IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 121 OF 2016 (IKJ)

IN THE MATTER OF THE POULTON FAMILY TRUST

BETWEEN:

(1) MICHELE ALEXIA CANHAM
(2) JAMES ALEXANDER POULTON
(3) NICHOLAS JAMES POULTON
(4) JAMES MICHAEL POULTON
(5) DAISY ELIZABETH HOUGHTON-POULTON

Plaintiffs

AND:

(1) CUTTY SARK LAND COMPANY
(2) DEBORAH MCMULLAN POULTON
(3) WILSON MALCOLM MCMULLAN
(4) CHRISTINE JANE MCMULLAN
(5) CAYMAN NATIONAL TRUST CO. LTD.
(6) CNT (NOMINEES) LTD

Defendants

Appearances: Mr. Tom Lowe QC of counsel and Mr. Neil McLarnon of Travers Thorp Alberga for the Plaintiffs

Mr. Graeme McPherson QC of counsel and Ms Ilona Groark of Kobre & Kim (Cayman) for the 2nd to 4th Defendants ("D2-D4")

Mr. Sebastian Said and Mr. Zacharie Caudeiron of Appleby (Cayman) Ltd. for the 5th Defendant (the "Trustee") and the 6th Defendant (together, the "Trustees")

Dates of Hearing: January 12, 14, 15, 18, 19, 20, 21, 22, 26, 27, 28, 29, February 1, 2, 3, 4, 5, 8, 9,10, 11, 12, October 18, 19, 20 and November 1, 2, 3 and 4, 2021

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Judgment delivered: 18 February 2022

HEADNOTE

Discretionary trust- declaration of exclusion by settlor and protector excluding all beneficiaries save for settlor and his wife-distribution of all trust assets to settlor and wife shortly before his death-validity of

declaration of exclusion-whether declaration vitiated by lack of capacity or undue influence or improper exercise of a fiduciary power-unlawful means conspiracy-proprietary estoppel

JUDGMENT

Introduction

Preliminary

1. Alan Poulton ("Alan") was born in London in 1938. He became a successful businessman, principally through the London property market. He had 5 children, born to three mothers, who are the Plaintiffs in this case. On November 23, 2003 he settled the Poulton Family Trust (the "Trust") for the benefit of himself, his children and their descendants. The Trust Fund consisted of his 50% interest in the family business, in which at least two of his children were always directly employed. Under the initial terms of the Trust, Alan was entitled to 100% of the income for his lifetime with his children's entitlement to income and capital accruing after his death. In the early 1990s, he bought a property in Ponte Vedra Beach, Florida and travelled regularly between Florida and London. He married a lady named Joyce Jackson ("Joyce") there, but their relationship ended in 2003. In the summer of 2004, he married Deborah McMullan ("Deborah"), a union which lasted until his death in June 2016.

2. By 2014, Deborah was a beneficiary of the Trust entitled to 40% of the Trust income for her life after Alan's death. In early 2015, Alan was advised that he had a substantial IRS liability because he had not disclosed the existence of the Trust and that he should terminate the Trust and 'onshore' the assets and make fresh provision for his wife and children. This strategy was opposed by his children and the termination issue became a contentious one. In October 2015, Alan received a terminal cancer diagnosis, having been in declining health from early that year. Alan's children complained to the Trustee that they were being denied access to their father, and raised concerns about his mental capacity and Deborah's undue influence. He last saw any of his children in early August, 2015. On March 2, 2016, roughly three months before Alan's death, he removed his children and their descendants as beneficiaries of the Trust and requested that the Trustee terminate the Trust and distribute the entire Trust Fund to himself and his wife. The Trustee resolved to give effect to Alan's wishes on May 12, 2016. Corporate formalities transferring control of the holding

company previously owned by the Trust to Deborah, her son and daughter-in law were still being completed when Alan died on June 6, 2016.

3. Against this background, it is perhaps unsurprising that the present litigation has been bitterly fought with, all too often, shockingly unkind accusations being exchanged on both sides. Some of the evidence would provoke any reasonable bystander to exclaim, like Kurtz in '*Heart of Darkness*': "*The horror, the horror!*" Such a bystander would, on the other hand, have admired the way in which his eldest child Michele and his wife Deborah each acknowledged under cross-examination the most compelling truth: that Alan would have wanted to take care of them all.

Summary of Findings

4. The Plaintiffs' case had two main limbs. They sought to set aside their purported removal as beneficiaries by a letter dated February 24, 2016 but said by D2-D4 to have been executed by Alan on March 2, 2016 (the "Declaration of Exclusion") on the grounds of either (1) Deborah's undue influence, or (2) Alan's own lack of mental capacity. Other, makeweight claims against D2-D4 were sensibly only addressed in a cursory way: (a) improper exercise of a fiduciary power/fraud on the power, (b) estoppel, and (c) unlawful means conspiracy. Only the first of the latter three claims were addressed by the Plaintiffs' counsel in oral closing argument.

5. The Trustees played a neutral role in the proceedings with the Plaintiffs not pursuing the claims which were initially asserted against them. Despite their limited involvement, Mr Said vigilantly ensured that his clients, gingerly seeking to stay out of the main protagonists' line of fire, did not suffer any collateral damage.

6. For the reasons that are set out in hopefully sufficient detail below, I find that the Declaration of Exclusion is liable to be set aside on the grounds of undue influence. However somewhat narrowly, I find that Alan possessed sufficient mental capacity to make the critical decision. He was not suffering from any permanent cognitive impairment and the substance of the decision that he made (to remove his children as beneficiaries and request that the Trustee terminate the Trust and distribute all its assets to himself and his wife), was in contemplation for a sufficient period of time for any periods of transitory cognitive impairment to be immaterial.

7. In considering the two main claims, I have addressed the issue of capacity first because it is (in light of the assistance of expert evidence and its basis in largely uncontroversial medical records) a more straightforward claim to evaluate. Second, because the Plaintiffs' undue influence claim was significantly based on Alan's vulnerability due to his physical and mental medical position (both of which were addressed to some extent by the Experts), it seemed logical to determine his mental capacity first before assessing the validity of the undue influence claim.

8. I find that Alan was particularly vulnerable to undue influence after his terminal cancer diagnosis in mid-October 2015 and until his death. He was largely bedridden, frail and heavily dependent on Deborah to manage his financial affairs. He was legally blind and suffered from anxiety, a psychological condition which was clearly exacerbated by conflictual situations. His vulnerability was not negligible in the summer of 2015 when his health was sharply declining, but by October 2015 his vulnerability was particularly acute. By this time his attempts to terminate the Trust, which were initially inspired by Alan's tax position, had turned into a battle royale between Alan's Florida and London families. Deborah was a passionate defender of Alan's wellbeing and had a strong motivation to prevent her husband becoming anxious and stressed by both (a) taking control of communications with lawyers and (b) isolating Alan from potentially stressful and inevitably tiring discussions with his children. As the conflict sharpened in August 2015, Deborah found invaluable litigation-managing help in the form of the exuberantly combative accountant friend of hers and Alan's, Mr Joseph Knecht. He, probably more than Deborah, was willing to demonize Alan's children and forestall any trans-Atlantic family reconciliation, appreciative of the fact that, after Alan's terminal diagnosis, if the Trust assets were distributed to Alan and Deborah jointly, the prize (after IRS liabilities were met) would fall entirely into Deborah's lap.

9. The Plaintiffs perceived that Deborah was primarily motivated by pure greed and a desire to deliberately influence their father, but a careful review of the contemporaneous record shows that she had a deep-seated fear that the Plaintiffs' control of the Trust after Alan's death would work to her financial disadvantage. This fear was not an irrational one; for just as she viewed herself as entitled to inherit all of her husband's wealth, it seems likely that Alan's children instinctively viewed her as an interloper in the Trust that their father had originally settled exclusively for them, whose income entitlement would eat into what they originally hoped to receive upon their father's death. Moreover, Deborah was genuinely concerned for her husband's welfare, upset his initial Trust termination requests were opposed by his children and shocked by her perception (after he

became seriously ill) that they were putting their own financial interests ahead of all else.

10. The Plaintiffs' initial opposition to the Trust termination plans was perhaps understandable in hindsight but would not have been apparent to Alan and Deborah at the time. The Plaintiffs clearly appeared to Deborah to be greedy and uncaring of their father's welfare, seemingly uninterested in protecting him from the civil and potentially criminal penalties from the IRS which threateningly loomed. While Alan had been advised to terminate the Trust, his children received advice which cast doubt on this strategy.

11. Each side was arguably right. But after Alan's terminal diagnosis in October 2015, the significance of criminal penalties must have waned and the July 2015-vintage plan of Alan taking control of the Trust assets, resolving the IRS claim and (at some future point uncertain) creating two US-based grantor trusts for his wife and children respectively, was well past its sell-by date. Deborah may have avoided seeking guidance on the notoriously tricky question of gauging a terminally ill patient's life expectancy, but it was or ought to have been obvious that Alan's life expectancy was very limited indeed by early March 2016, at least.

12. Unless Alan freely and independently decided that he wanted to effectively 'disinherit' his children, terminating the Trust and recovering the assets for himself (or himself and his wife jointly) without making alternative provision for them would not be a prudent decision. It being common ground that he never decided he wanted to 'disinherit' his children, it was difficult (if not impossible) to view his decision to exclude the children and recover the Trust assets for himself and Deborah making no immediate provision for his children as reflecting his own free and independent decision. The pivotal consideration was not whether or not there was a substantial contingent IRS claim that had to be met with no obvious payment source apart from the illiquid Trust assets. The crucial question was whether Alan wished to terminate the Trust in circumstances in which, after the IRS claim had been dealt with, his wife would benefit from the net Trust assets and his children would not.

13. Although I find that the presumption of undue influence arises, I am satisfied on the balance of probabilities in any event that the Declaration of Exclusion should be set aside on the grounds of undue influence. The crucial circumstances which I find amounted to undue influence are far more nuanced and indirect than the high point of the Plaintiffs' case suggested. A fair and painstaking

analysis of the contemporaneous documentary evidence indicates that the undue influence which occurred did not involve any conscious misconduct on Deborah's part. In an emotionally-charged family conflict, she convinced herself of the 'iniquity' of her 'enemies' and the 'righteousness' of her own cause. The circumstances consisted of a period of some six months before the Declaration of Exclusion was executed during which Alan had no meaningful contact with his children and the partisan narrative with which he must have been fed conveyed the broad idea that his children had abandoned him, both emotionally and financially, in his greatest hour of need. The effect of this fundamentally misleading narrative was to eliminate any motivation Alan might have had to make provision for his children in place of their interests under the Trust before the termination occurred and to ensure the practical result that upon his death his wife would receive all of the Trust assets (as joint owner and sole heir). As important, if not more important still, Deborah, egged on by a forceful comrade in arms, terminated the services of Alan's Cayman lawyers after they proposed a mediated solution to the family dispute. The fresh lawyers representing Alan in relation to the Declaration of Exclusion and the wider Trust termination transaction which was ultimately consummated were expressly retained on terms that did not oblige them to advise Alan about the merits of the decision. On the contrary, their retainer positively obliged them to achieve the result which eventually came to pass. The critical decision, as it presented itself on or before March 2, 2016, was made by Alan in circumstances where:

(a) there is no or no reliable evidence that he received independent legal advice about the substantive merits of the transaction;

(b) he had been deprived of all meaningful contact with the Plaintiffs for several months, following his terminal diagnosis in mid-October 2015;

(c) although it is unclear when doctors expected Alan to die, he passed just over 3 months after executing the Declaration of Exclusion; and

(d) the practical effect of the decision was to effectively 'disinherit' the Plaintiffs by terminating the Trust of which they would be (after their father's death) majority beneficiaries, and distributing the assets jointly to Alan and his wife, who would receive the entire fund upon his death.

14. The Declaration of Exclusion is accordingly liable to be set aside on the grounds of undue influence.

15. As regards the alternative mental incapacity ground, I dismiss that claim. The medical evidence does not support a finding that Alan, even after his terminal diagnosis, suffered from any permanent cognitive impairment. He did suffer from temporary cognitive impairment from time to time, but the evidence on balance suggests that even taking into account the fact that the crucial decision was more momentous than the July 2015 version of the transaction, Alan (as recorded by the Trustee's representatives on March 2, 2016) clearly understood the wider ramifications of not simply executing the Declaration of Exclusion but also terminating the Trust. Because the medical evidence relating to capacity provides part of the foundations for my findings in relation to the undue influence claim, I review the evidence relating to capacity before setting out my detailed review of the undue influence-related evidence.

16. I also dismiss the Plaintiffs' subsidiary improper exercise of a power and/or fraud on the power claims, the estoppel claim and the conspiracy claims which were more clearly unsupportable and which (by the end of the trial) were not pursued with great conviction.

The pleadings

The Amended Statement of Claim ("ASOC")

17. The Plaintiffs advance the following main claims against D2-D4 to vitiate the Declaration of Exclusion, as a platform for subsequently vitiating the steps taken pursuant to it:

    (a) undue influence and unconscionable conduct;

    (b) mental incapacity;

    (c) breach of fiduciary duty and/or estoppel.

18. Their fourth claim is a claim for damages against D2-D4 based on the torts of conspiracy and conspiracy to injure.

Undue influence

19. The foundational undue influence plea provides as follows:

> "*75. In the premises, Alan's purported exercise of powers vested in him as Settlor and Protector by the February 2016 Letter was void, invalid and/or it and the steps taken pursuant to it are liable to be, and should be, set aside on the basis that they were procured by the undue influence of Alan by Deborah and/or her unconscionable conduct. In particular: (i) their relationship as husband and wife; (ii) Alan's severe ill-health as at the date of the February 2016 Letter; (iii) Alan's vulnerability due to his failing eyesight, terminal cancer and excessive alcohol consumption; (iv) Deborah's ability to control Alan's access to and communications with his family, friends and professional advisers, Deborah assumed a position of trust, confidence and control in relation to Alan's personal and financial affairs.*
>
> *75.2 The effect of the declarations contained in the February 2016 Letter was for the financial benefit of Deborah, and for her almost immediate financial benefit in circumstances where Alan had terminal cancer, to the detriment of Alan, the Plaintiffs (and their lineal descendants)*…" [Emphasis added]

20. Paragraph 75 distils the essence of the vulnerability limb of the undue influence relied upon, critically Alan's vulnerability to Deborah's influence due to his terminal illness, his dependency on her and her ability to control access to family and professional advisers. Paragraph 75.2 distils the essence of the disadvantage or prejudice relied upon for the purposes of the undue influence claim, namely that the effect of executing the Declaration of Exclusion in circumstances where Alan was terminally ill was to benefit Deborah and prejudice Alan and the Plaintiffs. The effect was said to be achieved by subsequent connected transactions, *inter alia* the Trustee's Deed of Amendment dated April 11, 2016 (permitting the appointment of capital as well as income and which Alan purportedly consented to as Protector), the Trustee's Deed of Appointment, Indemnity and Termination dated April 14, 2016 and the Trustee's Resolution dated May 12, 2016 which critically "*accepts and gives effect to the Declaration*" and "*determined…to exercise the Power of Appointment to appoint the whole of the Trust Fund…to Alan and Deborah jointly*".

21. After nearly 20 pages of particularised pleas, the following further averments are made:

> "*75.3 The effect of the declarations contained in the February 2016 Letter further calls for explanation in circumstances where:*

(i) *Alan's apparent wishes therein contained were at odds with his apparent wishes contained in the August 2013 letter to the effect that a principal reason for setting up the trust was to benefit his five children, and that it was his wish that 'the Trust must always be kept intact'. These earlier wishes accorded with the Plaintiffs' own understanding of Alan's original motivation for establishing the Trust and his long-standing wishes held thereafter as expressed from time to time, including his letter of wishes.*

(ii) *The production of the February 2016 Letter came a number of months after the Plaintiffs were erroneously told by Mr Packman that the Trust had already been 'dissolved', whereas it had not been. The exclusion of all of the Plaintiffs as beneficiaries, whilst Deborah remaining as a beneficiary, was also inconsistent with the proposals put forward by Mr Packman and the letter received on or around 12 August 2015 by the directors of CSLC, under which the shares in CSLC would be distributed to Alan alone.*

(iii) *On the few occasions on which the Plaintiffs were able to speak with Alan, he did not appear to understand the extent of his IRS liabilities or to support the termination of the Trust.*

(iv) *Deborah deprived the Plaintiffs of any opportunity to discuss the February 2016 Letter with Alan, or of any opportunity to communicate with him at all between the date of the February 2016 Letter and Alan's death, notwithstanding the Access Petition. This followed a period going back to around August 2015 since which time Deborah had almost entirely deprived the Plaintiffs the means of communicating with Alan.*

(v) *Shortly after the February 2016 Letter, the voice messages and allegations of wrongdoing were made against Michele and Nicholas which, for the reasons stated above, should be inferred were the produce of Deborah's influence and would not have freely been made by Alan.*

75.4 *In those circumstances, it is to be presumed alternatively to be inferred that Deborah caused the February 2016 Letter to be produced and signed by Alan by undue influence and/or her unconscionable conduct. It is further averred that the facts as set out above (i) give rise to the presumption of undue influence and that Deborah and the Third and Fourth Defendants carry (i) the burden of rebutting the presumption of undue influence in relation to each of the following (1) the Letter of Exclusion, (2) the Deed of Amendment, (3) the Deed of Appointment, Indemnity and Termination, (4) the Transfer of Shares, and (5) the Cutty Sark Land Company Proxy.*"

Capacity

22. The following foundational averments are made in support of the lack of capacity case:

"*76. Further and alternatively, Alan's purported exercise of powers vested in him as Settlor and Protector by the February 2016 Letter was void, invalid and/or it and the steps taken pursuant to it are liable to be, and should be, set aside on the basis that he, as at February 2016, lacked mental capacity to exercise those powers.*

77. In particular, Alan's mental faculties were significantly impaired by, inter alia:

77.1 excessive alcohol consumption and/or other medication he was taking; and

77.2 distress and confusion caused by:

(i) his diagnosis of terminal cancer;

(ii) his failing eye-sight; and

(iii) *isolation from his family and friends.*"

23. After over 5 pages of particularised averments, the following conclusory pleas are made:

"*77Q. It is further averred that given the facts as set out herein above Deborah and the Third and Fourth Defendants bear the burden of proving capacity in relation to each of the following (1) the Letter of Exclusion, (2) the Deed of Amendment, (3) the Deed of Appointment, Indemnity and Termination, (4) the Transfer of Shares, and (5) the Cutty Sark Land Company Proxy.*"

Wrongful exercise of power and/or estoppel

24. It was thirdly averred in paragraph 78 of the ASOC that the purported exclusion of the Plaintiffs as beneficiaries was:

(a) an invalid misuse of a fiduciary power; and

(b) an exercise which was unconscionable for Alan to purport to make in light of contrary representations he had made to the Plaintiffs upon which they had relied.

Conspiracy

25. It is fourthly averred, *inter alia*, that:

"*79. Further and alternatively, Deborah, Wilson and Christine are liable in damages to the Plaintiffs, in an amount to be assessed, for the torts of unlawful means conspiracy and/or conspiracy to injure.*

80. It should be inferred that Deborah combined together with Wilson and Christine, them having established or suspected the value of the assets held in the Trust were substantial, so that they should together take steps to remove the Plaintiffs as beneficiaries of the Trust to the financial detriment of the Plaintiffs, leaving the assets of the Trust for Deborah (and indirectly for the benefit of Wilson and Christine) upon Alan's death which they knew would occur in the near future…"

Prayer for relief

26. The primary relief sought by the Plaintiffs is set out in the prayer to the ASOC as follows:

"*(1) Appropriate declarations to the effect that the Plaintiffs' purported removal as the beneficiaries of the Trust was void, voidable and now avoided, or otherwise of no effect.*

(2) Appropriate declarations that the purported transfer of the shares of CSLC to Alan and Deborah jointly was invalid and/or should now be set aside.

