions to him to advise in November 1999, the draft offer, and a schedule summarising the parties' valuations of the properties as at July 1996, but none of the voluminous enclosures (although he was invited to ask for them if he required them). He was told that the claimant's costs exceeded £300,000 and that no proposals had been received from the remaining defendants, represented by the Solicitors Indemnity Fund, for any contribution towards those costs. He was told that the first to fourth defendants had indicated that a payment of £1.35m plus £400,000 for the repayment of the mortgage might be acceptable. They indicated that the Part 36 offer would be unlikely to be accepted. Importantly, Mr Stone was told that the properties would be acquired by Mr and/or Mrs Barton, who would be providing the total consideration of £1.7m, and who, he was told, had already expended very substantial sums on his parents' living expenses, a schedule of which would be provided, together with his maintaining his two younger brothers since July 1996 while they trained as doctors. The letter mentions the mutual wills, and the fact that Mrs Naidoo had said that the purpose of the litigation was to restore the family fortunes fraudulently obtained by Saantha, but they were in no financial position to bring the litigation. It mentioned that the loser of the action might ultimately be liable for in the order of £1 million in costs, or perhaps even little more.

102. The following day Mr Stone wrote an engagement letter to Mrs Naidoo indicating that he understood his instructions to be to advise her whether the proposed Part 36 offer was a proper and commercially sensible compromise of her claim, and if so whether it was in her best interests that the compromise be funded by her transferring all her own and her late husband's interests in the property businesses and policies to Mr Barton in exchange for his promises to

maintain her in the house at Lulworth Road for the rest of her life as long as he could afford to do so. He pointed out that she was liable for his costs, but Mr Barton had agreed to meet them. He said his assessment of the position would be very broad in relation to the risks involved in the main proceedings because of the shortage of time available to read all the relevant papers: if she wanted him to read further, that would delay the offer; alternatively, she might prefer to consult another solicitor who was more immediately available.

103. There appears to be no record of the advice which Mr Stone gave. At any rate none has been disclosed. On 23 December 1999 he sent some proposed manuscript amendments to the draft 1999 agreement, which he indicated were subject to instructions. They did not change the basic outline of the deal. The Part 36 offer was sent out on 29 December 1999 and the 1999 Agreement was executed by Mr and Mrs Barton and Mrs Naidoo and dated 30 December 1999. It recited, curiously, not that Mrs Barton had been, but that she was being, advised by Cobbetts on the contents. That reflected the reality, that she had received advice from Mr Stone, and his involvement was continuing.

104. It is possible to discern even from the letter of engagement a cautious and sceptical tone in relation to the question whether funding the proposed compromise in the way described would be in her best interests. It would be surprising if it were otherwise. I am unable, therefore, to accept the claimant's suggestion that Cobbetts merely acted as a 'rubber stamp' on this occasion: that was emphatically not their role, and there is no reason to think that they would have thought that it was (quite the contrary).

The 2000 Agreement

105. The December 1999 Part 36 Offer was not accepted and so the 1999 Agreement did not come into effect. However, in about February 2000 settlement terms were agreed between Saantha and his companies and Mr Barton.

106. Pannone wrote to Cobbetts again on 8 February 2000 to say that, subject to their giving separate advice to Mrs Naidoo, settlement had been reached. The letter said that it had taken 'horrendous efforts' to obtain a negotiated settlement with the first to fourth defendants, and they were keen to finalise the order urgently.

107. Evidently, Mr Stone gave further advice to Mrs Naidoo, this time in the context of the proposed 2000 Agreement. Cobbetts' letter dated 23 April 2001 shows, and I accept, that they had sent an account to Mrs Naidoo on 12 January 2000 for the work done to that date, which was paid 'somewhat reluctantly' in early March 2000. They then invoiced a further £2068 (including VAT) on 19 June 2001 and sent a reminder on 21 August 2001. Mr Barton disputed the invoice and would not pay. That invoice was for advising her in connection with the proceedings and the agreements, and advising briefly as to her own and her late husband's mutual wills. Cobbetts' letter of 6 July 2001 states that the bulk of it related to the separate advice in respect reference to the terms of the agreements, and the bill covered a period of 18 months from January 2000 to June 2001 made up of 1.2 hours, 4 hours letters, 2.8 hours on the telephone, and 6.1 hours preparation, at an agreed rate of £175 per hour. Plainly a substantial amount of time was put into giving this advice on the 2000 agreement and the proposed settlement. There is again no direct evidence as to the terms of the advice given.

108. I consider that I am entitled to infer from the time taken and the seniority of the person involved, that it was competent advice. That would have involved

bringing home to Mrs Naidoo the precariousness of her position if she signed the agreement, and her profound future dependence upon the continuing life, health, solvency, trustworthiness and goodwill of Mr Barton over the course of the rest of her life, and that she would be taking a very great risk. I consider that I am entitled to infer that this was seriously attempted, since that was part of Mr Stone's specific role and duty. I consider that I am entitled to infer that he would also have pointed out that without Mr Barton's continued support in the litigation, and in the absence of any other funding options, it would be bound to fail, and perhaps to involve a very substantial and insupportable liability in costs owed to Saantha and the other defendants, that the prospects of success in any claim in negligence against her current solicitors were incalculable, and that there was no obvious alternative means of funding any such claim. No party to the present litigation has suggested she had other options.

109. Prior to her death, Mrs Naidoo stated in her undated letter (or memo) of 2001 that she had never understood Cobbetts' advice and had told them she trusted Mr Barton in relation to the 1999 Agreement and 2000 Agreement only because he had told her to say so. That is an indication, in my judgment, that Mrs Naidoo felt she had been advised of the risks in entering into those agreements: otherwise she would not have needed to say she had not understood it.

110. I infer that the litigation team was satisfied at the time that Mrs Naidoo had received independent advice capable of freeing her from any undue influence on the part of Mr Barton, though because I cannot tell what information they received about it, the inference takes matters no further.

111. I draw these inferences in the absence of any evidence from Mr Stone himself, notwithstanding that he appears to be alive, working, and readily traceable. No satisfactory explanation of why he has not been called on behalf of the defendants has been provided, but I draw no inferences from that.

112. Mrs Naidoo and Mr and Mrs Barton entered into a supplemental agreement on 18 February 2000 providing that the terms of the 1999 Agreement would bind them notwithstanding that the condition precedent had not been met, provided a specified consent order was made no later than 3 March 2000 ("**the 2000 Agreement**"). On 29 February 2000 a Tomlin Order was made in the 1997 Proceedings in settlement of the claims against Saantha and his companies, and the 2000 Agreement became unconditional.

113. In outline, the Tomlin order provided that in full and final settlement of the proceedings the claimants would pay the first to fourth defendants £1.75 million in return for the Ardmere Complex, the Bungalow and business, Horsfield Cottage, 1 Lulworth Road, the businesses at the Ardmere Complex and Horsfield Cottage, and the Allied Dunbar policies; and that there would be no order as to costs.

114. For present purposes, the 2000 Agreement was effectively the same as the 1999 Agreement.

115. The element of the 1997 Proceedings which did not involve Saantha and his companies was the subject of a three-week trial in March 2000. Judgment was handed down in August 2000. The 2000 Agreement was not considered by the court.

Fraudulent misrepresentation

116. The claimant claims that the 2000 agreement should be set aside for the fraudulent misrepresentation made by Mr Barton in procuring Mrs Naidoo's signature to it that the judge in the 1997 proceedings needed to see evidence of her signature, in circumstances in which he refused to show her anything other than the signature page of the document which, in the event, was the 2000 agreement. The only information about this originates from Mrs Aylmer, who was the witness to her signature. Mrs Aylmer did not give evidence, however; nor did she sign a witness statement although invited to do so. Charan gave evidence that Mrs Aylmer, who was a friend of Mrs Naidoo, had told him that Mr Barton had given Mrs Naidoo a blank piece of paper to sign and told her that the court needed a sample of her signature. He did not explain to her what she was signing, or that it meant signing over all her assets to David. He was not cross-examined about this. Nina Ferris, his solicitor, gave evidence that in March 2019 Mrs Aylmer, when interviewed as a potential witness, had told her in summary that Mr Barton had attended her home at 1 Longworth Rd and asked his mother to sign the last page of a document, but the rest of the document was not shown to her; told his mother that she did not need to read it and that her signature was required so that the judge could see/check it; that Mrs Aylmer asked why she needed to sign as well, and was told by Mr Barton that the judge required the signature to be witnessed to confirm it was Mrs Naidoo's signature; that Mr Barton was forceful and would not take no for an answer. She immediately prepared a draft witness statement setting out what she had been told. Nina Ferris was not cross-examined either. Accordingly, I accept that this is what Mrs Aylmer told both of them.