(3) Appropriate declarations that the purported removal of Michele and Nicholas as directors of CSLC and the appointment of Deborah, Wilson and Christine as directors of that company was invalid and/or should now be set aside."

27. The remaining paragraphs of the prayer, with one exception, seek ancillary rather than substantive relief. Paragraph (8) seeks:

"*Further and alternatively, damages from Deborah, Wilson and/or Christine in an amount to be determined.*"

2nd-4th Defendants' Re-re-Amended Defence ("RAD")

Alleged undue influence and unconscionable conduct

28. Reliance is firstly placed (at paragraph 27 of the RAD) on clause 12(c) of the Trust Deed:

"*The Trustees shall have power to determine all questions and matters of doubt which may arise in the course of the management administration realization liquidation partition or winding up of the Trust Fund.*"

29. It is averred (at paragraph 95.2) that the Trustee's decision that Alan had capacity and was not subject to undue influence is dispositive. The specific allegations of undue influence are denied or not admitted (at paragraphs 95 to 99A).

30. It is also averred that the Trustee's appointment of all the assets to Alan and Deborah is valid without regard to his being subject to undue influence (paragraph 99A).

Alleged incapacity

31. It is again averred (at paragraph 95) that the Trustee's determination on capacity is dispositive by virtue of clause 12(c) of the Trust Deed. The specific allegations of incapacity are denied or not admitted (at paragraphs 101-102O).

32. It is again averred that the Trustee's appointment of all the assets to Alan and Deborah is valid without regard to whether Alan lacked capacity (paragraph 102P).

Alleged wrongful exercise of power and/or estoppel

33. It is firstly denied that the power to remove the Plaintiffs as beneficiaries was a fiduciary power (paragraph 103) and secondly denied that the power was improperly exercised in any event (paragraph 104).

34. As regards the estoppel claim, the primary pleas were the following:

> "*105.1 As pleaded in paragraph 27 above, clause 6 (f) of the 2003 Trust Deed provided that no beneficiary had any entitlement to any part or parts of the Trust Fund or the income unless or until a power of appointment was exercised in their favour. The said clause is inconsistent with the existence of any estoppel in favour of the Plaintiffs or any of them.*
>
> *105.2 As pleaded in paragraph 27 above, clause 20 of the 2003 Trust Deed provided that anyone who was designated as an Excluded Person was prohibited from receiving any benefit of any kind from the Trust. By clause 8(a) of the 2003 Trust Deed, Alan as settlor, or the Protector for the time being, had power at any time to declare in writing that any person* [who] *was a beneficiary would be an Excluded Person. The said clauses together are inconsistent with the existence of any estoppel in*

favour of the Plaintiffs or any of them."

Alleged conspiracy

35. Before denying the specific allegations made by the Plaintiffs in relation to conspiracy, the RAD avers as follows:

> "*108. The Plaintiffs' conspiracy claim is entirely based on supposition and inferences that it is alleged should be drawn. Further, the Plaintiffs have failed to specify or properly to plead whether the claim is one of unlawful means conspiracy, and in that case what were the unlawful means adopted; or conspiracy to injure, and in that case properly to plead that cause of action. In the premises, it is averred that the Plaintiffs' conspiracy claim is misconceived and should be struck out as frivolous and vexatious.*"

Plaintiffs' Re-amended Reply to the 2nd to 4th Defendants' Re-Amended Defence ("Reply")

36. The Plaintiffs' Reply joins issue with the entirety of the Re-Amended Defence and responds specifically to numerous specific averments the 2nd to 4th Defendants make. As regards the plea that the Trustee had an independent power of appointment unaffected by any want of capacity or undue influence which may be established, it is averred:

> "*1A…If, in the circumstances, the Trustee believed that Alan and Deborah were the only beneficiaries of the Trust at the time of the exercise of the power of appointment, it was mistaken in its belief and exercised the power [on] a mistaken basis and flawed basis such that the exercise is void and/or voidable, and should be set aside by the Court".*

37. It is also denied (at, *inter alia*, paragraph 38A) *"that the Trustee had in April 2016 its own power to appoint the assets of the Trust in favour of Alan and Deborah absolutely with or without the need for any consent from Alan as alleged or at all*". The 2nd to 4th Defendants' entitlement to rely on clause 12 (c) of the Trust Deed as conferring a discretion on the Trustee to finally determine the issues of capacity and undue influence is also denied (paragraphs 41 and 44).

Appleby's July 22, 2020 letter on behalf of the Trustee

38. In response to a letter on behalf of the Plaintiffs from Travers Thorp Alberga dated June 29, 2020

seeking clarification of the Trustee's position, Appleby responded by letter dated July 22, 2020. Most significantly, their client's position was said to be as follows:

> "*It is the Trustee's position that capacity and undue influence were and are relevant to the validity of the termination of the Trust, and the appointment of the CSLC shares to Alan and Deborah absolutely.*
>
> *Accordingly, it is also the Trustee's position that if Alan did not have capacity or was unduly influenced, the termination of the Trust and the appointment out of the CSLC shares ought not stand.*"

Opening submissions and the legal issues in controversy

Capacity: the test and the burden of proof

39. The governing principles as regards the test for legal capacity in the present context are essentially agreed. All parties rely broadly on this Court's decision in *Re O Trust* [2018(1) CILR 59] and the authorities cited therein: 'Written Opening of the Plaintiffs' (paragraphs 69-79); 'Second to Fourth Defendants' Written Opening Submissions' (paragraphs 152-158); 'Written Opening of the Fifth and Sixth Defendants' (paragraphs 21 to 27). In summary:

    (a) for Alan to have had capacity, he must have been able to understand (1) the nature of the Declaration of Exclusion and its effects, (2) the extent of the property he was disposing of and (3) the claims to which he might give effect;

    (b) the level of understanding required is context-specific.

40. A critical threshold issue in dispute is what level of understanding was required in the factual circumstances of the present case, because the precise nature of the surrounding circumstances in which the Declaration of Exclusion was made is very hotly contested. At the end of the factual evidence, it appeared to me that the most important factual issues to be determined and evaluated in relation to this threshold issue were the relevance and significance, if any, of Alan's October 2015 terminal cancer diagnosis on, in particular, the nature and effects of the Declaration of Exclusion.

41. As regards the burden of proof, the 2nd to 4th Defendants merely disputed (at paragraph 171) the Plaintiffs' pleaded case that the Defendants bore the burden of proving Alan's capacity. In fact, the Plaintiffs' opening submission at trial was far more nuanced:

> "*80….However, once the donor is shown prima facie to have lacked the necessary capacity to make the gift the evidential burden shifts to the donee to demonstrate that the gift was made with full capacity (see Williams v Williams [2003] WTLR 137 at 1383; Goriat v Goriat [2010] EWHC 1537 (Ch); Kicks v Leigh [67]). It is submitted that a prima facie case is established once there is a well-founded suspicion that a person lacks capacity (see Re O [36]).*"

42. The Trustees (citing *Re O Trust* at [33]) made the following concise opening submission (at paragraph 27g):

> "*In relation to instruments made under a trust, the party positively asserting that capacity existed has the burden of proving that on the balance of probabilities.*"

43. In *Re O Trust,* the just quoted approach commended by the Trustees in this case was indeed adopted. However, this was in the absence of authority being cited on the burden of proof on the basis that it was "*the most practical approach*". In the present case, my provisional view was that the Plaintiffs were correct to accept that they bore the burden of making out a *prima facie* case of lack of capacity.

Undue influence

44. There is substantial agreement on the governing principles in the opening submissions:

(a) the relationship of husband and wife is not one where undue influence is automatically presumed;

(b) where one spouse is shown to be sufficiently subject to the influence of the other, undue influence will be rebuttably presumed;

(c) the onus will then be on the party seeking to uphold the impugned transaction to show that the transaction was not actually vitiated by undue influence.

45. The Trustees provided this helpfully pithy summary of what the legal concept of undue influence means:

> "*48. As relevant to this case, following Etridge, establishing undue influence requires, at its simplest:*
>
> *a. influence of such weight and nature;*
>
> *b. that its product, i.e. another's consent to a transaction;*
>
> *c. "ought not fairly be treated as the expression of another person's free will*
>
> *(Snell's Equity at [8-016], citing Lord Nicholls in Etridge at [7].*"

46. The Plaintiffs' primary submission is that the relationship between Alan and Deborah was such that undue influence should be presumed. According to the 2nd to 4th Defendants (citing principles upon which the Plaintiffs also rely):

> "*180. The leading case is Royal Bank of Scotland v Etridge (No.2). Etridge confirmed that two primary facts must be shown before the presumption of undue influence will arise:*
>
> *a) there must have been a relationship of influence between the parties; and*
>
> *b) the impugned transaction must be one that calls for explanation.*
>
> *181. Once these two primary facts are proved, the court can infer, in the absence of a satisfactory explanation, that the transaction must have been procured by undue influence.*"

47. The Plaintiffs' alternative submission is that they are able to establish that actual undue influence vitiated the transaction. In their submissions, they explain what qualifies as "*coercion*" as follows:

> "107…*What amounts to coercion is relative to the person coerced. All those factors that establish Alan's vulnerability are relevant to what counts as coercion. In Wingrove v Wingrove (1885) 11 P.D. 81 p82-3*
> *'The coercion may of course be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be, that the mere talking to him at that stage of illness and pressing something upon him may so fatigue the brain, that the sick person may be induced, for quietness' sake, to do anything. This would*

equally be coercion, though not actual violence."

108 To similar effect is in Hall v. Hall (1868) 1 P & D 481 at 482. Sir J.P.Wilde

'Pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes, is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led but not driven; and his will must be the offspring of his own volition, and not the record of someone else's."

109 Because coercion is often exercised privately and hidden in front of others who might be witnesses it is unlikely to be proved by direct evidence. Proof of the use of actual undue influence will normally be a matter of inference (see Schrader v Schrader [2013] EWHC 466 (Ch) per Mann J:

'96. It will be a common feature of a large number of undue influence cases that there is no direct evidence of the application of influence. It is of the nature of undue influence that it goes on when no-one is looking. That does not stop its being proved. The proof has to come, if at all, from more circumstantial evidence. The present case has those characteristics. The allegation is a serious one, so the evidence necessary to make out the case has to be commensurately stronger, on normal principles."

48. The main controversy is not the legal meaning of undue influence, nor as to when it may be presumed. The crucial dispute centres on:

(a) whether the Plaintiffs can establish that Deborah's influence over Alan (and his dependency upon her) was in all the circumstances so significant that a presumption of undue influence arises; and

(b) the extent to which, in any event, Alan may properly be held to have decided to execute the Declaration of Exclusion of his own free and independent will.

Breach of fiduciary duty/estoppel

49. These claims did not appear to me to be advanced with much conviction at the beginning of the trial. The Written Opening of the Plaintiffs did not advance any submissions to the effect that the

execution of the Declaration of Exclusion was vitiated because it entailed the improper exercise of a fiduciary power.

50. It appears to be common ground that, according to what appears on the face of the document, Alan executed the Declaration of Exclusion as Settlor and as First Protector. The 2nd to 4th Defendants submitted:

> "*204. The Trusts Law expressly allows the inclusion in a trust of a power to exclude beneficiaries. Cayman law does not set a default position as to whether powers are personal or fiduciary in nature. The Trust Deed does not specify whether any of the reserved powers are to be treated as personal or fiduciary.*
>
> *205. There is a long line of authority discussed in Thomas that confirms that where a power is exercised by a settlor, it will be treated as being a personal power, and therefore is not subject to any fiduciary constraints.*"

51. The Written Opening of the Fifth and Sixth Defendants (at paragraphs 56-64) sets out a cogent analysis as to why powers vested in a settlor which may be exercised for his own benefit are personal rather than fiduciary in character. Most instructive, for present purposes, are the following three authorities relied upon by the Trustee's counsel. Firstly, '*Lewin on Trusts*' Volume II, 20th edition at paragraph 33-066 states:

> "*A power of exclusion may, however, be vested in a third party, including a beneficiary, who is not a fiduciary. If, upon its true construction, it is a beneficial power, etc. one exercisable in the donee's own interests, it may be exercised so as to leave him the sole beneficiary. Such a power is equivalent to a general power of appointment or, if the donee was also the settlor, a power of revocation.*"

52. Secondly, in *Tasarruf Mev Sigorta Fonu-v-Merrill Lynch Bank & Trust Co (Cayman) Ltd* [2012] 1 WLR 1721 ("TMSF"), the Privy Council held that the power of revocation conferred on the settlor of a Cayman Islands trust could be delegated. Lord Collins opined as follows:

> "*62. In the present case the power of revocation cannot be regarded in any sense as a fiduciary power, and the respondents do not suggest otherwise. The only discretion which Mr Demirel has is whether to exercise the power in his own favour. He owes no fiduciary duties. As has been explained, the powers of revocation are tantamount to ownership.*"

53. In *Clayton-v-Clayton* [2016] NZSC 29 (23 March 2016), the New Zealand Supreme Court held:

"*[44] We agree with the Court of Appeal that, if Mr Clayton had a non-fiduciary power as Principal Family Member to make himself the sole beneficiary under the VRPT deed, the effect of the exercise of that power would be analogous to the revocation of the VRPT, justifying the application of the same analysis as in TMSF…*"

54. Based on these opening legal arguments, and the absence of any apparent doubt about the ability of the Settlor under clause 8 of the Trust Deed to exercise the power for his own benefit, my provisional view was that this limb of the Plaintiffs' claim should be summarily dismissed.

55. The Plaintiffs' opening submissions on estoppel provided as follows:

"*113 The Plaintiffs' estoppel is plain and obvious. Given the consistent and longstanding representations made by Alan to his children that they were working in a family business and given that they spent their adult working lives in that business, Alan was estopped from exercising any power of exclusion that he may have to exclude them and take the benefits of their years of hard work and effort (for not very much money) and use it either for his (Alan's) own benefit or the benefit of Mrs. McMullan-Poulton. The Plaintiffs will rely on this regard on Henry v Henry [2010] UKPC 3, paras [52]-[62], Gillet v Holt [2001] Ch. 210, Thorner v Major [2009] UKHL 18 which demonstrate how rights can be created in favour of parties who have done substantial work without having adequate commercial recompense for their efforts and how family members can acquire rights.*"

56. The 2nd to 4th Defendants do not expressly rely on their pleaded case that the estoppel claim is inconsistent with the terms of the Trust. Rather, it is suggested that the Plaintiffs evidentially cannot make out a valid case. As to the legal elements of the claim, it is submitted proprietary estoppel can no longer be relied upon, only estoppel by representation:

"*210. To establish estoppel by representation, the UK Children must prove that:*

a) Alan made a representation to the UK Children collectively.

b) Alan's representation contradicts a representation or case which D2-D4 are advancing in the litigation.

c) *Alan's representation was made with the intention of inducing the UK Children collectively to rely upon it.*"

57. At first blush, it is difficult to accept the 2nd to 4th Defendants' proposition that "*proprietary estoppel is a legal dead end*" (paragraph 206). Just over a year before the present trial commenced, the Privy

Council upheld a proprietary estoppel claim in *Mohammed-v-Gomez (Trinidad and Tobago)* [2019] UKPC 46 (19 December 2019). According to Lord Carnwath:

> "*26. In the light of that discussion, the Board doubts how far it is possible or useful in the context of proprietary estoppel to draw fine distinctions between different categories. It is true that such issues seem to have attracted lively academic debate (see eg the references in Snell's Equity 33rd ed (2014), para 12-033). However, as Lord Walker makes clear, once one has moved beyond claims based on specific contractual rights, there may be no clear division between the nature and quality of any alleged verbal assurances, and the conduct of the respective parties in response. Depending on the factual context acquiescence may be seen as one aspect of assurance.*
>
> *27. To similar effect is his earlier judgment in Jennings v Rice where he underlined the dangers of "over-simplification":*
>
> > *'The need to search for the right principles cannot be avoided. But it is unlikely to be a short or simple search, because (as appears from both the English and the Australian authorities) proprietary estoppel can apply in a wide variety of factual situations, and any summary formula is likely to prove to be an over-simplification. The cases show a wide range of variation in both of the main elements, that is the quality of the assurances which give rise to the claimant's expectations and the extent of the claimant's detrimental reliance on the assurances. The doctrine applies only if these elements, in combination, make it unconscionable for the person giving the assurances (whom I will call the benefactor, although that may not always be an appropriate label) to go back on them.' (para 44).*"

58. The Trustees in their Written Opening also summarised the law on proprietary estoppel without suggesting that it has no application in the context of a discretionary trust.

59. Nonetheless, my provisional view was that that, if the Plaintiffs' incapacity and undue influence cases both failed, it was difficult see how the Court could alternatively make factual findings supporting the proprietary estoppel claim. The rejection of those claims appeared, by the end of the evidential phase of the present case, to require findings that Alan:

(a) with full or sufficient capacity;

(b) of his own independent free will;

(c) had made a rational decision to exclude his children as beneficiaries under the Trust and ask the Trustee to distribute the assets to himself and his wife. This decision, it would presumably be found, was based to a material extent on the grounds they had, through their own misconduct, waived the right to benefit from the Trust or his estate.

Conspiracy

60. The Plaintiffs' Written Opening does little to cure the alleged inadequacies of pleading in relation to the conspiracy claim, of which the 2nd to 4th Defendants complained in their RAD. It is submitted on behalf of the Plaintiffs:

> "*110 Mrs. McMullan-Poulton acted in conjunction with her son and Christine to take over the trust and deprive the Plaintiffs of their residual interest. Christine even filmed Alan purportedly being advised of the contents of the Declaration of Exclusion. Wilson helped his mother sequester Alan and was involved in all of the key events.*
>
> *111 In making misrepresentations to Alan to the effect that his children were withholding money, his children had abandoned him when he was terminally ill and in applying undue influence (a wrongful act) Mrs. McMullan-Poulton, Wilson and Christine became involved in a conspiracy against the Plaintiffs.*
>
> *112 This may be relevant to relief if it transpires contrary to what is submitted above that the steps taken by Alan and/or the Trustees in 2016 cannot be set aside so that the Plaintiffs only remedy is to seek direct relief against Mrs. McMullan-Poulton.*"

61. The 2nd to 4th Defendants' Written Opening Submissions do not appear to even deal with the conspiracy claim. The Trustees' Written Opening, consistently with their neutral position, helpfully distilled the legal principles governing the two pleaded forms of conspiracy upon which the Plaintiffs rely. Firstly unlawful means conspiracy:

> "*67. The tort of unlawful means conspiracy requires a plaintiff to prove that:*
>
> *a. Two or more persons combined to take action;*
>
> *b. Which action was unlawful;*
>
> *c. Intending to cause damage to the plaintiff by the unlawful action;*

and

d. The plaintiff suffered the intended damage: Clerk & Lindsell at [23-105]…"

62. My strong provisional view at the conclusion of the evidential phase of the trial was that no sufficiently coherent or particularised case of unlawful means conspiracy had been either (a) pleaded or (b) advanced through evidence or cross-examination. Accordingly, this limb of the conspiracy claim was liable to be summarily dismissed.

63. As far as conspiracy to injure is concerned, the Trustees placed the following guiding principles before the Court:

> "*70. The second form of the tort of conspiracy – lawful means conspiracy, or conspiracy to injure – requires proof of the following:*
>
> *a. Two or more persons combined to take action;*
>
> *b. With 'the object of deliberate damage without just cause', i.e. with 'the predominant purpose not of advancing [their] own interests, but of injuring [the plaintiff].'; and*
>
> *c. The plaintiff suffered the intended damage: Clerk & Lindsell at [23-122] and [23-129]."*

64. The Plaintiffs clearly alleged in their pleadings and by way of evidence that the 2nd to 4th Defendants combined together to exclude the Plaintiffs as beneficiaries and terminate the Trust, injuring the Plaintiffs as a result. But the main thrust of their case is that these Defendants were motivated by their own self-interest, not acting "*with the predominant purpose of…injuring*" the Plaintiffs. It was difficult to see how the "*the object of deliberate damage without just cause*" element of the tort could be proved, especially since this alternative claim would only arise for consideration in circumstances where the Plaintiffs' undue influence case had failed.

65. My strong provisional view at the conclusion of the evidential phase of the trial was that no sufficiently coherent or particularised case of unlawful means conspiracy had been either (a) pleaded or (b) advanced through evidence or cross-examination. Accordingly, this limb of the conspiracy claim was liable to be summarily dismissed.

Summary of provisional views on legal issues in controversy based on opening submissions

66. To summarize, the main issues in dispute at the end of the evidential phase of the trial appeared to be whether the Plaintiffs could make out grounds for setting aside Alan's Declaration of Exclusion on the grounds of mental incapacity or undue influence. The alternative proprietary estoppel claim seemed to be of marginal significance because, viewed broadly, it was difficult to conceive of how the claim could succeed alongside factual findings pursuant to which both of the main claims failed.

67. As far as the improper exercise of a fiduciary power and conspiracy claims are concerned, those claims appeared to be liable to be summarily dismissed.

FACTUAL EVIDENCE: EVIDENCE-IN-CHIEF AND GENERAL IMPRESSIONS OF WITNESSES GIVING ORAL EVIDENCE

The Plaintiffs' Case

Michele Alexia Poulton

Overview of evidence-in-chief

68. Michele, Alan's eldest child (born in 1966) swore an Affidavit dated July 17, 2020 which ran to almost 300 pages comprising 565 paragraphs. However, it was clarified in the 'Written Opening Submissions of the Plaintiffs' (at paragraph 7(3) (i)) and in oral argument that some 365 paragraphs (by my count) were not strictly evidence. Rather, those paragraphs contained references to notes which were not her own but which were referred to for convenience by way of explaining the Plaintiffs' case.

69. By way of background, she describes her father's early life and their relationship during her childhood. Alan's parents ran a fish shop which seemingly inspired Alan to pursue entrepreneurial avenues with considerable energy and success straight after school. She suggests that he considered his social background to be modest and felt out of place in more 'elevated' circles: he declined to take up a scholarship to Dulwich College and as an adult complained about "snobby" people at the local golf club. However, he would pay for Michele to go to James Allen's Girls School and for

James (Jamie) to go to Dulwich College. She describes him as generous with his children but enjoying a simple quality life for himself and details how they worked together on various business ventures both before and after Michele left University (by which time her parents had separated).

70. Family businesses were generally run from premises which Alan had bought through his companies. Michele avers that he was proud of the portfolio which she still manages and insisted that it would support future generations of the family. She, Jamie and her half-brothers Nick and James are all currently involved in some way in the family business. In her own right, after her marriage, she moved up the property ladder through buying and renovating properties. She now lives in Surrey and is an approved foster carer.

71. Michele avers that Alan moved to Florida after meeting Joyce to whom he was married for 10 years. They separated, and she died shortly thereafter. Concerned about her father, Michele travelled with her three small children to Florida in April, 2004. She saw little of him because he was staying with Deborah, whom Alan married later that year, eight months after Joyce's death. Thereafter, the quality of contact she had with her father diminished and when Michele subsequently saw him in London she was concerned about his drinking and his gaining weight. As far as Deborah was concerned, Michele observed with concern lavish spending, understood from her father that she wanted the Trust varied or dissolved and felt that her father was being driven apart from his children. Michele felt Alan was "not himself and was frustrated and unhappy" when she next visited him in Florida in August 2012.

72. Through 2014, Michele averred that she and her father would speak three or four times a week. He was interested in his grandchildren, and less interested in the details of the business from which he had increasingly withdrawn. From early 2015 when she became aware of a US tax problem, she and her siblings had discussions with their father several times. He seemed tired and unwilling to discuss the situation at length, merely insisting that he would not pay the tax. He reported that Deborah was terrified of being destitute and that Alan would go to prison.

73. In early August 2015, Jamie went to Florida prompting an angry phone call from Alan in the course of which Michelle accused Deborah of trying to create a rift between himself and his children. Terminating the Trust was not discussed. Deborah subsequently accused Michele of stealing from her father. On August 12, 2015, she and Nick were asked to approve a transfer of shares from the

Trust to their father. They then realised that attempts were being made to terminate the Trust and thereafter their attempts to speak with their father were repeatedly thwarted and they engaged in correspondence with the Trustees. Attempts to contact Alan at the Mayo Clinic where he was an outpatient in September 2015 were also unsuccessful. Michele emailed Florida Social Services expressing concerns about her father's welfare. From October 2015 she was involved with requests for funds to cover medical expenses, but still had not spoken to her father for months and sent Deborah an email requesting telephone contact on Christmas Day.

74. On March 23, 2016, Michele received a voicemail message from her father accusing his daughter of being a liar and a thief. He sounded "*demented and drunk*". In April 2016, she contacted lawyers in Florida about commencing proceedings to gain access to Alan. These proceedings were commenced on May 27, 2016. On June 6, 2016, her father died.

General impressions of witness

75. Michele did not wilt under a penetrating cross-examination which began on the morning of Day 2 and concluded near the end of Day 4. She displayed impressive composure throughout, combined with a combative approach to any attempts to undermine what she viewed as central tenets of the Plaintiffs' case. Although she was generally credible overall, she very frankly conceded that certain aspects of her Affidavit setting out her evidence-in-chief was not in fact as fair and balanced as she initially contended it was[1]. She often found it difficult to answer questions directly, unable to resist adopting an argumentative stance on issues she considered important to her case. She was also, occasionally, unwilling to accept seemingly mistaken recollections despite being shown inconsistent and more contemporaneous documents. This was, I felt, largely attributable to an understandable difficulty in distinguishing between her past and present state of knowledge.

76. It also seemed obvious that she viewed her case as, in effect, waging war against an existential threat to a life which had to date been built around the family business which was ultimately owned (as to 50%) by the Trust. There were occasions when it seemed obvious that she was being economical with the truth. Deborah blames Michele for opposing her marriage to Alan from the outset and accuses her of subsequently cheating her father. Michele blames Deborah for Alan

[1] E.g. Transcript Day 2, page 96 lines 1-9; page 102 line 4 to page 103 line7.

missing her wedding in 2012 and stated under cross-examination that her father's drinking went "*off the scale*" after meeting Deborah, implying she was indirectly responsible for the decline in her father's health. Despite this, Michele was evasive when asked to indicate whether she liked or disliked Deborah: "*I didn't need to like her or dislike her, I just needed to accept her, and I did*"[2]. It seemed clear that if the "elder abuse" allegation had been a genuine or substantial concern, the Plaintiffs would have pursued it more vigorously than they did in the autumn/winter of 2015. Yet Michele was unwilling to accept the obvious in this regard[3].

77. It is difficult to imagine a more partisan cause being advanced by a witness. Michele (as do her siblings) accuses Deborah, her father's last wife, of unduly influencing Alan to terminate the Trust and distribute all the assets to himself and his wife, after removing Michele and her siblings and their children from the beneficial class. She also accuses Deborah of deliberately denying his children access to their terminally ill father during his last days, in furtherance of a conspiracy to injure the children. Moreover, the termination of the Trust potentially brings to an end a family business which has been a central part of most of Alan's oldest child's life. She also admitted to being guilty of what was at best sharp practice in (a) failing as a director of APL to disclose its guarantee of JA Poulton Building Contractors' liabilities; and (b) failing to disclose to third parties that she had signed various documents using what purported to be her father's signature[4].

78. Although I found Michele to be a credible witness in general terms, her emotional and financial interest in the outcome of the present case requires me to treat the most controversial parts of her evidence with considerable care.

James Alexander Poulton

Overview of evidence-in-chief

79. Jamie (born in 1968) is Alan's second-oldest child. Jamie's Affidavit begins with an often lyrical account of "*MY LIFE WITH DADDY*". Until he was 13, this was a time of family get-togethers and indulgent overseas holiday trips. His parents separated around the time Jamie entered the same

[2] Transcript Day 2, page 56 lines 19-25.
[3] Transcript Day 3, pages 222-237.
[4] Transcript Day 3, page 35 lines 14-20; page 47 lines 19 -25.

"snobbish" private school his father had declined a scholarship to attend years before. He suggests that his father, the son of a fishmonger, was nonetheless both looked down on by his fellow Grammar School boys and scorned by former schoolmates from his "rough" primary school. Nonetheless, Alan would achieve significant financial success through various business pursuits, notably through building a London property portfolio, which enabled him to live comfortably and support his expansive family.

80. Jamie avers that after his parents' separation, he and his father continued to have regular contact at weekends and as a young adult he was introduced to the business world by his father. His early endeavours included running a market (Bosun's Yard) and working at his father's Soho cinema (the Astral). Jamie left school at 16 and initially worked in the City. His father was a guide as he bought property and undertook various entrepreneurial pursuits. But when he opened a fish restaurant in 1997, Alan was particularly delighted because his own parents had operated a fish shop. The most pertinent averments made against this background are the assertions that Alan set up the Trust because "*he wanted to protect what he had built and he wanted to make sure he was leaving it safe for his family*". These averments are based on what he deposes his father told him.

81. Jamie describes the January 2004 marriage between Alan and Deborah as ushering in a decline in the amount of contact he had with his father. Firstly, Alan's trips to the UK from Florida declined. Secondly, he blames Deborah for poisoning relations between his father and the children generally. Jamie travelled with his own family to Florida in 2015. Plans for them to stay with his father were cancelled. At a restaurant lunch, his father was in a wheelchair and appeared to be heavily sedated. At a subsequent lunch at his father's home, there was no opportunity to talk and a third lunch was arranged. At this lunch, also at Alan and Deborah's home, he and Jamie spoke about the Trust and the IRS problem which had by then surfaced. Alan did not appear to have a grasp of what was going on, but asked Jamie to meet him the following day to receive instructions with a view to Jamie investigating the matter on his father's behalf.

82. The next day Deborah said by email or text that Alan could not meet with Jamie as previously planned. He drove to the house, knocked at the door, saw Deborah hiding inside, and was not let in. A security guard came and said that he had been instructed to escort him off the property. He left the property and went to Miami to meet the tax lawyer. It emerged in discovery that Mr Packman, the US tax lawyer engaged on Alan's behalf, had advised against Jamie and his family

staying with Alan during their visit. However, the main aftermath of the meeting with the lawyer in Miami was that Alan called Jamie and angrily accused him of complaining to the lawyer in Miami that Deborah was not taking care of him properly. He concluded that this untruth was fabricated by Deborah to alienate him from his father. He left Florida and never saw his father again before he died. His father did call him back once in London to discuss the IRS issue, but the phone was cut off and Jamie was unable to get through when he called back.

General impressions of witness

83. Jamie's cross-examination began at the beginning of Day 4 and concluded near the end of Day 6. An early break was required mid-morning of the first day of his cross-examination to allow him to recover from cramp. However, he recovered and gave his evidence in a predominantly straightforward and credible way. Like his sister Michele, he was willing to admit that some of his attributions of blame against Deborah in his Witness Statement were not "fair and balanced". One explanation he offered was impressively forthright:

> "*But at this point I had also read an awful lot of stuff that she had written about us. And actually, her behaviour, I don't –– I can't understand how –– I don't understand how she could –– what I experienced of her stopping us seeing him and talking to him in the last months of his life , when he was ill, I can't understand who would think that –– that's reasonable behaviour. So I –– that's probably what I thought, that she had –– and maybe that's why it's not fair and balanced because I don't feel very fair –– fair and balanced –– … towards her.*"[5]

84. He occasionally was adamant about points of detail which appeared on the face of it to be clearly wrong. On the other hand, he was willing to admit his weaknesses as a witness because he was not good at remembering dates. His fundamental honesty was revealed when he admitted having spoken to his sister at the end of Day 4 when he had been examined-in-chief and warned by me not to discuss his evidence with anyone until his evidence had been completed. He claimed to have merely spoken to his sister in substance about the evidence that she had just completed giving, to the effect that a phone call had been recorded[6].

85. Jamie's personal commercial interest in the outcome of this case was clearly less than that of those

[5] Transcript Day 4, page 77 lines 9-21.
[6] Transcript Day 6, page 153 line 1-page 155 line 24.

of his siblings, notably Michele and Nick, whose livelihoods revolved around APL, the company ultimately half owned by the Trust. Nonetheless, his emotional and financial interest in the outcome of the present case requires me to treat the most controversial parts of his evidence with some care.

Vivian Gill

Overview of evidence-in-chief

86. Ms Gill was in a relationship with Alan between 1987 and 1992. They had a daughter, Daisy, in October 1991. She regarded herself as a "trophy girlfriend". He provided for Ms Gill and his daughter from the outset, assisting Ms Gill to buy homes and paying for Daisy's education and other needs.

87. Ms Gill deposed in her Affidavit that her daughter's relationship with her father was impaired after he married Deborah, and in particular after Daisy and a friend were sent back home prematurely from a visit to Florida in 2007. Daisy has been unwell since. She deposed that Alan told Ms Gill that Deborah was not aware of the fact that he was supporting Ms Gill and his daughter financially and that Alan appeared secretive when speaking to her on the phone.

88. This prompted her to sell the property Alan had helped her to purchase and buy a property in her sole name. Daisy wrote her father letters which Alan reported he had not received. She finally expresses her belief that Alan established the Trust for the benefit of his children and would not have sought to benefit a woman at the expense of his children.

General impressions of witness

89. Ms Gill gave her oral evidence in a very straightforward and balanced way despite (a) her obvious financial interest in protecting her daughter's rights as a beneficiary of the Trust, and (b) her apparent bias against Deborah, whom she blames for undermining her daughter's relationship with Alan. Despite her obvious intelligence and articulateness, there was no hint of any attempt to put a partisan 'spin' on the truth. I found her to be an entirely credible witness.

James Michael Poulton

Overview of evidence-in-chief

90. James (born in 1984) is Alan's second-youngest child and the youngest to give oral evidence at trial. He states that his father referred to him as his "number 3 son". He describes the closeness of his relationship with his father, including visits he and Nick made when young to Alan's home at Marsh Landing in Florida. His father financially supported his education at private schools and his attendance at University College (meeting his living expenses). He also paid for health insurance, membership at the Hurlingham Club and for season tickets at Chelsea Football Club (although Alan was not himself a football fan).

91. In 2008-2009, he started work at APL assisting in the refurbishment and maintenance of various properties owned by the company and receiving what he considered to be modest remuneration in market terms. He considered it obvious that Deborah did not like him because of adverse comments about him she had made to his father, who he visited in Florida in 2012 and 2013 after his trips to London became less frequent.

General impressions of witness

92. James was in general terms a credible witness who frankly admitted to being nervous prior to testifying. His honesty was directly questioned by reference to an embarrassingly misleading email he sent with a view to maintaining a reduced rate club membership. He could only freely admit that it was an inappropriate thing to do. He appeared to me to be less than frank when explaining why he had not directly contacted (or attempted to contact) his father by telephone during the 2015-2016 period, leaving those attempts to his siblings. When he admitted to being "*disappointed*" to learn that in a Letter of Wishes his father had proposed a 10% allocation for him and 20% for each of his older siblings, this appeared to me to be a gross understatement.

93. I approach the controversial parts of his evidence with similar care to that of Michele and Nicholas. He has in the past, with a view to achieving comparatively trivial benefits, admittedly played fast

and loose with the truth[7]. His financial stake in the present litigation is far more significant, albeit less than that of his older siblings. His emotional stake in the outcome of the present litigation is no less than theirs.

Nicholas James Poulton

Overview of evidence-in-chief

94. Nick (born in 1980) is Alan's second son and third child. His Affidavit runs to 174 pages (excluding exhibits). He describes how Alan bought a house in Putney for his mother just before he was born and his close relationship with his father during his childhood and beyond. He deposes that Alan formed a close relationship with Nick's maternal grandfather, who played the organ for 30 years in Chichester. Nick recalls or has photographs of family holidays with his father to southern Europe, southern Africa and Florida. In May 2003, he travelled with his father to the Cayman Islands to set up the Trust. He avers (at paragraph 12):

> "*…We stayed at a hotel on 7 mile beach and would go for long lunches and dinners and discuss our Father's intentions for being there. He explained why he was setting up the trust and that he wanted to ensure that Alan Poulton Ltd could never be split up by anyone be that a wife of his or his children's. He always seemed worried that one of us could marry someone that could possibly challenge the trust and he wanted to ensure that this never happened. Whilst we were there my Father went to a couple of meetings. He said he was happy with the meetings and that the future of Alan Poulton Ltd and his legacy should now be secure.*"

95. He describes himself as entrepreneurial from a young age, working in family businesses while in school and while at the L.S.E. After university, he joined the family business because his father wanted him to. As time went on, he and Michele ran the business and his father's involvement gradually diminished. He describes APL and various limbs of its business: retail shops, property management and short-term rental of vacant retail space. Nick became responsible for his father's personal finances, which included payments to himself and his siblings, particularly Daisy and forwarding money to Florida.

[7] For the avoidance of doubt I intend to cast no doubt on James' general character and honesty which in a general sense were confirmed by his own admission of past missteps.

96. Nick responds to Deborah's allegations of theft, and asserts that she had limited knowledge of Alan's business affairs. He avers that a running tally of what was owed between he and his father was always maintained. He provides two examples of how he repaid sums he owed in 2013 and 2015. He prepared a detailed account of "*US INCOME AND EXPENDITURE*" setting out what money was forwarded to Florida and how it was spent. This forms the basis for his subsequent averment that Deborah wrongly complained that Alan's children had left them penniless after his terminal diagnosis in October 2015. Nick describes his trip to Florida in April 2015 when he was disturbed by his father's drinking and the decline in his health, particularly a loss of mobility and declining sight. Alan reported he was taking medication for stress and that a US tax problem had arisen in relation to the Trust. Deborah was worried that the IRS would take everything and leave them with nothing. He promised his father that the children would provide whatever support was required.

97. A detailed account based largely on email correspondence is given in relation to discussions with Alan's US tax advisor, Mr Kevin Packman, and the Trust over subsequent months in 2015. In August, Jamie learned that steps were being taken to terminate the Trust and transfer its assets (the shares in Cutty Sark).

How contact with Alan was cut off and/or thwarted between in or about September 2015 and his death.

98. In the autumn of 2015, a Mr Joseph Knecht began communicating with Alan's children. Nick considered him to be "plotting with Deborah" while purporting to be acting as a financial advisor on Alan's behalf. In late October he warned that "*things will not end well for all of you children*" if a resolution transferring all of the Cutty Sark shares to Alan was not signed. Nick also sets out a detailed account of emails and telephone call transcripts between Alan's children and the Trustees.