117. It was put to Mr Barton in cross-examination that this was what he had done, but he said he had had nothing to do with the signature of the 2000 agreement by Mrs Naidoo and had been told to keep it at arms length: Mrs Aylmer had made it all up. An attendance note dated 16 February 2015 by a solicitor at Breens solicitors, Faye Lowery, records that Mrs Naidoo had told her that Mr Barton had asked her to sign a blank page some years ago which she would swear on the Bible to anybody was a blank page under the pretence that the court wanted to see a copy of her signature, that her carer had witnessed her sign this and that it later transpired that what she had signed had transferred all of her assets, cars, money, policies and her home, over to him. This was also put to Mr Barton, who described it as a fabrication. Since it is in a solicitor's attendance note, I accept that Mrs Naidoo said that.

118. What she seems not to have said on this occasion was that she had had legal advice, for at least some of which Mr Barton had paid, over a period of some weeks if not months, about her entering into the 2000 agreement. Nor did she explain on this or any other occasion why Mr Barton should have had to do this, given its centrality to the settlement of the Saantha proceedings, and the knowledge of its terms which she must at least to some degree have acquired if only as a result of the advice given by Mr Stone before she signed it. I would accept that Mr Barton might be capable of the conduct described but given the implausibility of Mrs Naidoo's account of it, and the absence of Mrs Aylmer to have her evidence tested in cross-examination, I find that Mrs Aylmer's account, and Mrs Naidoo's account, of how she came to sign the 2000 agreement are both unreliable, and I do not accept them. It follows that I do not

accept that the 2000 Agreement should be set aside for fraudulent misrepresentation on the part of Mr Barton.

Undue influence

119. The claimant's alternative case is that the 2000 agreement was procured by the undue influence of Mr Barton. I have already found that in 1998 Dr and Mrs Naidoo were in a profound relationship of trust in and dependency on Mr Barton. That can only have increased by the time of the 1999 agreement and 2000 agreement. By that stage, as Mr Barton eventually accepted in cross-examination, Mrs Naidoo's situation had substantially worsened. She was a widow and, as she said in her undated letter of 2001, very low and upset. She and Mr Barton were engaged in substantial litigation with substantial risks to both of them, and she was heavily dependent upon Mr Barton both to fund the litigation and to conduct it, and it evidently seemed the only way to recover for her immediate family what had been among the most substantial assets. I therefore find that at this time, and indeed at all times from at least 1998, there was a relationship of trust and confidence in Mr Barton.

120. The 2000 Agreement certainly does call for an explanation. No one would ordinarily enter into an agreement willingly to transfer to one of their several adult children and his wife what amounted to all of their assets or hope of recovering assets (including her interest in 1 Lulworth Road, all of the properties that she and Dr Naidoo had formerly owned and were seeking to recover in the 1997 Proceedings, the Policies and all interest in the 1997 Proceedings) and give up their right to live in their own home for a mere terminable licence and the promise of an allowance, however helpful and trustworthy that child might have

been, or might have been expected to remain. Moreover, it placed the rest of her children, for whom she had made no significant provision otherwise, entirely at the mercy of Mr Barton as regards those assets.