General impressions of witness

99. Nick showed impressive resilience in the face of robust cross-examination spanning all of Days 8 and 9 and half of Day 10. In many ways, his oral evidence was most compelling as a testimony of faith in his relationship with his father, his siblings and the centrality of the family business to all

of their lives. Accordingly, his inability to conceal hostility towards Deborah and her son Wilson in many of his answers was unsurprising. More surprising was his occasional willingness to give straightforward answers which did not obviously assist the Plaintiffs' case. For instance, he admitted that his father had in the past paid whatever tax he was told he owed[8]. He also (somewhat reluctantly) admitted that he was not sure of Deborah's influence over his father at the time, by way of explaining an August 25, 2015 email to Kevin Packman which did not blame Deborah for his father not wanting to speak to his son at that point[9]. In stark contrast, shortly thereafter, he sought to resile from a straightforward interpretation of his own words in an August 27, 2015 email to Kevin Packman: "*He also said that he thought the children had been informed about what he was proposing…*"

100. Nick was also cross-examined at length about expenditures from his father's London HSBC account which he accepted was used both for his father and himself, with a tally being kept between them after his father ceased visiting London. He was forced to admit that after his father's regular trips to London stopped around 2010, his personal use of the account increased. It seemed obvious to me that while some system of tallying was carried out, its rigour was subject to doubt. This had no material impact on my assessment of his general credibility as a witness.

101. More significant, to my mind, was a general approach to his evidence which echoed that of his siblings. The desire to present what seemed to me to be a 'fairy tale' portrait of a perfect relationship with his father, unblemished by the occasional conflicts and tensions which are usually inherent in a parent-child relationship, no matter how strong. Nick clearly attempted to airbrush 'inconvenient truths' out of this idyllic portrait. Most striking was his evasive and unconvincing response when referred to his own email to Vivian Gill dated February 21, 2013 in relation to Daisy in which he stated: "*Know Daddy hasn't helped matters over the years….we have all had our issues over the years*":

> "*Q…That passage plainly is an observation about how Alan has treated you all over the years, not Debbie, isn't it?*
>
> *A. Yeah. Yeah, it would be, but I don't really know what the issues are. I may have just been trying to –– to appease –– to try and –– to try and kind of make Vivian*

[8] Transcript Day 8, page 176 lines 19-22.
[9] Transcript Day 8, page 86 lines 8-9.

feel better about Daisy and the way she had been treated. I don't –– I don't personally feel that way about myself or –– or anything really…"[10]

102. Nick's emotional and financial interest in the outcome of the present case, combined with his tendency to deny the existence of inconvenient truths, requires me treat the most controversial parts of his evidence with considerable care even though he was in general terms a credible witness.

Evangelina Palmer

Overview of evidence-in-chief

103. In her Affidavit, Ms Palmer deposed that she met Alan and Deborah in 2010 through her former husband Joseph Knecht. She states that Mr Knecht and Deborah had known each other for 30 years, and were close friends. During her marriage she and her husband would socialize with the Poultons. However, she withdrew from these contacts because of excessive drinking and because her husband and Deborah were too close.

104. She avers that Mr Knecht was motivated only by money and referred to the fact that he had been arrested for fraud and embezzlement in the past. He told her that Deborah was a "gold-digger". It was clear to her that Alan loved his children, and did not have similar feelings towards Deborah's son Wilson. She describes various documents she found in relation to the Trust and Alan's capacity and produced a note she prepared of a call Deborah made to her.

Impressions of witness

105. The main function of Ms Palmer's evidence appeared to be to launch a collateral attack on the character of Deborah while launching a frontal assault on Joseph Knecht, Ms Palmer's ex-husband and former adversary in bitter divorce proceedings. It was not entirely clear how she came to be a witness in a dispute which did not concern her. Be that as it may, she could hardly be described as a neutral non-partisan witness. To the extent that her disdain for Mr Knecht was extreme and her evidence seemed designed to undermine the value of the services her ex-husband had provided to

[10] Transcript Day 8 page 185 lines 1-6.

Deborah and Alan, Ms Palmer was a very partisan witness indeed. Although she gave her evidence in a confident, mostly careful and straightforward manner, I find that her evidence should be approached with extreme care.

Michael David French

Overview of evidence-in-chief

106. Mr French, an English Chartered Accountant, was a partner of Harrison Hill Castle & Company, based in Bromley, Kent, from 1977 until 2018 when he retired at 65. He assumed primary responsibility for Alan's affairs in 1992 when the previously responsible partner retired. However the firm acted for Alan's various businesses from the 1960s. APL became his major asset. After Michele and then Nick joined, "*the business was very much a family enterprise*". As regards Alan and Michele, he deposed that they "*worked together as a great team. I cannot recall them having any disagreements whilst I was present.*"

107. After Alan relocated to the US, he told Mr French that the Trust would protect the interests of his children when he was no longer around. He also worked closely with Michele in relation to Poulton Contractors as a vehicle for residential property development, and trusted his daughter's knowledge of the property market and the day to day running of the business to her. In 2007, when an interest rate swap was entered into with Barclays Commercial, "*Alan was fully involved in this financing arrangement from the outset*".

108. Mr French himself continued to handle Alan's UK tax returns and prepare and audit the accounts of APL. After Alan ceased travelling to the UK for in-person meetings, they would discuss audit issues over the phone. Michele, Nick and Vicky Cornwall, London-based directors, would handle day-to-day executive matters with Nick seeking guidance and advice from his father. On March 31, 2015, he first learned from Alan of his US tax problems and in May that year complied with Holland & Knight's requests to collate information for providing to the IRS. When he learned in June about plans to change the Trust, he advised Alan that he should "*take advice from several sources*". In July, he supplied further documents to Alan's US tax lawyers and on July 21, 2015 learned through an email from Mr Packman that it was proposed to dissolve the Cayman Trust and form a US Trust. On August 20, 2015, in response to an email from a new email address, he again

advised Alan to obtain a second opinion and offered to discuss the matter if Alan wished. Subsequent emails purporting to come from Alan used language he would not have used.

109. He last spoke to Alan on September 16, 2015 on the telephone call. Alan's speech was slurred and Deborah was "*very agitated and concerned about the potential claims against Alan*", having been advised that "*the IRS can seize assets in Cayman and UK in respect of claims against Alan*". The following day he received an email from Joe Knecht explaining that he had been authorised to deal directly with Mr French in relation to Alan's affairs. He communicated with Mr Knecht and Deborah and supplied requested tax information through October. On November 2, 2015 Deborah advised him that Alan had been diagnosed with cancer. He was unable to speak to Alan during calls to the home in October and December.

110. Mr French last communicated with Deborah in early February 2016 having received Alan's signed UK tax return and thereafter learned from his children that "*they were becoming increasingly concerned about access to their father and the lack of updates in his medical condition.*"

Impressions of witness

111. Mr French explained that he had retired some two years ago, but admitted that Alan's business had generated 2%-5% of his former firm's fee income. His sympathies clearly lay with the Plaintiffs. Their father had been his client for many years and Michele and Nick had been his main interface with the companies in the last years of Alan's life.

112. He gave his evidence in a straightforward manner, attributing the absence in his Affidavit of many important interactions he had with Alan's US tax advisers in the summer of 2015 to an oversight on his part. Two parts of his testimony in re-examination I found indicative of his general reliability as a witness. Firstly, when given an opportunity to explain his failure to initially recognise Michele's signature on a document, he declined the opportunity to say he was looking at another signature on the same page. Secondly, when referred to a draft letter purporting to record his advice to Michele, he was willing to express doubts as to whether the advice he had purportedly given actually came from him.

113. Also noteworthy was his response to cross-examination about whether or not Alan had prior

knowledge that Michele had signed his name on the Barclays hedge application form. He made no attempt at all to support Michele's evidence beyond the broad assertion in his Affidavit that Alan was aware of the relevant contract from the beginning:

> "*Q.* *Okay. I just want to understand though. When did you learn that, for logistical reasons or otherwise, Michele would sign documents on Alan's behalf? Was it when I just put it to you then or did you know previously?*
>
> *A.* *No, I knew previously.*
>
> *Q.* *When did you know? Throughout the time that Michele was a director of APL? Some time more recently?*
>
> *A.* *No, I don't know when. I honestly don't know when.*"[11]

114. I found Mr French to be in general terms an entirely credible witness. Nonetheless, because of his obvious loyalty to the Plaintiffs who may in general terms be viewed as his longstanding former clients, any controversial aspects of his evidence should be approached with this in mind.

Alexandra Pakenham Poulton

Overview of evidence-in-chief

115. Alexandra, who has distinguished family antecedents, started dating Nick in 2008. The couple married in 2016. In her Affidavit, she sets out her impressions of how hard Nick worked in the family business, and how his responsibilities increased as Alan's visits to London and direct involvement declined. She also described her interactions with Alan in London and during a final April 2015 trip to Florida, as well Nick's attempts to contact his father in the last few months of Alan's life.

116. Having last seen him in 2010, when excessive drinking on his part was already evident, she was "*shocked*" by the decline in Alan's health in April 2015. Nevertheless she said they had "*wonderful meals*" in the course of which Alan expressed pride in "*Nicky's*" business acumen and the fact that his son had joined the family business. However, she described tension between Alan and

[11] Transcript Day 10, page 192 lines 18-25.

Deborah's son Wilson. She described Nick as being "distraught" in subsequent months when he was prevented from contacting his father.

Impressions of witness

117. Alexandra's evidence is largely that a wife supporting her husband and is only tangentially relevant to the central issues in controversy. Despite that, she gave her oral evidence in a straightforward manner and I found her to be credible overall. Nonetheless, her lack of impartiality warrants approaching any controversial aspects of her evidence with appropriate care.

The 2nd to 4th Defendants' Case

Deborah McMullan Poulton

118. Deborah's Witness Statement runs to 70 pages (comprising over 250 paragraphs) excluding exhibits. This is unsurprising as she is the main Defendant against whom the Plaintiffs advance their claims. Her written evidence addresses her personal background, meeting Alan, her marriage and family relationships, IRS/FATCA issues, Alan's attempts to obtain funds and terminate the Trust, Alan's death and the Plaintiffs' allegations that she kept them from their father. Her evidence-in-chief may be summarised as follows.

119. She was born in Baton Rouge, Louisiana, in 1954. Her mother was a homemaker, and her father was a Korean War veteran and inventor who eventually started his own manufacturing business after the family moved to Jackson, Mississippi when Deborah was nine years old. The family was a religious churchgoing one. She graduated early from High School, and then worked as a secretary and bookkeeper.

120. Deborah first married in her late teens. The couple attended Emory University together but she worked fulltime and studied part-time to support her husband's fulltime studies. After she became pregnant with her first son, she gave up her studies and worked fulltime. She endured physical and emotional abuse, "*I stayed with him because I had been raised to believe that a wife was always to be subservient to her husband …*", until eventually divorcing in or about 1976. She returned to Mississippi where she worked as a legal secretary, studied Business and Real Estate Law and

became a licensed real estate broker. After dating for several years, she married her second husband in early 1988. Their son, Wilson, was born in November of that year.

121. In around 1990, the family moved to Ponte Vedra Beach. She continued running her real estate business in Mississippi, but then took a job with the US Professional Golfers Association ("PGA") in Sawgrass, Florida to assist her husband with health insurance benefits. Although he was a good father and stepfather, her second husband was mentally domineering and eventually unfaithful. Deborah filed for divorce in 1994. She describes the proceedings, which did not conclude until four years later, as a "*nasty divorce and custody battle*". She denied allegations to the effect that she was a "serial litigant" or had misrepresented in previous proceedings between the parties to the present proceedings the true extent of her employment history. Her previous marriages, she deposed, had nothing to do with the present case.

122. Deborah deposes that she met Alan at the Ponte Vedra Lodge and Club and they got to know each other in the weeks that followed. A few months later, Alan proposed to her, after she had made it clear she was unwilling to cohabit with him as she had (in addition to her older son) a 14 year old child (Wilson). Initial wedding plans were abandoned after an argument; Alan explained that Michele had been opposed to her father marrying. A second proposal by Alan was accepted, and the marriage took place in July 2004 at Christ Episcopal Church in Ponte Vedra Beach. Alan's children were invited but did not attend. Deborah and Wilson (whose father had died in January) moved into Alan's home.

123. Her relationship with Alan was a close one until he died, unlike her previous marriages. Alan soon became a surrogate father to Wilson, whom he encouraged to go to the University of St Andrews in Scotland in 2007. Although Wilson used his inheritance for most of his student costs, he received an allowance from Alan. Alan told Deborah that the guest house he built over the garage in 2005 (the "*Chateau*") would always be Wilson's. Alan was impressed when Wilson made property investments using his own resources and they would discuss business together. Wilson obtained a Masters in Management and Finance and Management, and Alan travelled to attend the first graduation ceremony. As far as his own children were concerned, she deposed that Alan bemoaned the fact that they travelled the world rather than focussing on work. He also said they were not as close as he would have liked and were jealous of each other. She provides various examples of Alan falling out with his children: (a) Daisy's August 2006 visit with a friend which resulted in her

being prematurely sent back to London; (b) the discovery in 2010 that Michele had forged Alan's signature on a hedging agreement resulting in a £3 million loss for JA Poulton Building Contractors together with the loss of a London apartment as a result of it being transferred out of his name.

124. Apart from being diagnosed with retinitis pigmentosa in 2011, Alan was in good health until 2015 it is averred. He attended the Emergency Room ("ER") in January 2015 for stomach pain and was noted to have a weakness in his legs. By late June, Deborah expressed concerns about Alan's declining health to Dr Brinker. Based on his doctor's advice, Deborah took Alan to the ER again on July 1, 2015. He saw Dr Brinker on July 15, 2015, who advised that if it was necessary to prove his competency, Alan should have further neurological testing. Deborah deposes that her husband was strongly opposed to this.

125. Following his surgery at the Mayo Clinic in October 2015, it was advised that more home help and a lift chair be acquired. At this juncture, he stopped drinking alcohol. In early November "*Alan was not well, and was not making sense*". He was upset at being taken to hospital again and asked to be discharged. On January 15, 2016, Alan was told he was ineligible for a special cancer treatment programme in Arizona because he was unable to demonstrate he had the funds to pay. He responded well to chemotherapy and his health improved in January 2016, declined in February 2016 and on April 7, 2016 his stoma ruptured necessitating further emergency surgery. Deborah was upset that hospital records had wrongly indicated that Alan had undergone colonoscopies in 2008 and 2012 resulting in a late detection of colon cancer. Because home care would be too expensive, Alan remained in hospital until his death.

126. The IRS/FATCA issues began on December 11, 2014 when a Trust Officer of the Trustee notified Alan that as a result of FATCA, it was required to confirm the tax status of each client. He was advised to obtain his own tax advice and requested to complete certain forms. In February 2015, Deborah deposes that she and Alan retained lawyer John Ball who worked with accountant Dan Worrell on preparing the forms required by the Trustee. Concerns as to whether Alan had properly filed his US tax returns were expressed. Mr Ball recommended that specialist tax attorney, Kevin Packman of Holland & Knight in Miami, should be instructed. Alan and Deborah had an initial telephone conference with Mr Packman on March 9, 2015, and later that month Alan met him in person. She stated:

"*129….I was not present, but Alan told me after his meeting that Mr Packman had told him that, due to his failure to report his worldwide income and the existence of the Trust to the IRS, and his failure to file reports of his connections to accounts and companies outside of the US, Alan faced potential criminal penalties. Alan told me that Mr Packman had advised him that his best option was to enter into the IRS's Offshore Voluntary Disclosure Program ('OVDP') and that this gave Alan the best chance to avoid the risk of criminal charges.*

130. Alan was advised by Mr. Packman that as a requirement to enrol into the OVDP, he would have to pay a substantial sum to the IRS comprising tax, interest and a monetary penalty estimated to be at least US $2 million. Alan would also be required to disclose to the IRS the locations and details of all of his assets and income worldwide over the previous 8 years."

127. Alan accepted that he had no choice but to enter the OVDP and realised that he would have to raise substantial sums from APL to meet his likely liabilities to the IRS. On April 23, 2015, Mr Packman advised that Alan was pre-cleared to enter the OVDP and that detailed voluntary disclosure had to be submitted within 45 days. By May, Alan had told Deborah that his best option was to terminate the Trust and transfer the assets to the US where they would be under his control. It was at this point contemplated that Alan would create two US trusts, one for his children and another for his wife. In early June, in response to concerns raised by his children about the proposed termination, Alan asked Holland & Knight for advice on the option of creating a UK Trust. Deborah herself asked whether 50% of the assets could be placed in a US trust for her benefit, and another 50% in a UK trust for the children's benefit. On June 24, 2015, the IRS confirmed that Alan had been accepted into the OVDP.

128. On July 17, 2015, Alan executed a Deed of Amendment and a Deed of Appointment, both of which were drawn up by the Trustee's attorneys. These deeds were designed to terminate the Trust and distribute the assets to Alan. On July 24, 2015, Kevin Packman sent the Deeds to the Trustee and explained the position to Michele, Nick and Mr French. Meanwhile, Deborah deposed, she had suggested all of Alan's children visit or meet in Miami as an early birthday for Alan. Only Jamie visited in August and seemed interested only in discussing the Trust and his restaurant with his father. Alan did not want to discuss these matters, but was pressured by Jamie into allowing Jamie to meet with Kevin Packman in Miami. On August 10, 2015, Jamie ignored an email saying his father was not up to seeing him, came to the house and was removed by security. Thereafter, the children continued to object to the termination of the Trust and offered no significant help to their

father.

129. In September 2015, Alan engaged Joe Knecht as a go-between with his children. In October 2015, Alan's HSBC account statements were received from Nick and he was "*horrified*" to discover that Nick had been using the account as if it was his own. In late October 2015, Alan asked the Trustee to ensure that the usual consultancy fees and dividend payments should be remitted. The priority was now medical expenses. A UK solicitor had by now been instructed on behalf of Alan, as well as Rachel Reynolds of Ogier in Cayman. On November 23, 2015, the IRS notified Alan that US$134,693.68 was owing in respect of the tax year 2014. In late December 2015, Kobre & Kim were retained in place of Ogier with the specific brief of regaining control of APL. The new lawyers recommended removing the children as beneficiaries, terminating the Trust and transferring the CSLC shares to the remaining beneficiaries, Alan and herself.

130. The Trustee visited Alan on March 2, 2016, and later that day Alan executed the Declaration of Exclusion dated February 24, 2016, in the presence of notary public Harold Griffin. The process was filmed by Christine on her cell-phone. On April 11, 2016, Alan executed the Deed of Amendment and on April 14, 2016, he executed the Deed of Termination and Indemnity. The Trustee confirmed it would act on these documents and on June 1, 2016, Alan and Deborah resolved as CSLC shareholders to remove Michele and Nick as directors and appointed Deborah, Wilson and Christine in their place. Alan died on June 6, 2016.

131. The allegations that Alan lacked capacity or was subject to undue influence when he executed, critically, the Declaration of Exclusion, were refuted. Deborah denies keeping the children from contacting their father and insists that any lack of communication was Alan's own choice. She averred:

> "*247. Alan's desire to terminate the Trust remained consistent from the time he began estate planning in January 2015 to his passing in June 2016. Indeed, the obstructions he faced from his own children made him even more resolute. This case is not really about me, nor is it about Wilson and Christine or even the Plaintiffs. This is about Alan and respecting his wishes.*"

General impressions of witness

132. Deborah was subjected to gruelling cross-examination which began first thing in the morning of Friday January 29, 2021 (Day 12) and concluded early in the morning of Tuesday February 8, 2021 (Day 19), just over seven days later. At the end of her re-examination, I asked whether she thought she resembled either her homemaker mother or her military veteran father or, alternatively, felt that she was a mixture of both. She answered:

> "*I'm probably more like my mother, people say. But I do have some of my father too.*"

133. That was an insightful answer, which reflected the witnesses' awareness that there is often a distinction between "self as seen by self" and "self as seen by others". It was consistent with her evidence-in-chief to the effect that she felt that her role should be that of the dutiful wife. The central theme of her defence to the broad accusation that she unduly influenced Alan to terminate the Trust and the many emails purportedly sent on his behalf were in fact motivated by her own self-interest was reflected in what turned out to be a stock answer: "*I took direction from my husband*", or similar phrases[12]. The idea she in all respects acted almost as an automaton was on its face improbable, as was the notion that all emails she sent reflected communications to which Alan was privy. She only became overcome with emotion when viewing obviously distressful images of her late husband on his sick bed, or when discussing his final days. Neither a 'damsel in distress' nor a 'warrior queen', she appeared to me (in light of both her demeanour in the witness box and some of the contemporaneous emails) to be both supportive and nurturing as well as a force to be reckoned with in any conflict in which her vital interests (or her husband's wellbeing) were at stake.

134. Deborah's response to suggestions that she was mainly motivated by her own personal interests was often the riposte that she was "*trying to help* [her] *husband*"[13] or, more broadly: "*We shared the same goals because −− and I was his wife and I loved him and he loved me*"[14]. She was often reluctant to admit that emails which appeared clearly to have been articulating her views were just that. This may have been in part due to her often adversarial stance as a witness when dealing with

[12] E.g. Transcript Day 12, page 106 lines 4 and 15-16, 22, page 141 lines 3-4; Transcript Day 14, page 97 lines 1-2.
[13] Transcript Day 14, page 132 lines 12-13.
[14] Transcript Day 14, page 116 lines 14-15.

controversial topics in addition to an unwillingness to accept that she was ever acting of her own initiative. She clearly adopted a more deferential non-confrontational stance when dealing with what appeared to me to be more obviously peripheral issues. However Deborah did eventually accept sole authorship of an email to Kevin Packman (dated July 27, 2015) which very glaringly reflected her own personal views about Alan's children at that time[15].

135. She was also willing to accept that when Alan was seriously ill she would likely have acted on the basis of his presumed as opposed to actual wishes:

> "*Q.* *I'm asking you really about communications you had with other people in the period when he was extremely unwell, without any question extremely physically unwell. Do you believe that you were corresponding with other people in the way that Alan would have wanted without him telling you what to say?*
>
> *A.* *Absolutely. I was begging for help*."[16]

136. Much like the Plaintiffs who gave oral evidence, Deborah was credible in general terms but was almost never willing to accept a view of reality which was inconsistent with what she regarded as key aspects of her case. For instance despite writing to Kevin Packman on July 27, 2015 about Alan's children that "*He is perfectly competent…They better be nice to their daddy as he may not leave them anything if they try to say he is not competent*…", she denied that she had any concerns at that point that Alan's competency might be an issue[17]. More striking still was her response to a nurse's detailed note recording complaints made by Deborah herself in a phone call on February 27, 2015 about Alan's excessive drinking and verbal abuse. This was clearly inconsistent with what she regarded as the 'fairy tale' picture she sought to portray of a 'perfect marriage', unblemished by the ups and downs which even strong relationships typically experience. She did not recall the conversation, she disputed the truth of the record and even asserted the conversation never took place:

> "*I don't know −− I'm sorry, sir. I don't remember who this nurse is and what time frame. I would not have made −− I would not have said these things to a stranger coming in our home… but this −−this conversation did not take place.*"[18]

[15] Transcript Day 17, page 63 lines 18-25.
[16] Transcript Day 14, page 117 lines 10-16.
[17] Transcript Day 17, page 165 lines 2-7.
[18] Transcript Day 13, page 45 lines 6-13.

137. Important aspects of Deborah's evidence, to a greater extent than the Plaintiffs' evidence, depend upon her account of private interactions between herself and her late husband. Under cross-examination she displayed a propensity for advancing views of not insignificant factual matters which were at odds with what appeared to be objectively verifiable truths. This, together with her significant emotional and financial interest in the outcome of the present case, requires me to treat the most controversial parts of her evidence with considerable care even though she was in general terms a credible witness.

Martin William Pfab

Overview of evidence-in-chief

138. Father Pfab was ordained as a priest in 1962 and worked as a prison chaplain for many years. He also was a handyman at various churches and private homes. As at the date of his July 2020 Witness Statement, he was the pastor at the St. Elizabeth Episcopal Church in Jacksonville, Florida. In 2006 he met Alan and Deborah when he baptised her son Robert's baby at the St. Mary's Episcopal Church in Green Cove Springs, Florida. He was hired to work on Deborah's Green Cove Springs home. He was subsequently employed as a handyman at Alan and Deborah's Ponte Vedra Beach home later that year.

139. He deposed that he developed a friendship with Alan over the next 10 years and believes that Alan used him as a spiritual sounding board. He does not believe that Alan would be easily influenced by others, despite being a "*gentle soul*". He recalled him being "*agitated*" that Michele "*had somehow caused Alan to lose one of his properties in London, which forced Alan to move*". He also recalled Alan telling him "*Michele had forged his signature on a document, which would cause him problems down the line*". Although Alan expressed concern about other decisions Michele had made in his absence, Father Pfab got the impression that "*because Alan did not want to cause any conflict, he would just let things slide*".

140. After Alan returned home from hospital in October 2015, Father Pfab noted that he was "*saddened not only by his illness but also by his children's behaviour*". He also noted that "*he appeared mentally alert during our conversations in 2015*". Three to four weeks before Alan's passing, he

told the pastor that he wanted to be cremated. Father Pfab presided over the memorial service held on June 10, 2016.

General impressions of witness

141. Father Pfab was 85 years of age when he testified before the Court (via video-link), and was the only witness who gave his evidence wearing a protective mask. As he admitted that he had no clear recollection of precise dates, it seemed obvious to me that he must have had more assistance with preparing his Witness Statement than he was willing to admit. However, he gave the substance of his oral evidence in a straightforward way and I found him to be an entirely credible witness in general terms.

Sean Alexander Murphy

Overview of evidence-in-chief

142. Mr. Murphy became a certified nursing assistant in 2011, and worked at the Mayo Clinic in Jacksonville from 2013. He qualified as a registered nurse in December 2019. He met Alan at the Mayo Clinic in late 2015, and "*quickly developed a good rapport*". He described Alan as a "*jokester*". At Deborah's request, he cared for Alan at home after his discharge about 3-4 times a week during his days off from the Clinic. He had to end these duties as his part-time study burden increased in December 2015.

143. He deposed that he would normally arrive at noon and leave between 4.00pm and 5.00pm. Deborah would usually be home. Mr Murphy did not believe Alan could be talked into doing anything which he did not want to do, and did not sense that Deborah had a controlling influence over her husband. As his condition worsened, Alan "*could easily become irritable*". When under the influence of pain medication, he "*expressed confusion about his life in London*". He observed that "*It was clear to me that Alan was the leader in the house*" and that "*Deborah seemed to be completely devoted to Alan, even while handling her own ailments, and she cared and attended to his every need*".

General impressions of witness

144. Mr Murphy, whose evidence-in-chief was largely unchallenged, gave his oral evidence in a straightforward way and I found him to be an entirely credible witness.

Harold Dee Griffin

Overview of evidence-in-chief

145. Mr Griffin received his notary license on August 14, 2014 for the State of Florida and in December 2015 was contacted by Deborah whom he deposed must have identified him online. In his Witness Statement, he deposes that he notarised four sets of documents executed by Alan, four at his home and the fifth and sixth at the Mayo Clinic:

(a) December 17, 2015 (Quitclaim Deed, Power of Attorney and Last Will and Testament);

(b) March 2, 2016 (Declaration of Exclusion dated February 24, 2016);

(c) April 2016 (Deed of Amendment dated April 11, 2016);

(d) April 14, 2016 (Deed of Appointment, Indemnity and Termination dated April 14, 2016);

(e) May 2016 (*inter alia*, CSLC share transfer form dated May 12, 2016);

(f) June 2016 (a document not directly relevant to the present case).

146. He deposed that in each case he read out the relevant document and sought to ensure that Alan understood what it meant. As regards the critical Declaration of Exclusion, Mr Griffin deposed that Alan was awake and chatting and that Deborah wished to have the notarial process recorded and the recording was performed by Christine on her cell phone. In his Witness Statement (at paragraph 9), he stated:

"*I asked Mr Poulton to explain to me what the document meant. Mr Poulton told me that the letter meant his children would not inherit any money from his Trust. He then signed the document, and I notarised his signature*".

General impressions of witness

147. Mr Griffin gave his oral evidence in a relaxed and straightforward manner. Cross-examination centred on whether the Declaration of Exclusion was actually executed on March 2, 2016. Mr Griffin testified that he had no record of the transaction nor any present recollection of the date of his attendance and assumed that in preparing his Witness Statement someone must have supplied that date to him. In re-examination, he was referred to an Angela Williams-Myers' note of a telephone call with him on April 5, 2016 in which he confirmed that the document had been notarised on March 2, 2016 at around 3.00pm. When asked if his memory of the notarial process which on any view took place in March 2016 would have been better on April 5, 2016 than it was today, he responded: "*Hopefully better*"[19].

148. I found Mr Griffin to be an entirely credible witness.

Wilson Malcolm McMullan

Overview of evidence-in-chief

149. Wilson was born in 1988. His father, to whom he was close, died early in the year that his mother and Alan married, 2004. He deposes that he and Alan became close thereafter and that Alan often described him as his "*fourth son*". He referred to Alan as "*Señor*" as a result of a trip to Cancun. He averred that Alan said he had had a natural affinity with Wilson from the beginning and that his own children were jealous of their relationship. Alan not only built the guesthouse (the "Chateau") for Wilson, but was influential in the choice of the University of St. Andrews, and attended his graduation with Deborah.

150. As to Alan's personality, he deposed that despite being "*an absolute gentleman*", he had a temper when upset that his children did not want to pay for his medical expenses, he threatened to pay

[19] Transcript Day 18, page 178 line 15.

someone to have Nick's legs broken and kill Michele. Wilson took this seriously, because Alan had told him stories of his links with the criminal underworld in the early years of his career. Other averments painting a picture of discord between Alan and his children before 2015 include the assertions that:

(a) Alan was irritated that Nick and James were using his credit card rather than spending time with their father during a December 2010 visit to Florida;

(b) Alan agreed with bad ideas proposed by Nick to avoid having to deal with the "*aggro*"; and

(c) APL's income diminished significantly, to Alan's frustration, after Alan took a back seat;

(d) Alan's children did not give the impression they genuinely cared about him, "*instead seeing him and APL as a financial safety net for their many (failed) business ventures, and their jet-setter, socialite lifestyle*";

(e) "*Alan thought his children were arrogant, greedy and deceitful*".

151. Following Alan's terminal cancer diagnosis in October 2015, Wilson investigated alternative cancer treatment options. He deposed that he understood from his mother that although a suitable programme had been identified at the Mayo Clinic's Phoenix location, Alan was denied entry because of a lack of funds from the Trustee or Alan's children. In March 2016, he was preparing for his CFA examination. He applied to postpone his exams so he could assist his mother caring for Alan. He, his mother, Christine and a priest were at Alan's bedside at his death on June 6, 2016. Wilson's Witness Statement concludes by stating that it is his "*mission to correct the horrific injustices carried out against this great man by his children whom he did nothing but help.*"

General impressions of witness

152. Wilson was an admittedly nervous first-time witness, who nevertheless gave his oral evidence in a generally confident, often humorous and occasionally tearful manner. It was essentially put to him that he was an active and enthusiastic participant in a plan to benefit together with his mother and

wife from Alan's wealth at the expense of his children. He explicitly denied wanting to get involved in the battle over the termination of the Trust. However, in denying knowing why numerous emails were sent to him by his mother, he indirectly highlighted his relative youth (around 27 in 2015) and provided a potential explanation as to how he may well have become somewhat reluctantly involved:

> "*Q.* *If your mother sends you an email and you don't respond, does she call you?*
>
> *A.* *Maybe. I don't know. She calls me all the time. I never pick up the phone. I mean, I try to, but she can be really annoying sometimes. Sorry, I don't mean to be disrespectful, but she's −− I don't know.*
>
> *Q.* *So you don't answer her calls, you don't look at her emails because she can be annoying?*
>
> *A.* *Very much so, yes, sir.*"[20]

153. He was, in contrast, quite vague about what he actually did to comply with his discovery obligations in terms of searching his own email system and did not dispute the suggestion that he had actually only disclosed one email in his own right, a June 2, 2016 email from English solicitor Emily Exton which was copied to his mother. Whether he had in fact replied to any of his mother's "*annoying*" emails was subject to some doubt. Wilson was unconvincing when he testified that he could not recall a rare email actually sent by him on March 23, 2016 at 2.57 am to his wife and mother. This email attached the draft of a quite aggressive letter to be sent to the Plaintiffs' attorneys in response to their attempt to have the Trustee read a message to Alan at the March 2, 2016 meeting. He did not dispute the suggestion that his mother seemingly stopped sending him emails after Mr Knecht entered the stage as Alan's adviser in August 2015[21]. By this stage it was obvious that the battle was getting hotter and it seemed far more plausible that any initial reticence he might have had about entering the battlefield had dissolved.

154. When asked whether he had drafted his own Witness Statement, he responded:

> "*Yes, sir. I had help with the attorneys. They did the formatting and stuff. But these words were −− these are all mine.*"

[20] Transcript Day 19, page 63 lines 2-10.
[21] Transcript day 19, page 118 lines 12-24.

155. This answer was also difficult to accept at first blush. Much of his Witness Statement speaks with what appears to be the voice of a young man just into his 30's who recently married and is still living at home. Paragraphs 75 to 76 ("*Alan's relationship with his UK children*"), on the other hand, sound far more like his mother's voice, as reflected in some of her email 'rants' against Alan's children. Moreover, some of the contents of his Witness Statement, reporting things Alan allegedly said (or did not say) about his children in his final days, are shockingly hurtful, even if true.

156. In the final analysis, even though I found Wilson to be a generally credible witness, the zeal of his partisanship is so great that the most controversial aspects of his evidence must be approached with extreme caution and care.

Christine Jane McMullan

Overview of evidence-in-chief

157. Christine was raised in Aberdeen, Scotland, and met Wilson on an inter-disciplinary course at the University of St Andrews in 2008. In her Witness Statement she deposes that she first visited Alan and Deborah's home in the summer of 2009 and thereafter became quite close to Alan. After graduating with Wilson in 2011 (on which occasion the respective parents met), she pursued an MSc in International Relations and Diplomacy at the University of Leiden, while he pursued his Masters at St. Andrews. She accepted Wilson's marriage proposal in 2013.

158. After receiving her fiancée visa, she moved to the United States on July 31, 2015. She initially had no real idea about Alan's financial issues. She and Wilson married at the Christ Episcopal Church in Ponte Vedra Beach in September 2015. After his cancer diagnosis in October 2015, Christine often spoke with Alan or attended chemotherapy sessions with him. She overheard Alan complaining to Deborah about dividend payments being late and overheard him displaying anger towards Michele and Nick in a discussion with Wilson. She stated that Alan "*adored Deborah"*, that *"Deborah was 'subservient'*" to him and told her that he "*loved Wilson very much*".

159. Christine described her agreement to become a director of CSLC in May 2016 as follows:

> "*25. I understood from what Alan said to me that day that, by becoming a*

director, I would help him to take back control of CSLC, and through it, his ownership of Alan Poulton Ltd. ('APL'), so that he could then release some of the value in APL to pay his liabilities to the IRS and cover his medical treatment. Alan wanted Deborah, Wilson and me to be appointed as directors so that together with him we could outvote Nicholas and Michele if necessary. He said that he trusted me and knew that could count on me to act in his and Deborah's best interests."

160. Responding to one plank of the Plaintiffs' claims, she also averred as follows:

> "*32…they attempt to demonise Deborah as a wicked lady who tried to separate Alan from his family who loved him: this is a complete fabrication and was not at all what I witnessed as an outsider coming into this family.*"

161. She denied having any interest in becoming involved in the dispute, and merely forwarded emails, reviewed draft emails or put together bundles of documents at Deborah's request. Her Witness Statement omits any mention of her recording of the Declaration of Exclusion in March 2016. It was only in her oral-examination-in-chief that she testified that this occurred on March 2, 2016.

General impressions of witness

162. Christine generally gave her oral evidence in a relaxed and straightforward manner. She was understandably overcome with emotion when reminded under cross-examination that she had executed legal documents consummating the transfer of control over APL on the day after Alan had died. The notable exception came when it was first put to her, by reference to the date of the recording revealed by an examination of the metadata, that she had not in fact recorded the execution of the Declaration of Exclusion on March 2, 2016. An anxious look briefly flickered across her face, almost as if she had seen a ghost, when the first question was put to her in relation to this topic. She answered this series of questions in what appeared to me to be a somewhat defensive manner[22].

163. I found Christine to be a predominantly credible witness, who did her best to give her evidence in a fair and honest manner despite her obvious partisan ties that bind her to her husband and mother-in-law. She displayed her fundamental honesty in her responses to questions about emails in late

[22] Transcript Day 20, page 85 line 22-page 93 line 16.

December 2015 relating to Michele's attempts to contact her father:

> "*Q. So you're really strategizing a way in which Deborah can create a record of having called without having to speak to Michele?*
>
> *A. That is what it seems like, yes, sir.*
>
> *Q. That's, around Christmas, a pretty nasty thing to do, don't you think?*
>
> *A. I agree, sir, yes.*"[23]

164. The most controversial aspects of Christine's evidence must be approached with some care. As Anne Brontë has noted: "*The ties that bind us to life are tougher than you imagine, or than anyone can who has not felt how roughly they may be pulled without breaking.*"

Mohammed Jalil Akhter Asif QC

Overview of evidence-in-chief

165. Mr Asif QC is the managing partner of Kobre & Kim (Cayman) and an English leading counsel well known to the Court. In his main Witness Statement, he explains how Kobre & Kim were retained on behalf of Alan, he describes meetings with Alan on January 28-29, 2016, events taking place in connection with the matter in February 2016, the meeting at the Poulton home on March 2, 2016, and events in April, May and June. His supplementary Witness Statement exhibits notes taken at the March 2, 2016 meeting which were accidentally and belatedly discovered on his iPad in late December 2020.

166. He deposed that Kobre & Kim were initially approached in mid-December 2015 by Mr Knecht who explained that Alan wished for "*more aggressive*" Cayman Islands representation. Mr Asif assigned primary carriage of the matter to his then-colleague James Corbett QC. Both lawyers spoke to Mr Knecht on December 22, 2015 and ascertained that Alan's objectives included terminating the Trust, transferring the assets to himself and possibly his wife, removing the other beneficiaries and removing Alan's children as directors of the underlying company. It was initially envisaged that the Trustee would be made to act on the deeds already executed by Alan in July

[23] Transcript Day 20, page 99 lines 7-13.

2015. Because of concerns about the need to verify that Alan was giving instructions, Mr Asif flew to Jacksonville and met Alan and Deborah and had an initial meeting on his own on January 28, 2016 and a second meeting with colleagues participating via Skype the following day. He observed no signs that Alan was being bullied and found Deborah to be quite deferential.

167. In mid-February, the strategy which was ultimately adopted was devised:

> "*68. It was about this time that we started to consider the alternative route of a new declaration to be made by Alan excluding all beneficiaries of the Trust other than himself and Deborah, and then Alan and Deborah using the rule in Saunders v Vautier to call for the termination of the Trust and the transfer of all the assets to themselves as the only remaining beneficiaries…This was because of the continuing delays with the Trustee in acting on the deeds that Alan had executed in July 2015 and the Trustee's repeated changes of position (so far as we could see) as to what the issue was.*"

168. He averred that a draft of the Declaration of Exclusion was forwarded to Alan and Deborah on February 24, 2016 by Kobre & Kim associate Mrs Pamella Mitchell. It was envisaged that Alan would sign it using Dr Brinker of the Mayo Clinic as his witness, which might explain why the document bears the date February 24, 2016. Deborah told Mr Asif on February 26, 2016 that Alan had been too ill to go to the Clinic on February 25, 2016 and that his next appointment with Dr Brinker was on March 2, 2016.