121. It was said on behalf of the claimant, additionally, that it left her worse off than she had been before the Saantha proceedings, and made the conduct of that claim effectively pointless, when she had understood that the object was to win back her assets so that she would at least retain her home and the policies. I accept that, as a matter of fact, that is more likely than not; but since I am concerned with the 2000 Agreement, it seems to me that I must consider the position as at that date, by which time Mrs Naidoo was substantially committed to those proceedings; by which time such considerations had been superseded: she was where she was. Mr Barton's evidence, was that long before and shortly after Pannone advised that legal aid would not be available for these proceedings, back in April 1997, Dr and Mrs Naidoo had already agreed that he should retain all the assets retrieved under those proceedings. I reject that evidence, however, because I have already found that at that stage the relationship was not yet one of dependence or trust in the relevant sense.

122. Absent a satisfactory explanation, the only inference can be that Mrs Naidoo entered into the 2000 Agreement as the result of undue influence on the part of Mr Barton, in the abuse of that relationship. The explanation offered by Mr Barton is his successful funding of the Saantha proceedings and settlement. That is not a satisfactory explanation. On that footing, the proceedings were effectively pointless as regards Mrs Naidoo, or worse. While it might have made sense even at this late stage for Mrs Naidoo to agree that he should benefit

substantially from the assets recovered as a result of the settlement, I am not satisfied by any means that her giving them all up is satisfactorily explained by the litigation funding, a mere licence to live in her own home, an allowance, and warm words about providing for the other children. Accordingly, I consider that (subject to the question of independent advice) the presumption that the 2000 Agreement was procured by undue influence is established.

123. Mr and Mrs Barton however relied upon the provision of independent advice from Cobbetts. It was suggested on behalf of the claimant that in fact the purpose of the advice had been to protect Mr Barton from any claim that he was a 'Saantha -like' figure and to ensure that his ability to benefit from the properties was watertight. I accept that, as far as it goes: so much is apparent from the attendance note of the consultation with John McDonnell QC on 12 February 1999. Mr Barton suggested in evidence that it was really to protect the lawyers. I accept that too, as far as it goes: if the lawyers had failed to see that independent advice was obtained, they might be vulnerable to a claim. But in order fully to protect Mr Barton, or even the lawyers, Mrs Naidoo needed to be genuinely protected by the provision of appropriate independent evidence; and everybody would have understood that. The claimant's point on this is therefore a bad one.

124. The claimant submits that Cobbetts was identified by and instructed by Pannone. I accept that the evidence shows that it was Pannone who put Cobbetts in touch with Mrs Naidoo. I also accept that their instructions (that is, the information about what they were being asked to do for Mrs Naidoo, and against what factual and legal background) came from Pannone. That is plain from

their letters, which I accept were sent to and received by Cobbetts. I do not accept the explanation for the proposal leading to the 1999 Agreement was provided entirely by Mr Barton: it seems to me that that must have come from Pannone, who were acting both for him and for Mrs Naidoo; but I do accept that he will have had input into it. I accept, too, that the arrangement was that Mr Barton should pay Cobbetts' fees, although it was Mrs Naidoo who was liable for them, as Mr Stone made clear in correspondence.

125. I do not accept that any of this rendered Mr Stone's advice insufficiently independent of Mr Barton. His job was explicitly to give advice independent of Mr Barton, and I find that he would not have accepted it if he had not felt that he was able to do so, and that the circumstances described above did not prevent him from doing so, and that any competent lawyer in his position would have been able to do so. Mrs Naidoo was his only client, and he will have been entirely focused upon her interests.

126. I do not accept that Cobbett's had insufficient time to give proper advice to Mrs Naidoo, or that Cobbetts said so. They were pointing out that time was tight before the 1999 agreement, as indeed it was. I accept Mr Barton's observation that Mr Stone would not have acted unless he was confident that he could do an adequate job. I consider that the time spent, particularly by the time of the 2000 agreement, was entirely adequate for the purpose.

127. I do not accept that following such advice Mrs Naidoo did not appreciate her position, and in particular the position of vulnerability in which the 2000 agreement would put her. I find that she did. That would have been obvious to any competent lawyer from the terms of the 2000 agreement itself, and I do not

doubt that Mr Stone was competent. It follows that I do not accept her later observation that she had not understood the advice to that extent.