169. The most important part of his evidence concerned the March 2, 2016 meeting at the Poulton home when the Trustee's representatives were also in attendance. He averred that he arrived at the home at around 8.30am, having stayed in Ponte Vedra overnight. Wilson picked him up and drove him to the home. He met with Alan, Deborah, Wilson and Christine and explained the purpose of the Trustee's representatives' visit, as he understood it. This was to ensure there was no "*improper outside influence*" on Alan, not to assess his capacity. He recommended that only he and Alan attend the meeting with the Trustee's representatives. Mrs Williams-Myers and Mr Whan Tong arrived at about 9.30am and had a brief pre-meeting with Mr Asif outside the house.

170. Mr Whan Tong took the lead in the discussion with Alan. Towards the end of the meeting, which initially lasted about 1.5 hours, Mrs Williams-Myers attempted to read out to Alan an email from

his children, but was stopped by both Mr Asif and Mr Whan Tong. When Alan became tired and irritable, Mr Asif suggested a break and for the Trustee's representatives to separately meet with Deborah. They did so in a separate part of the house. About 20-30 minutes later the meeting with Alan resumed but it soon became clear that Alan was still tired so the meeting was brought to a close. A specimen signature was sought by the Trustee's representatives but the pad was held in front of Alan "*at a strange angle*", so Mr Asif was not surprised he was unable to provide this signature.

171. After the Trustee's representatives had left, Mr Asif deposes that he had a brief meeting with the family in the course of which he believes he suggested that the signing of the Declaration of Exclusion should be filmed. He has no clear recollection as to whether this suggestion was made on that day or even whether the execution of the Declaration was discussed on that day at all. He did not stay long after the Trustee's representatives left, because he had to fly from Jacksonville to Miami and then catch an evening flight to London.

172. His belatedly-discovered notes of what Alan said at the March 2, 2016 meeting largely correspond to the Trustee's representatives' own contemporaneous notes, including 'mistakes' upon which the Plaintiffs placed reliance at trial.

General impressions of witness

173. Mr Asif gave his oral evidence in a careful and straightforward manner. His evidence-in-chief was clarified rather than subjected to any positive challenge. I found him to be an entirely credible witness.

The 5th to 6th Defendants' Case

Ian Christopher Whan Tong

Overview of evidence-in-chief

174. Mr Whan Tong is the Group Legal Counsel of Cayman National Corporation Ltd., the holding company of the 5th and 6th Defendants. He was called to the Ontario Bar in 1996, and worked at the

Toronto office of the prominent Canadian firm Fasken Martineau until 2002, when he was called to the Cayman Islands Bar. His 93-page Witness Statement covers the role of the Trustee, his professional background, the suggestion that the Trust was a sham, the background to his involvement from mid-December 2015 to mid-January 2016, correspondence with the parties between January 5, 2016 and February 25, 2016, the meeting of March 2, 2016 and related preparations and subsequent record-keeping, advice taken from Appleby in relation to the Declaration of Exclusion and related correspondence, his own Affidavit of October 26, 2016 and the relevance of the many matters alleged in the Amended Statement of Claim of which he was not then aware to the approach taken by the Trustee.

175. With the Plaintiffs no longer pursuing their claim of gross negligence against the Trustees, those portions of his Witness Statement responding to this claim ceased to have any relevance by the time of trial. The most important aspects of his evidence related to the March 2, 2016 meeting between the Trustee and Alan, the preparations for it and the record made of it.

176. By way of prelude, Mr Whan Tong deposed that he participated in a call with Alan's children on February 25, 2016 at Michele's request and that the recording apparently made had been made without the Trustee's knowledge and consent. Concerns were expressed that Deborah was controlling Alan but that the children could not verify the true position. In the call, he revealed that the Trustee had itself been seeking a meeting with Alan for two weeks without success. He advised the children to obtain Cayman Islands legal representation and made it clear that the Trustee would adopt a neutral position. Legal action seemed inevitable at this point as the parties seemed to be "*poles apart*" in relation to a financially significant dispute.

177. The "influence" concerns resulted in Mr Whan Tong deciding that the Trustee should meet Alan on his own. On February 26, 2016, the meeting was scheduled for March 2, 2016. As a result of a discussion with the then-President and Chief Executive Officer of Cayman National, Mr Stuart Dack, the witness decided to follow the "golden rule" for cases of doubtful capacity. He found an online article by Dr Robin Jacoby, '*How to assess capacity to make a will*'. On February 29, 2016, he had a conference call with Appleby in which how to approach the meeting in light of these concerns was discussed. He was advised that there was no need for a doctor to be present.

178. On March 1, 2016, Mr Whan Tong and his colleague Mrs Angela Williams-Myers flew to Jacksonville via Miami from Cayman and overnighted in Ponte Vedra. They arrived at Alan's gated home at around 9.36am. After initial introductions with the family, the Trustee's representatives had a brief meeting with Mr Asif about the format of the meeting. He was permitted to speak to Alan freely and any interventions made by Mr Asif were helpful. Alan was not told that his capacity was being assessed. Mr Whan Tong asked most questions although Mrs Williams-Myers asked some. When his colleague sought to read out a letter from the children, both he and Mr Asif prevented her from doing so. Alan conversed normally and there was no indication of his having consumed alcohol. Both he and his colleague took handwritten notes, but his were less detailed as he was doing most of the talking. His "*impression was that Alan knew his own mind and knew what he was doing*". He significantly deposed as follows:

> "*123. We asked Alan about his children. On this subject Alan was particularly lucid and coherent. It struck me that he had strongly-held views and it was clear he felt his children had wronged him. Alan said that he had looked after his children, paid their school fees and set them up with flats and businesses. He mentioned Michele, Nicholas and Jamie, in each case complaining about how much money he had given them and how he got nothing in return. He seemed particularly annoyed with Nicholas (Nicky), whom he said 'took everything'. Alan said he had been on good terms with his children in the UK, but they were not on good terms anymore. He spoke of being starved of money, with barely enough to buy a 'tin of sausages at the supermarket…He said his children had once sent him money, but this had stopped. He said he had tried to call the children, but they had not taken his call. I asked Alan if it would surprise him that his children wanted to speak to them, and Alan said he would be surprised. I asked if he would like to speak to them and he said 'yes I think so.*"
>
> *124. I asked Alan if he agreed that the trust was set up for the benefit of his children, and Alan said it was. I then asked him if he felt his children had treated him poorly, and he replied 'really poorly'. I asked if he intended not to provide for his children, and Alan said the only reason for this was that they did not provide for him…*
>
> *125. I then asked Alan to explain the position with the IRS. Alan said they wanted $2 million, he laughed (probably ironically) and said the IRS could 'f…off'. He was more animated about his tax liabilities than at any other point in our interview…*"

179. As Alan needed a break after 1.5 hours, they spoke separately with Deborah. Mr Whan Tong did not allow anything she said to influence his assessment of Alan. The meeting briefly resumed with Alan:

> "*129. This conversation was fairly brief as Alan was clearly very tired and was swearing and becoming irritable. Nevertheless, Alan told us that he would like to see his children, and that he did intend to provide for them, although he did not know how he was going to do this.*"

180. After the meeting, the Trustee's representatives reported to Appleby and prepared a file note which was based on their respective handwritten notes. Their conclusions were to the effect that Alan had capacity and that there was no evidence of Deborah having unduly influenced his decision-making.

General impressions of witness

181. Mr Whan Tong was cross-examined by both counsel for the 2nd to 4th Defendants and the Plaintiffs. Broadly speaking, clarification was sought of his evidence-in-chief, on the one hand, and whether due account had been taken of mistakes made by Alan was explored on the other hand. Mr Whan Tong gave his oral evidence in a careful and straightforward manner. I found him to be an entirely credible witness.

Angella Williams-Myers

182. Mrs Williams-Myers is Senior Manager of Trust Services for SMP Partners (Cayman) Limited, which acquired the Trustee's business on September 2017. She has more than 20 years' experience in the trust and corporate sector and holds, *inter alia*, an MSc. Degree in Management from the University of Liverpool. She became a Manager of Trust Services in April 2015 and Senior Manager of Trust Services in January 2016.

183. In her Witness Statement, which runs to 76 pages, she explains that operational handling of trust clients occurred at the Trust Officer level and that she was required to exercise oversight over trusts where difficulties arose. She had experience of both "*warring families*" and capacity issues in the past. The responsible Trust Officer for the Trust was initially Ms Ondina Hernandez, who was replaced by Mr David Dobson in July 2015 after she left the Trustee's employ. She also describes

the main Trust documents.

184. The body of her evidence-in-chief addressed the first attempt to terminate the Trust in the summer of 2015, Alan's requests for distributions to cover medical expenses and tax liabilities (October 2015-January 2016), the November 2015 Deed, arranging the meeting with Alan and information requests, the end of December 2015 and Mr Whan Tong's involvement with the Trust, the January 2016 Dividend and the Trustee's requests for information and, most substantially, the March 2, 2016 meeting and subsequent events.

185. Mrs Williams-Myers deposes that the Trustee was contacted in early May 2015 by Mr Packman in connection with Alan's desire to terminate the Trust and have the CSLC shares transferred to him outright. Appleby prepared a Deed of Amendment and a Deed of Appointment, Indemnity and Termination in July 2015 (the "July Deeds"). The Deed of Amendment was sent to Mr Packman and executed by Alan on July 17, 2015. A revised version of the Deed of Appointment was sent to Mr Packman on July 20, 2015 and executed by Alan on July 22, 2015. Opposition from the children became apparent on August 3, 2015. The Trustee explained that resolutions from the directors of CSLC approving the share transfer to Alan would be required, and sent draft documentation to Mr Packman on August 6, 2015. On September 2, 2015, Mr Packman advised the Trustee that Michele and Nick (two of CSLC's three directors, Alan being the third) opposed the proposed share transfer. Mr Dobson on behalf of the Trustee on September 11, 2015 suggested that Mr Packman meet Michele and Nick and agree a compromise (a 50% split of the shares), but this suggestion was not taken up.

186. In October 2015, Alan's attorneys began to press for distributions to cover Alan's medical expenses and substantial tax liabilities. The Trust Fund was the CSLC shares. There was no significant pool of liquid assets. Distributions came from APL, 50% of which was owned by CSLC and 50% by the Sheridan family, in the form of monthly dividends. Those payments would go into a CSLC bank account for which Nick was a signatory; he would then transfer monies to his father's account. Additional funds could only be made available at the APL board or shareholder level with the approval of the Sheridans. The Trustee could not make distributions as it saw fit. In later October, 2015, Appleby forwarded correspondence from Ogier on behalf of Alan indicating that health costs for cancer treatment were likely to be significant in the absence of US insurance. The Trustee

sought particulars of medical expenses and further details about Alan's medical condition.

187. On November 2, 2015, the Trustee received a letter from the Poulton children complaining about, *inter alia*, a lack of access to their father and fears that he was being deliberately alienated from them through "*increasingly ridiculous and fabulous stories*". Four days later the Trustee received from a new email address (*jamesalanpoulton@comcast.net*) a Deed of Removal and Appointment of Protectors which sought to remove Michele, Jamie, Nick and James as Protectors and replace them with Deborah and Holland & Knight. At this point, the Trustee's two main priorities were arranging an in-person meeting with Alan and obtaining sufficient support for the claimed medical expenses to seek further distributions.

188. On December 8, 2015, Michele sent the Trustee a spreadsheet documenting monthly dividend payments of £16,666.66 over the past two years and the remittance of a very recent £50,000 loan. She proposed that going forward the dividends could be forwarded to the Trustee and paid directly by the Trustee to her father so that the Trustee could be reassured that payments were being duly made. After taking advice from Appleby, the Trustee accepted the proposed modification to the payment mechanism. On December 23, 2015, three of the children sent an email advising that the payment of Alan's medical expenses and the legal fees of Kevin Packman and Ogier would not be legitimate expenses for APL to bear. The potential for a significant dispute becoming imminent, Mrs Williams-Myers deposed, it was decided to involve Group Legal Counsel. In February 2016, Kobre & Kim replaced Ogier on behalf of Alan and the March 2, 2016 meeting was arranged by the Trustee, in consultation with Appleby. The children instructed Ms Shelly White of Walkers.

189. The March 2, 2016 meeting and the notes taken during the meeting and prepared after it are described in some detail. She critically deposed as follows:

> "*99…During our return journey, we discussed our impressions of Alan and our preliminary conclusions regarding his capacity and [the] existence of any influence which would call into question whether we were hearing Alan's wishes as opposed to someone else's…The way I expressed my view was that overall, i.e. taking all of Alan's answers together, I did not have doubts about Alan's capacity. Ian and I were both also satisfied that we had not seen anything which concerned us regarding Deborah's influence over Alan. While Alan was frail and bedridden he was still assertive and we had not seen any 'red flags' which gave us concerns*."

190. Soon after the meeting, Michele made attempts to arrange a trip to visit her father and the Trustee suggested that the matter be taken up by their lawyers with Kobre & Kim. On March 23, 2016, Jamie reported that he had spoken to his father who had displayed none of the anger portrayed by Deborah and was open to receiving a visit. On April 5, 2016, Appleby advised there was no basis for doubting that the Declaration of Exclusion had been validly executed. The Trustee's lawyers prepared the supplementary deeds required to terminate the Trust. On May 12, 2016, the Trustee resolved to give effect to the Declaration of Exclusion, amend clause 4(a) of the Trust Deed and appoint the Trust Fund to Alan and Deborah. Walkers were notified of the Trustee's decision to proceed on the same date.

General impressions of witness

191. As in the case of Mr Whan Tong, Mrs Williams-Myers was cross-examined by both counsel for the 2nd to 4th Defendants and the Plaintiffs. Broadly speaking, clarification was sought of her evidence-in-chief in general, on the one hand, and whether due account had been taken of mistakes made by Alan at the March 2, 2016 meeting was explored on the other hand. The quiet-spoken Mrs Williams-Myers gave her oral evidence in a careful and straightforward manner. I found her to be an entirely credible witness.

EXPERT EVIDENCE: OVERVIEW OF REPORTS AND GENERAL IMPRESSIONS OF THE WITNESSES

The Plaintiffs' psychiatric expert evidence

Professor Robin Jacoby

Overview of Expert Report

192. Professor Jacoby is Professor Emeritus of Old Age Psychiatry at the University of Oxford. A Fellow of the Royal College of Physicians, a Fellow of the Royal College of Psychiatrists, he holds a Doctor of Medicine Degree from the University of Oxford.

193. His Medical Report is dated September 23, 2020. His Report is based on a review of, *inter alia*,

various medical records, the Trustee's representatives' notes in relation to the March 2, 2016 meeting with Alan and the related Witness Statements, the video of the Declaration of Exclusion being read to Alan and two voicemail recordings.

194. He has been a consultant psychiatrist for over 40 years and has written medico-legal reports in more than 370 mental capacity cases, mostly contentious probate cases. He has given expert evidence in over 20 England and Wales High Court trials which resulted in published judgments (five of which judgments have been published in the last five years). He became a Professor of Old Age Psychiatry at the University of Oxford in 1998, and has, as one would expect, published widely.

195. Professor Jacoby firstly explains that he was asked to give a medical opinion on the mental capacity of Alan "*to make financial and testamentary decisions, as well as on his vulnerability to undue influence*". In assessing mental capacity in general, he has regard to the legal test in section 3(1) of the Mental Capacity Act 2005 (England and Wales). In assessing testamentary capacity, he has regard to the test in *Banks-v-Goodfellow* (1869-1870) 5 LR QB 549 at 565:

> "*It is essential …that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties-that no insane delusion shall influence his will in disposing of the property and bringing about a disposal of it which, if the mind had been sound, would not have been made.*"

196. While making it clear that he will defer to the Court in relation to legal matters, he expresses what he understands, based, on his experience, the law, means by "undue influence":

> "*167. In order for undue influence to be established in probate coercion must be proved…*
>
> *168. In medical practice I should aver that undue influence is not so much replacement of the will of the victim by the will of the influencer; but rather persuasion by the influencer over the victim, who is vulnerable…, .and thereby makes decisions he would not otherwise have made.*"

197. He identifies relevant red flags for undue influence as including:

(a) relationship risk factors (the testator being in a relationship with someone upon whom they are emotionally or physically dependent);

(b) social or environmental risk factors (e.g. isolation or family conflict);

(c) psychological and physical risk factors (e.g. deathbed wishes, serious medical illness, mental disorders, substance abuse); and

(d) legal risk factors (e.g. departing from previous wishes, favouring a new beneficiary).

198. Professor Jacoby opines that Alan "*was vulnerable to undue influence in 2015-2016 by reason of physical illness, mental illness and sequestration from his family*" (paragraph 174).

199. As far as capacity is concerned, he opines that a medical assessment should have been carried out. As regards whether or not Alan had capacity to execute the Declaration of Exclusion on March 2, 2016 and the subsequent related documents, he opines:

> "*185. In my opinion, on the balance of probability, the Deceased lacked the necessary capacity for the decisions…*
>
> *190. …given the Deceased's condition in March 2016 and what I have seen from the medical records disclosed, I consider it unlikely that he would have had the capacity to make major financial decisions.*"

200. Professor Jacoby reiterates his central conclusions in his Supplemental Report Concerning the Joint Statement dated December 17, 2020.

General impressions of witness

201. Professor Jacoby gave his evidence with the confidence and skill to be expected of the experienced expert witness that he is. He readily admitted that some information relevant to his Report had not been supplied to and considered by him, notably the portions of Ian Whan Tong's Witness Statement which explained how he prepared for the March 2, 2016 meeting between the Trustee and Alan. Professor Jacoby was also willing to admit that some extracts which he quoted from the medical records were selective and not balanced. In my judgment any expert supporting

conclusions they have reached will inevitably, to some extent, be partisan in the supporting material to which they refer.

202. On the margins, Professor Jacoby seemed to have been rather too keen to refer to background factual matters in his Report which seemed to present Deborah in a poor light. Only one clear instance of unfair presentation on a matter directly related to capacity (an incomplete quote in paragraph 60) was established through Mr McPherson QC's diligent cross-examination. This related to a July 30, 2015 Dr Brinker note, well outside the central period under consideration. In one instance the Plaintiffs' Expert was in my judgment too quick to concede that he had erred in stating in the opening paragraph of his Executive Summary that the Declaration of Exclusion had "*effectively disinherited*" Alan's children. That phrase appeared to me to accurately describe the practical effect of the transaction which Alan consummated almost literally on his deathbed.

The 2nd to 4th Defendants' psychiatric expert evidence

Dr Joel M. Silberberg

Overview of Expert Report

203. Dr Silverberg is currently the Chief of the Forensic Psychiatry Division of the University of Florida, College of Medicine at Gainesville, Florida. He obtained an MB, ChB in Medicine and Surgery from at the University of Witwatersrand and undertook his Residency in Psychiatry at the Stritch School of Medicine, Loyola University of Chicago. He is a Distinguished Life Fellow of the American Psychiatric Association.

204. Dr Silberberg's Expert Report is dated November 9, 2020. It is based on a review of the medical records, witness statements and exhibits, a video recording and four audio recordings.

205. He has been a practising psychiatrist for over 35 years, and involved in academic psychiatric work for some 30 years. Before his current position, Dr Silverberg held professorships or associate professorships at, *inter alia*, the University of Nevada School of Medicine and Northwestern University's School of Law and Feinberg School of Medicine. He has published and presented extensively and has "*significant clinical experience about the effect of alcohol and drugs (both*

prescription and illicit) on cognition, memory and decision-making by patients." He has also served as a forensic expert in many cases dealing with capacity and substance use disorder.

206. Dr Silverberg opines that it is more likely than not that Alan had mental capacity to make the specific decisions in issue at the relevant times. He makes reference to the capacity test under Cayman Islands law with reference to this Court's decision in *Re O Trust* [2018(1) CILR 59] and the test with which he is familiar under Florida/US law.

207. As regards medical records, he notes that US physicians are generally reluctant to document matters relating to the mental status of their patients for fear of getting drawn into legal battles. The Florida Medical Consent Law is said to be relevant because doctors in the litigious US context would have been eager to gain the protections against suit which flow from that legislation if they obtained Alan's informed consent for the various procedures they performed. Dr Silberberg takes the medical records at face value, but notes that human error is possible, they mostly reflect tick box options rather than personalised observations so that a record of identical states on different occasions does not exclude the possibility of some variation. A detailed review of the medical records is set out (at pages 27-45).

208. As regards Alan's capacity when signing the July 2015 Deeds, Dr Silberberg concludes that he more likely than not had capacity. Significance is attached to the notes and letters written by Dr Brinker and Dr Budd, "*because, in my experience, treating physicians usually avoid writing letters for a patient about their capacity. The fact that they were both willing to do so, provides additional support that they had no concerns regarding Alan's capacity at that time*". As regards the Declaration of Exclusion on March 2, 2016, the expert opines that:

(a) "*it is particularly helpful to consider the evidence of the independent people who met Alan on March 2, 2016 in order to form a view as to his capacity on that date*";

(b) in the video recording, "*Alan demonstrates mental capacity…His conduct does not indicate any impairment from the medications he was receiving at that time…or from any alcohol use*";

(c) as regards the voicemails from March 23, 2016, "*these messages appear to be a genuine*

reflection of his feelings. A patient with dementia or cognitive impairment sufficient to affect capacity would not be able to memorise and deliver 4 messages like this without 'messing up'".

209. As far as the April 11/14 Deeds of Amendment and Termination are concerned, Dr Silberberg relies upon the evidence of Mr Griffin, Deborah and medical records to support his conclusion that capacity more likely existed on each date.

210. It is accepted that after April 17, 2016, his medical conditions would (as evidenced by the records) have meant that Alan suffered from "*altered mental status and/or confusion*". The Expert nonetheless opines that he would likely have had lucid intervals and "*there is no evidence that he had delusions about his children that interfered with his capacity, either generally, or in regard to decisions made on the Specified Dates, and no basis from the medical records to infer that this may have occurred*". Dr Silberberg essentially opines that on May 12, May 24 and June 1, 2016 it is more likely than not that Alan had capacity based on the absence of reliable countervailing evidence.

General impressions of witness

211. Dr Silberberg gave his evidence in a confident and generally balanced manner. He explained that his main psychiatric specialty is alcohol abuse as opposed to geriatric psychiatry, but I found that he demonstrated a firm grasp of both psychiatry and general medicine as well. He was forced to accept that references in his Report to the underlying facts frequently relied on a version of events which his instructing clients contended for. Nonetheless, it seemed to me that his Report and oral evidence was somewhat more neutral than that of Professor Jacoby, but as regards the medical records it was clear beyond sensible argument that there was very little in the medical records in the first quarter of 2016 recording cognitive concerns. It was perhaps more straightforward for Dr Silberberg to opine that there was no documented evidence of dementia. He also fairly accepted that in giving his opinion that Alan had capacity to execute the Declaration of Exclusion, he was not aware that the document had not been discussed at the March 2, 2016 meeting with the Trustee's representatives. In response to my own questioning after re-examination, the Expert agreed that the decision Alan was making in March 2016 was "*more complicated*" than the decision made in July 2015.

212. Overall I found Dr Silberberg to be an impressive expert witness.

Agreed Joint Statement of Experts

213. Following a Zoom video-conference on December 4, 2020, the Experts produced a Joint Statement dated December 9, 2020. They agreed (*inter alia*):

(a) an ordering of capacities;

(b) various factors (e.g. visual and physical disability and chronic illness) which are not relevant to capacity;

(c) that none of the conditions Alan was known to suffer from pre-October 2015 permanently impairs brain function and that Alan was not diagnosed with nor shown by medical records to be suffering from chronic ailment relative to his capacity;

(d) Alan was not diagnosed with any alcohol use disorder and altered mental status due to such a substance is usually of short duration absent permanent brain injury;

(e) Alan was not diagnosed with a neurological or psychiatric illness (other than anxiety), nor major depression (they disagree as to whether there was any chronic cognitive impairment);

(f) Alan's expressed views about termination of the Trust were consistent from April 2015. That from late 2015 he had a repeated pattern of thought about the Plaintiffs thwarting him and was angry at them;

(g) there is no evidence that Alan was suffering from delusions;

(h) the applicable test for mild cognitive disorder;

(i) that the mistakes recorded at the Trustee's meeting could be attributable to factors other than cognitive impairment and the video showed an ability to listen and recall information

and answer questions over several minutes;

(j) Alan's statements in the voicemail messages "*are coherent and goal-driven*".

The Plaintiffs' forensic technology expert evidence

Mr Sean Theron

Overview of Expert Report

214. Mr Sean Theron's Expert Report was dated January 15, 2021 at which time he was a Principal, Forensic Technology and eDiscovery Services at KPMG in the Cayman Islands. He obtained a Bachelor of Commerce (Information Systems) degree from the University of Cape Town in 2004 and became an AccessData Certified Examiner in 2019.

215. In short, the Plaintiffs' Expert examined the metadata of a video recording described as "JA Poulton Video Declaration2 March 2016.mp4.M4V" using three forensic tools. His central findings were that:

(a) the "*Encoded time*", "*Creation*" and "*Create Date*" respectively was each "*2016:03:20 22:22:13*"; and

(b) the relevant timestamp reflected when the file was created.

216. In the event, the only controversy did not turn on these findings, but instead focussed primarily on whether, apart from these agreed facts, the date in question may have been created through some "transcoding" of the original recording which extinguished the prior metadata indicating an earlier creation date. It is of course fundamentally a matter of factual evidence as to when the video recording was originally made.

General impressions of witness

217. Mr Theron gave his evidence in a straightforward manner. He sensibly conceded that it was possible that the original metadata including the date of creation could have been changed through some modification to the original document, such as uploading the video to Dropbox, although he suggested this was unlikely.

Mr John White

218. Mr White's Expert Report was dated July 8, 2021. He leads Deloitte's Digital Forensic and Electronic Discovery service for the Caribbean and Bermuda and has over 13 years' experience in criminal and civil matters. He has M.Sc.'s in Digital Forensics and Criminal Justice.

219. Mr White's evidence was not challenged on the basis that there was in reality only a factual dispute turning on an assessment of the factual witnesses. He opined that the video recording as uploaded to Dropbox was not recorded on the default camera of an iPhone. It was either recorded using another app or the original metadata had been altered by some transcoding process, by accident or design. He examined additional metadata fields to those considered by Mr Theron, and compared the data in the video recording in question with the data found in other iPhones in use in 2016. This suggested that, *inter alia* "*if the Video was recorded on an iPhone, it must have been transcoded and compressed at some point prior to being uploaded.*"

220. The Defendants' Expert also placed before the Court (a) the factual averments that it was possible to download a variety of other video apps in 2016 for use on Apple phones, and (b) "*anecdotal*" evidence that Dropbox users have complained to Dropbox that their metadata has been altered by the uploading process. His Report concluded:

> "*46. To summarize, it is my opinion that the 'Create Date' metadata field value is not conclusive or determinative of when the events in the Video took place, and it is impossible to identify a conclusive date and time of original recording of the Video because the relevant data has not been reliably preserved.*"

General impressions of witness

221. Mr White's fleeting, cameo-like appearance on the witness stand was perhaps attributable in part to the impressive quality of his fulsome Expert Report. He was merely asked to confirm his implicit conclusion that the video recording was clearly made at some point prior to the electronic record being uploaded to Dropbox.

THE KEY TRUST AND RELATED DOCUMENTS

2003

222. The original Trust Deed ("Deed of Settlement Relating to the 'Poulton Family Trust'") is dated November 23, 2003. The Trust's "*proper law*" is Cayman Islands law and this jurisdiction is also the "*forum for administration*" (clause 2). The Trust is a discretionary trust under which the beneficiaries have no ownership interest in the assets held by the Trust.

223. Under clause 4, the Trustee is only empowered to advance assets for the benefit of one or more Beneficiaries out of income. Capital could only be appointed at the end of the Trust Period (150 years, or such earlier date as the Trustee with the consent of the Protector might appoint: clause 1). Clause 5 provides that the Trustee's powers of appointment and advancement shall be exercised "*if they shall so think fit*". Clause 6(f) makes it clear that the Beneficiaries have no entitlement to any part of the Trust Fund unless the Trustee has exercised its powers of appointment in a Beneficiary's favour. Clause 12 confirms that, subject to having regard to the benefit of all or any one of the Beneficiaries and where the consent of the Protector is required, "*every power and the discretion of the Trustees shall be exercisable at their absolute and uncontrolled discretion*" (12(b)).

224. Clause 8 ("*POWERS OF EXCLUSION*") was by common accord the power purportedly exercised in relation to the Declaration of Exclusion. It pertinently provides (as amended in 2013):

> "*(a) The Settlor may, during his lifetime and while he has mental capacity, and the Protector may, with the consent in writing of the Settlor during his lifetime and while he has mental capacity or after the lifetime of the Settlor, by declaration in writing made at any time or times during the Trust Period declare that the Person or Persons or members of the class*

specified (whether or not ascertained) in such declaration who are, would or might but for this Clause be or become a Beneficiary or Beneficiaries or be otherwise able to benefit hereunder as the case may be:

(i) shall be wholly or partially excluded from future benefit hereunder;

(ii) shall cease to be a Beneficiary or Beneficiaries;

(iii) shall be an Excluded Person or Persons;

and any such declaration may be made irrevocable or revocable by the Settlor during the Trust Period and shall have effect from the date specified in the said declaration, provided that this power shall not be capable of being exercised so as to derogate from any interest to which any Beneficiary has previously become indefeasibly entitled whether in possession or in reversion or otherwise, including, without limitation, Deborah Poulton's entitlement in and to forty per cent (40%) of the income of the Trust Fund on the provisions described in Clause 4 (d) above."

225. Clause 9(a) empowers the "*Settlor and the Protector*" to add to the Class of Beneficiaries. Clause 9(f) empowers the Trustee to exclude Beneficiaries "*with the prior written consent of the Settlor or the Protector*". The Second Schedule lists the initial Beneficiaries: the Settlor, his five children and their lineal descendants and his youngest child Daisy's mother, Vivian. Clause 24 ("*REVOCATION*") provides:

"*(i) This Trust shall be irrevocable;*

(ii) Without prejudice to any other powers expressly contained herein to amend or alter this Deed of Settlement the Trustees may by deed amend or alter this Deed of Settlement but only at the written request or with the written consent of the Protector."

226. Under clause 22 and the Fourth Schedule, Michele, Jamie and Nick are designated as the First to Third Protectors, respectively.

227. The undated 2003 Letter of Wishes ("2003 LOW") requested that all income be distributed to the Settlor during his lifetime, and thereafter 20% to each of his first four children, with the remaining 20% divided equally between Vivian (in her lifetime) and Daisy.

2007

228. The June 7, 2007 Letter of Wishes ("1st 2007 LOW") altered the suggested distribution of income percentages as follows:

(a) Vivian and Daisy's respective shares were reduced from 10% each to 5%;

(b) Deborah was allocated 20% for a maximum term of her life, after which her share would revert equally to the remaining beneficiaries.

229. The October 9, 2007 Letter of Wishes ("2nd 2007 LOW") removed Vivian and Daisy altogether and proposed that their combined 10% allocation should be assigned to family emergencies.

2012

230. On August 2, 2012, the distribution of income allocations was revised to provide, after Alan's death, 40% to Deborah, 15% to each of Michele, Jamie and Nick and 10% to James. 5% was not allocated ("2012 LOW"). On the same date, Alan executed a Will ("2012 Will") which critically provided:

> "*I give, devise, and bequeath, all of my estate, of whatever kind and character, to my loving wife.*"

2013

231. On September 23, 2013, Alan executed a Deed of Removal and Appointment so that the Fourth Schedule to the Trust Deed listed the Protectors in the following order:

(1) Alan;

(2) Nick;

(3) Michele;

(4) Jamie;

(5) James.

232. On October 24, 2013, the Trustee at the request of the Protector (now Alan himself) amended clause 4 of the Trust Deed ("*TRUSTS OF INCOME AND CAPITAL*") to expressly provide that after the Settlor's death, 40% of the income should be paid to Deborah with the balance to the remaining beneficiaries as the Trustee thinks fit. Clauses 8 and 9 were amended to explicitly make clear that the powers of exclusion could not be exercised to derogate from Deborah's 40% income entitlement, if that right had vested.

233. Alan signed a February 26, 2014 Letter of Wishes ("2014 LOW") which proposed that after his death, the income distribution allocation should remain the same as in 2012 save that the 'missing' 5% was now allocated to Daisy.

2015

234. By letter dated January 30, 2015, Alan wrote to the Trustee requesting that CSLC transfer its 50% shareholding in JA Poulton Building Contractors Ltd to Michele.

235. The July Deeds were then incompletely executed by Alan:

(a) the Deed of Amendment dated July 17, 2015 was executed by Alan as Protector, and sought to amend clause 4 of the Trust Deed to permit the payment out of capital as well as income. However it was not executed by the Trustee in which the power to amend was vested, subject to the Protector's consent;

(b) the Deed of Appointment, Indemnity and Termination dated July 22, 2015 was executed by Alan as Appointee, but not by the Trustee which held the power to appoint and terminate the Trust.

236. By a Deed of Removal and Appointment dated November 5, 2015 signed by Alan, Nick was removed as Second Protector and replaced by Deborah.

237. A Will dated December 17, 2015 was executed by Alan and witnessed by Christine and both witnessed and notarised by Mr Griffin (the "2015 Will"). In addition to leaving the remainder of his estate to Deborah, as the 2012 Will provided, Article IV of the 2015 Will provided:

> "*Should my wife predecease me, I give, devise and bequeath the rest and remainder to* [sic] *my estate of whatsoever kind and nature and wheresoever situated to EDWARD ROBERT SUTTON and WILSON MALCOLM MCMULLAN, in equal shares, per stirpes.*"

2016

238. The Declaration of Exclusion, despite bearing the date of February 24, 2016, was executed by Alan on March 2, 2016, according to the 2nd to 4th Defendants. The Plaintiffs' case is that it was in fact executed on or about March 20, 2016. As Settlor and First Protector, he irrevocably declared that all beneficiaries other than himself and Deborah be excluded, and the assets of the Trust were to be distributed to Alan and Deborah. Various documents were executed pursuant to the Declaration of Exclusion to effect the termination of the Trust and the distribution of the assets (the shares in CSLC) to Alan and Deborah, notably:

(a) a Deed of Amendment dated April 11, 2016 was executed by Alan as Protector of the Trust. The power of amendment was that of the Trustee, which resolved to exercise the power and executed the Deed on May 12, 2016;

(b) on April 14, 2016, a Deed of Appointment, Indemnity and Termination was executed by Alan and by Deborah in their capacity as appointees. The power of appointment was that of the Trustee, which resolved to exercise the power and executed the Deed on May 12, 2016.

THE KEY ISSUES IN DISPUTE AT TRIAL: PROVISIONAL VIEWS BASED ON THE OPENING SUBMISSIONS AND CROSS-EXAMINATION OF FACTUAL WITNESSES

Introductory

239. By the end of the first five weeks of the trial, when all the factual witnesses giving oral evidence

were cross-examined, it became apparent that, primarily because of my other judicial commitments, there would be a delay of at least 8 months before closing submissions (and possibly expert evidence) could be heard. I determined that it would be helpful to record, while they were fresh in my mind:

(a) my nearly contemporaneous impressions of the witnesses' oral evidence, which are set out above;

(b) my provisional views as to what the principal issues in controversy were, based on opening submissions and cross-examination of factual witnesses; and

(c) my provisional views on some of the more general, background issues which were canvassed in cross-examination.

240. The Plaintiffs' two main claims seek to invalidate the Declaration of Exclusion on the grounds of Alan's mental incapacity and/or on the grounds that his decision to execute it was vitiated by undue influence. It follows that the critical evidence is that which illumines the merits of those two claims.

241. However, while it was broadly agreed that the critical period of time covered from early 2015 (when Alan learned he had a serious tax problem) until March 2016 (when the Declaration of Exclusion was executed), it seemed like reams of evidence were also adduced in relation to preceding years. This was on balance probably unavoidable. The Plaintiffs significantly sought to show through their evidence of the earlier years how important the family business and Alan's children were to him. They sought to show how improbable it was that Alan would have wanted not merely to terminate the Trust he created to preserve that business for the benefit of his children and future generations, but also to disinherit them in favour of his wife and (indirectly) her children.

242. Deborah sought to show that long before the conflict about the termination of the Trust first erupted in the summer of 2015, Alan had become positively disappointed and disenchanted with his children. She sought to establish that the children's failure to comply with their father's wishes in 2015, in effect, merely added fuel to a fire which was already simmering. On this basis, it was entirely rational that he should, near the end of his life, wish to exclude them from any benefit under the Trust, having already made her the sole beneficiary under his Will.

243. The following issues appeared to me to be important threshold issues at the end of the evidential phase of the trial:

(a) Alan the man: what manner of man was he? Was he entirely decisive, dominant, strong-willed, or was he also sensitive and vulnerable to emotional pressure? How did he manage conflictual relationships and issues?

(b) Alan and his UK family (earlier years): was he disappointed with his children's work ethic, honesty and/or extravagant lifestyles before they opposed his initial attempts to terminate the Trust;

(c) Alan and his Florida family (earlier years): was Alan unhappy that Deborah wanted to change or dissolve the Trust? Did he positively dislike her son Wilson because of his interest in the family business?

(d) Deborah and Alan's UK family (earlier years): did Deborah view the UK children as her rivals? Did she positively seek to create a wedge between Alan and his children?

(e) Deborah and Alan (earlier years): was she from the start a "gold-digger"? Did she launch a campaign to maximize the extent to which she would benefit from the Trust and Alan's estate? Was she an archetypal "wicked stepmother"?

(f) Alan and Michele (earlier years): was Alan furious at Michele for forging his signature on the Barclays hedge application form and/or for causing JA Poulton Building Contractors a £3 million loss and/or for losing his apartment?

244. Turning to the critical 2015-2016 period, the following factual matters seemed obviously important:

(a) the July 2015 Deeds: did Alan with full capacity and of his own free and independent will make a rational decision to terminate the Trust with a view to raising funds to pay the IRS and eliminate or minimise the risk of criminal prosecution?

(b) contact with the children: did Alan of his own free and independent will refuse to

communicate with the children with a view to resolving the impasse about terminating the Trust and resolving the IRS problem because he expected their unquestioning compliance with his demands? Alternatively, did Deborah block contact because she was concerned the children might encourage or pressure Alan to change his mind?

(c) Alan's attitude towards the children in March 2016: was Alan misled and/or mistaken in believing that his UK children (1) had failed to provide basic financial support and/or (2) made no attempts to contact him, despite his IRS and health challenges?