128. I do accept that Mrs Naidoo will have told Mr Stone that she trusted Mr Barton wholeheartedly and implicitly. She did trust him in that way. While I accept that Mr Barton may have told her to say so, I find that she would have said so anyway.

129. However, competent advice is not always enough to free a person from the effect of undue influence. In my judgment, Mrs Naidoo would not have entered into the 2000 Agreement if she had been freed from Mr Barton's undue influence in relation to it by the advice from Cobbetts. I am not persuaded - indeed little or no attempt was made to persuade me – that she had no other options. It seems to me that no one in her position, difficult as it was, would have done so if they had had a genuinely free choice, unimpaired by such influence. Moreover, in the context of her already deep dependency on and trust in Mr Barton, increased as it had been by the time of the 2000 Agreement, I consider it unlikely that any independent legal advice, however competent and however forceful, could have freed her from that vulnerability and influence. I am driven to the conclusion that Mr Stone's advice did not have that effect, and accordingly that she entered into the 2000 Agreement as the result of that undue influence.

The Policy Trust Claims

130. I turn therefore to the purported policy trust claims. The claimant puts the defendants to proof that the trusts upon which they are purportedly held were properly executed by Mrs Naidoo, and that the manuscript additions to the first

policy trust restricting the class of objects of those trusts to Mr Barton, his spouse, children and remoter issue were made prior to execution. There was no evidence about this: in particular, Mr Barton accepted that he had not been there at the time either of execution or amendment. But there is a presumption of due execution of a deed; and, further, it is to be presumed that any alteration to a deed was made before execution, absent evidence to the contrary: see, for example, Halsbury, *Laws of England*, Vol. 32, para. 281. Accordingly, this point takes the claimant no further.

131. The claimant claims that these trusts should be set aside as having been procured by Mr Barton's undue influence, alternatively as having been executed pursuant to the 2000 Agreement which itself was procured by that undue influence. If not, he claims that Mr and Mrs Barton should be removed as trustees of the second and third policy trusts.

132. By 2000, after various dispositions, beneficial ownership of all three policies was held by Mrs Naidoo. On 27 June 2000 Pannone wrote to her enclosing three trust deeds for her to execute, the effect of which was to pass the benefit of all three policies to Mr Barton, subject to powers to appoint out to any of the named beneficiaries, who were restricted to Mr Barton, his wife, children and remoter issue. Mrs Naidoo appears to have executed those trust deeds. Charan expresses concern that it is not her handwriting, but I consider that in this case the assistance of a handwriting expert would be required to conclude that it was not, given that they were sent to her for signature, there is no evidence of complaint that she did not sign, and she was obliged to sign under the 2000 Agreement. I do not see her later attempts to keep paying the premiums as

sufficiently unambiguous to support the proposition that, for example, the defendants had forged her writing. (By 2008, however, for reasons which are unclear, there appears to be confusion, at least within the policyholder, about whether the first policy was the beneficial property of Mrs Naidoo, or was not subject to a trust at all. It seems to me that that confusion elucidates nothing, and accordingly I ignore it.)

133. The 1999 Agreement, and so the 2000 Agreement, required that the relevant policies be transferred to Mr and/or Mrs Barton and/or at their direction. I take it, therefore, that when the policy trusts were executed, they were executed pursuant to that provision. Since I have found that the 2000 Agreement was procured by undue influence, and that the policy trusts were executed pursuant to that agreement, it follows that they cannot be regarded as having been executed pursuant to any new exercise of free will on the part of Mrs Naidoo. They fall to be dealt with in the same way as the 2000 Agreement.

134. If I am wrong about that, the evidence shows that at the time Mrs Naidoo was still subject to the undue influence of Mr Barton; all the more so, because of the effect of the 2000 Agreement. Apart from the advice already given by Cobbetts in relation to the agreements, no independent legal advice was given in relation to these trusts. Again, therefore, the trusts were procured by undue influence.

135. The claimant claims that if the trusts are not to be set aside, Mr and Mrs Barton ought to be removed as trustees of the second and third policy trusts, for the benefit of the beneficiaries generally and the competent administration of the trust in their favour. I agree: Mr and Mrs Barton are not, for reasons which will be obvious from the terms of the judgment so far, suitable and proper persons

to act as trustees for any person other than themselves. Moreover, they have alleged that they, or Mr Barton alone, are the sole beneficiaries of these trusts, when they are not.

Laches

136. The defendants have pleaded a defence of laches. That is on the basis that Mrs Naidoo could have sought the relief presently sought during her lifetime, and the claimant could have sought such relief at any time following her death in February 2016; and that the defendants are seriously prejudiced in their ability to defend these proceedings due to the passage of time. In the defendants' skeleton argument, particular reliance was placed upon their inability to obtain a witness statement from Mr Stone. However, I can dismiss that immediately: there is no evidence that the reason why Mr Stone did not provide a witness statement had to do with the passage of time; and it seems unlikely on the evidence.

137. In closing submissions it appeared, indeed, to be accepted on behalf of the defendants that the passage of time did not mean that particular evidence had become unavailable. Instead, it was said that it was a matter of the practical ability of the defendants to call such evidence, and reference was made to the fact that a lawyer's memory would fade more quickly than that of other witnesses, given his professional obligations. However, there was no evidence that Mr Stone could not recall the matter.

138. I was reminded of the principles applicable to a plea of laches by reference to the passage in *Snell's Equity*, 34th ed., 5-011. In order for the plea to succeed, the passage of time must have given rise to circumstances rendering it

inequitable for relief to be granted. The destruction or loss of evidence which might have assisted the defendant would be an example; but Mr Barton has not demonstrated any degree of handicap for that reason; and, apart from the reference to Mr Stone, has pointed to no other specific evidence which the passage of time has rendered unavailable.

139. In any case, delay during the period when a victim is still subject to the undue influence, will not bar a claim: *Hatch v Hatch* (1804) 9 Ves 292. Although in her later years Mrs Naidoo complained bitterly about how Mr Barton had treated her, even to solicitors, she never did anything about it, and it is clear from the contemporaneous documentation that this was not because she agreed with what he had done, or acquiesced in it, but because she was still afraid of him, vulnerable, and at his mercy, as the result of the transactions which he had procured by his undue influence over her. Accordingly, there is no question of laches during her lifetime, although the point obviously does not apply after her death.

140. No plea of acquiescence was raised against the claimant either during her life or for the period after her death and until the commencement of proceedings.

Relief

141. I have held that the purported mutual wills agreement should be set aside. I will make an order for rescission and declare accordingly. I will also formally pronounce in favour of the validity of the 2015 Will in solemn form and, for the avoidance of doubt, make a declaration that the estate of Mrs Naidoo is to be administered and distributed in accordance with its terms.

142. No relief is to be granted in respect of the Choiceclassic Gift.

143. The 2000 Agreement and the Policy Trusts are vitiated by Mr Barton's undue influence. They are prima facie to be rescinded. At the trial it was recognised, however, that questions may arise as to the practical working out of any such order, with which neither the Court nor the parties were then in a position to deal. In the first place, one would need to be able to make findings about what transactions occurred as a result of the 2000 Agreement apart from the Policy Trusts. One would then have to consider whether they could be undone and if so, upon what terms, given that the object of the exercise is to achieve fairness and, in particular, given that consideration will have to be given to whether credit ought to be given to the defendants or Mr Barton for, for example, any intermediate expenditure. A particular difficulty may arise as the result of Mr Barton's criminal convictions, and the possibility that some or all of the assets in question may need to be treated as proceeds of crime; or that some or all of the expenditure for which credit might arguably otherwise have to be given might have come out of proceeds of crime. There is the practical consideration that there is a restraint order in place. I will invite further submissions, written, in the first instance (and not to exceed 5 pages in length for each side) as to how best to proceed to the determination of those questions given the conclusions reached in this judgment. I will then either direct an oral hearing on the question how to proceed if necessary, or give directions as to the determination of these further issues and the grant of further relief.