(d) the impact of the terminal cancer diagnosis in October 2015: did Alan consider or obtain advice on the implications of the October 2015 diagnosis on the initial decision to terminate the Trust without making immediate alternative provisions for the UK children by way of a US Trust or otherwise? Was the decision to terminate the Trust (without simultaneously or immediately thereafter making provision for a US Trust in favour of the UK children), effectuated in March 2016 through Alan executing the Declaration of Exclusion, substantially the same or materially different to the decision reflected in the July 2015 Deeds because Alan's demise was imminent?

(e) the weight to be attached to the video of the signing procedure and Alan's voicemails: when Alan actually signed the Declaration of Exclusion was hotly disputed. Had the Trustee and the Court been deliberately misled? Had Alan recorded the angry voicemails attacking Michele and Nick freely and independently, and of his own free and independent will?

(f) validity of the Declaration of Exclusion: did Alan with full capacity and of his independent free will in March 2016 decide to terminate the Trust and distribute its assets to himself and Deborah intending to achieve the practical result that the UK children would receive nothing upon his imminent death?

Provisional views on three broad threshold issues

Introductory

245. A significant portion of the Witness Statements and roughly four weeks of oral evidence directly or indirectly involved peripheral personal issues which the parties clearly felt emotionally compelled to deploy in support of their position in what is essentially a family dispute. Alan's children went to great lengths to demonstrate through, *inter alia*, an array of historical family photographs how significant the relationship they had with their father was. There was a legitimate forensic purpose served by this material; it was deployed to demonstrate that had their father possessed full capacity and/or not been subjected to undue influence, he would not have terminated the Trust and distributed the assets to his widow shortly before he died. Having spent several Court days observing the oral evidence of the four children who testified, I am satisfied that, over and above the financial motivations of winning their case, the Plaintiffs also were seeking to obtain some form of vindication about the relationship they enjoyed in his lifetime. It seemed that they each harboured deep unarticulated fears that in the final analysis their father had actually abandoned them.

246. For Deborah, accused in effect of being a gold-digger who had a premeditated plan to turn Alan against his children and persuade him to give all of his wealth to her, two lines of defence were deployed. Firstly, she sought to demonstrate the genuineness of their marital relationship from the start. Secondly, she sought to demonstrate that Alan was disappointed by his children and had, in effect, deliberately turned his back on them in favour of herself and her second son. Over and above supporting the merits of her case, it was clear to me that she was deeply concerned to vindicate the sincerity of her love for her late husband.

247. In the witness box, despite being remotely connected to the Court, each of the protagonists appeared to me to appreciate to a material extent the sanctity of their oaths and throttled back, tacitly, if not explicitly, from their most extreme attempts to demonize each other. Somewhat begrudgingly, each side effectively agreed that Alan indeed did love them all. These were conditional concessions because the Plaintiffs' claims remained to be determined based on contested views as to precisely why and in what condition Alan executed the critical documents that he did in March 2016. The competing narratives still depended, in part at least, on adverse findings the Court was invited to

make about the opposing parties. In these circumstances I consider it is appropriate to record some of the more general conclusions which I provisionally reached at the end of the factual evidence before the long break in the trial. These concern three broad threshold issues none of which trespasses to any material extent on the centrally disputed terrain covering the July 2015 to March 2016 period, or indeed any potentially pivotal controversial events before then.

248. While mindful of the need to avoid projecting my own life experiences into my appraisal of the facts of this or any case, transparent judging makes it appropriate to disclose the judge's particular human experience which may, consciously or unconsciously, be brought to bear in the fact-finding process. In short, and for the avoidance of doubt, my ability to connect with the social context of Alan and his London-based UK family is counterbalanced by a more than fleeting acquaintance with Deborah's Florida and southern US milieu.

Alan the Man

249. A vivid portrait of Alan was painted by the various witnesses who gave oral evidence about him. On the Plaintiffs' side, his eldest daughter (Michele, born in 1966), his eldest son (Jamie, born 1968), his middle son (Nick, born 1980) and his youngest son James (born in 1984) provided intimate insights into his character as a father. Some of their evidence had a fairy-tale quality to it: all was sweetness and light until the archetypal 'Wicked Stepmother', Deborah, entered the scene. But some of their less than reverential recollections of their father had the ring of truth. Vivian Gill provided valuable insights into what it was like to be a romantic partner of Alan in the years before he was ready to settle down and what he was like to engage with in co-parenting a somewhat delicate child. Michael French had a long professional relationship with Alan, and provided a somewhat more detached view of his former client.

250. On the Defendants' side, Deborah provided intimate insights as the only wife to whom he was apparently faithful. Their marriage lasted from 2004 (when he was 66) until his death nearly 12 years later. Some of her evidence had a fairy-tale air about it. Their marriage was an almost perfect one; he was devoted to her and her second son but disappointed in his idle, selfish and ungrateful step-children who failed to help their father in his time of greatest need. But much of her evidence about their relationship had the ring of truth. Her son Wilson gave intimate insights into the character of Alan as a step-father which I found to be entirely credible, even if his acceptance of

the literal truth of some of Alan's 'war-stories' appeared somewhat naïve. Deborah's daughter-in-law Christine and priest/handyman Father Pfab added to this portrait. Mr Whan-Tong and Mrs Williams-Myers, witnesses for the Trustees, were the most independent witnesses who had one meeting with Alan. What they observed was obviously helpful, if only to a limited extent.

251. The combined evidence of these witnesses, like pieces of a jigsaw puzzle, created what I consider to be a fairly clear picture of 'Alan the Man'. He was born in August, 1938 in an England which was probably more socially stratified than it is today. He had what in modern terms might well be described as 'strong working class credentials'. His grandfather was a 'knuckleduster'. His father was a fishmonger who ran the business with his mother, branched out into construction and provided the young Alan with an excellent foundation for an entrepreneurial career. It is a notorious fact that England was, even more so in the 1950s and 1960s than today, a stratified society with status ranked by, amongst other things, schools and accents.

252. Alan the student was exceptionally bright and won a scholarship to the very 'posh' fee-paying Dulwich College. He turned down the Scholarship, seemingly because he was unwilling to make what seemed to him to be a giant social leap. He went to the Grammar School instead, a selective entry State School which was more 'posh' than a general State secondary school but less 'posh' than a fee paying school. Even then, according to Jamie, he was nicknamed "Fish-face" by boys who presumably mocked his parents' entirely respectable business based on their own peculiar notions of where it ranked in the social pecking order. Alan's working class accent was perhaps also mocked; he consciously worked on getting rid of it and replacing it with an enunciation style which would be more 'normal' in middle class circles. He left school at 15, opened up a greengrocer's stall opposite his parents' fish shop and years later ended up building a multi-million pound property-based business in central London.

253. Both his London Family and his Florida Family appear to agree that Alan was proud of his financial success having started out from humble origins which he never entirely left behind. His approach to family was extremely unorthodox in late 20th century English terms. It is impossible to resist speculating that if he could have been transplanted into a traditional polygamous society, he would have been able to slake his thirst for romantic variety within a social structure designed to provide dignity and security for his many wives and all his children. Instead he loved, looked after and left each of the three women who bore his children, as well as a fourth partner (Joyce, to whom he was

married for 10 years) before finally marrying and settling down with Deborah, whom he met and married in his mid-sixties.

254. Alan was hard-working, had a knack for business, was generous but was a devoted father as well. Having regard to his own unease about joining a posh fee-paying school, he ensured that all of his children went to fee-paying schools and most attended highly ranked Universities as well. The average devoted father would feel that was enough to set the children up for life. But, perhaps deeply suspicious of a world which had not served him up with opportunities on a silver platter, Alan created a family business structure (centred around APL) which could also provide his children with employment. Later, through the Trust, he created a vehicle to preserve the family wealth for future generations. In return, he expected his children to demonstrate some of his own entrepreneurial spirit by acquiring property in their own right. Michele, Jamie and Nick were able to meet these expectations. James, despite attending the highest ranked University, was unable to get onto the property ladder, and failed to meet Alan's high expectations in that respect. There was seemingly tension between father and youngest son after James' suggested income share was reduced from 20% to 10% by the 2012 LOW.

255. Not only was Alan a devoted provider for his children, he also had warm loving relationships with them as well, enjoying family holidays when they were young. As one would expect of a successful entrepreneur, he was quite a character as well. When Michele was still at school, he once borrowed a Rolls Royce to pick her up, stopping ostentatiously at the kerbside to pick her up, with Donna Summer music blaring noisily. His daughter, mortified, went and hid. His business interactions, based in Soho, most famous for its sex industry, undoubtedly brought him into contact with the occasional "dodgy" character. He sold gambling machines and managed retail commercial and rental residential property. Alan was seemingly proud of the fact, as Jamie related, that a character loosely based on him as a younger man, "Hatchet Harry", featured in a London-based "Mockney" gangster movie, '*Lock Stock and Two Smoking Barrels*'[24]. In my judgment, he probably exaggerated his links to the 'Underworld' as an older man talking to his impressionable young stepson Wilson, a continent away from the relevant events. However, it is equally entirely plausible that Alan was socially flexible enough to simultaneously parlay his working class origins as a means of bonding with less salubrious business contacts while at the same time using his wealth

[24] First Witness Statement, paragraph 80; Transcript Day 5 page 55 line 5-page 56 line 24.

and upgraded accent to fit in with the 'posh set'; both at his local golf club and the East India Club in Central London. He was clearly an intelligent and sophisticated yet also very sensitive man, and Michele rightly objected to any suggestion that he was "rough around the edges". It is or ought to be a notorious fact that coarse language is frequently used by robust Englishmen of all social classes (perhaps less so by those in the more self-conscious middle classes) in a variety of social contexts. I made a similar observation in the course of oral closing submissions.

256. I also felt, for similar reasons, that too much had been made on all sides by harsh and occasionally violent remarks attributed to Alan about either his children or his step-son Wilson. Alan was a man who in his youth flitted between relationships and may well have developed the habit of convincing the lover he was with that they were his favourite and that he was irritated by their rival. A loving father might well use a similar ploy to assuage natural sibling rivalries and the need to assuage jealousy between his London children and his Florida step-son could have seen a replication of this pattern. Alan by all accounts seemed to be a sensitive man who had grown up in a tough part of town in a tough era, when 'macho' culture and casually 'macho' language abounded. In English 'alpha-male' social banter in more modern times, abuse is frequently used as a form of endearment or respect. No one familiar with those antecedents would have taken literally any of the 'threats' Deborah and Wilson claim to have heard him made about his children.

257. Regrettably, Alan's last days were lived under the shadow cast by his failure to regularize his US tax status after taking up residence there and failing to declare his interest in the Poulton Trust. He seemingly felt that as long as his UK tax obligations were met, he could live peacefully in Florida without having to confront the one person he was unwilling to bless with his generosity: the taxman. The elemental notion that he should be able to enjoy the fruits of his labours was far from unique. If Deborah was right to assert that he embraced the Church in his latter years, Alan might well have been keen to point out that even the Bible suggests that "*tax collectors*", like "*other sinners*", were persons deserving of spiritual rather than material support. Nonetheless, it seemed obvious from the outset that his vows to go to jail rather than pay his US taxes were hollow threats and that he ultimately accepted the need to resolve the "*FATCA*" crisis.

258. On the critical overarching issue of whether Alan wished to terminate the Trust to secure Deborah and deprive his children of any benefit from the Trust, my provisional view at the end of the factual evidence was that but for the fact that he believed his children had forsaken him after the summer

of 2015, he would not have desired this outcome. As time marched on, he appeared to lack the capacity in a general sense to navigate the complexity of exploring "win-win" solutions which would, in an ideal world, reflect his deep affections for all whom he equally loved.

259. The present litigation, on both sides, is ultimately all about money, despite each side seeking to display the purity of their devotion to Alan and his wishes. In this regard, it is difficult to avoid the view that Alan is in moral terms the most straightforward character in the present 'play'. While it is obvious that Deborah and Alan's children are financially motivated, the evidence fairly viewed does not support a finding that either side was at any material time solely or even primarily motivated by avarice. It is wholly unrealistic to expect that the wife or children of a man whose life was mostly centred on creating wealth to support those he loved should be able to surgically separate their emotional and financial connections with Alan. On both sides, the family relations were constituted by a distinctive blend of emotional and financial connections.

260. The cynical reflections of the German philosopher Schopenhauer on human nature are potentially pertinent (and complimentary to Alan as a man of business), but are overly harsh in assessing the motivations of the parties in the present case:

> "*The whole of these masks as a rule are merely… a disguise for some industry, commerce, or speculation. It is merchants alone who in this respect constitute any honest class. They are the only people who give themselves out to be what they are; and therefore they go about without any mask at all, and consequently take a humble rank.*"

Deborah-what manner of woman?

261. The Witness Statements painted contrasting portraits of Alan's widow. Most starkly, they implied the Court faced a choice between viewing her as either a fabled "Wicked Stepmother" or an archetypal traditional "Dutiful Wife". Fairly assessing her character and appraising the controversial aspects of her evidence obviously calls for a more nuanced analysis. In assessing her character and motivations for the purposes of the factual findings I am required to make, I caution myself against projecting my own preconceived assumptions into this analysis, appreciating of course that this is always a counsel of perfection.

262. To anyone with even a fleeting acquaintance of the conservative, patriarchy-tinged culture strands of the past and present British colonies of the American South, the Atlantic and the Caribbean, the tension between modern and traditional gender identities and roles for women of Deborah's generation is not an uncommon one. It seems obvious that for Deborah there was a tension between her aspiration to be a modern independent woman and a more natural inclination to be a traditional dutiful wife and homemaker like her mother. Her father appears to have been a traditional head of household, a hard-working man who ran a modest business after retiring from military service. On the face of it, it is difficult to see how her family background would have tilted her into playing the role of a "gold-digger". More plausibly, she would have wanted to marry "well" and have a comfortable life. By her own account, under questioning from the Bench (which I found to be entirely credible), her personality was more similar to her mother's than her father's[25]. Whilst it is not unknown for 'dutiful' wives to put on a submissive public face, while being dominant and manipulative in private, I do not accept that this sort of extreme 'switching' occurred in Deborah's case.

263. Her first husband was a fellow student and father of her first son. She gave up College and worked fulltime to support his legal education but was only rewarded (according to her account) with physical and emotional abuse. The divorce seemingly yielded no or no significant financial benefit to Deborah. Her second marriage, admittedly to an older man with indirect access to inherited wealth, ended in a bitter custody battle which she seemingly conducted with warlike vigour. Although it seems that Wilson was taken care of financially by his father (or his father's family trust), there is no suggestion that Deborah acquired any noteworthy financial benefit from the marriage. On the contrary, she testified that she was the sole breadwinner and that her then-husband used his status as primary carer as a basis for seeking custody[26]. Far from turning her into a gold-digger, this second unhappy marital experience made the divorcée yearn for complete independence, prompting her to write to the relevant court at one stage[27]:

> "*I would like to be rehabilitated and never have to depend on anyone again.*"

264. While superficially plausible, based on the fact that the 65 year-old Alan was some 16 years older

[25] Transcript Day 19 page 40 lines 11-15.
[26] Transcript Day 10 page 156 lines 9-15.
[27] Transcript Day 10 page 156 lines 23-24.

than Deborah when he married the 'Southern Belle', the idea that she was simply "after his money" seemed to me to be a rather shabby and overly simplistic suggestion. Alan and Deborah's wedding day picture appeared to me to vividly vindicate the saying that "the camera never lies". The happiness and pride of the groom next to his younger and taller bride is unmistakeable. Less obvious, but no less compelling, is the smile and look of pure joy in Deborah's eyes, an expression which (it seemed to me) could only have been manufactured by an Academy Award-winning actress. There is, after all, nothing implausible about a genuine bond being forged between two people from "somewhere else", each with a somewhat uneven romantic past and reared in households which lacked privilege and valued hard work, seeking to reinvent themselves in what is notoriously known to be a sunny and 'open to outsiders' State.

265. The evidence of his children also sheds light on Alan's ambivalent side. He wanted to gain access to places of privilege in the land of his birth; yet, having gained access, he would express disdain for the club members being "snobby". Those who break all manner of glass ceilings, perhaps, find that their success entails sustaining (at the very least) superficial emotional cuts and bruises. The newcomer into all manner of 'exclusive' spheres often finds that their own sense of belonging is not always uniformly reciprocated by their new 'friends'. It is easy to infer that in Florida, by way of stark contrast to England, Alan did not have to navigate such murky social waters and was able to find a new lease of life. America is not classless, but might fairly be likened to an archetypal 'Dagwood' sandwich; the middle class is the bulging, much-loved filling, stuffed between two thin slices of bread, the extremely rich and the extremely poor. He and Deborah were, perhaps, two romantics who had struggled to make romance last in the past, despite doubtless hoping that Florida would become a happy permanent home. Each with their own idiosyncratic vulnerabilities, they apparently still dared to pursue a fairy-tale ending with Alan rescuing the "Princess" and the Princess, to borrow Julia Roberts' iconic feminist-tinged '*Pretty Woman*' line, "*rescuing* [him] *right back*".

266. That may well be a somewhat impressionistic, rose-tinted view of how and why the marriage occurred. Nonetheless, in my judgment this positive framing finds solid evidential support not just in his children's admission that he loved Deborah and her own son's insistence that she loved Alan. But this conclusion also is supported by the evidence of Deborah's devotion to her husband, years later, through an excruciatingly difficult and ultimately terminal illness. A bright light was shone on her sensitivities to Alan's comfort by her decision to hire the licensed assistant nurse with whom

Alan struck up a relationship at the Mayo Clinic to care for him at the family home, after his release from hospital in late October 2015.

267. Professional carers who form positive relations with their patients generally have their best interests at heart and tend, in my experience, to make more penetrating and honest judgments than the average observer about those who are jointly involved with their patients' care. Sean Murphy, a native of Georgia who appeared to be of predominantly African-American descent, gave both a Witness Statement and oral evidence for Deborah over five years after he stopped working in the Poulton home. An assistant nurse in 2015, he fully qualified as a registered nurse in 2019. There was no suggestion that he was anything other than an entirely independent and unconnected witness, a young man in the early stages of a professional career with no conceivable motivation for giving false evidence. The following conclusory averments set out in Mr Murphy's Witness Statement (and the preceding detailed and nuanced foundation for them) unsurprisingly went unchallenged:

> "*26. I genuinely believe that Deborah tried to provide the best care for Alan. From what I saw, Deborah tried hard to cater for his wishes such as preparing his favourite meals. Deborah seemed to be completely devoted to Alan, even while handling her own ailments, and she cared and attended to his every need.*"

268. Mr Murphy started attending the Poulton home between noon and 5.00pm starting on October 23, 2015, but was not there every day of the week. The importance of his relationship with Alan is noteworthy because Alan was clearly a difficult patient who at least one visiting health professional found impossible to manage and whom Alan on November 3, 2015 forced to beat a retreat. The criticisms the physiotherapist made of Deborah in relation to that visit, quoted by Professor Jacoby at paragraph 76 of his Report, may to some extent reflect the frustration of the attending professional at their own failure to manage the patient. But they in no way suggest that Deborah was not genuinely concerned about Alan's welfare while struggling to manage a difficult predicament.

269. Accordingly, I found it difficult to doubt the sincerity of Deborah's answer to a question put by Mr McPherson QC in her oral evidence in chief [28]:

[28] Transcript Day 12 page 5 line 23 – page 6 line 5.

"*Q.* *I would ask it's a very open question and answer this as you think fit, but can you tell us a little bit about Alan, about your memories of him, why you loved him.*

A. *Alan he was a very intelligent man. He was very kind. He was considerate, he was loving. But he was a humble man. I loved him very much. I miss him every day.*"

270. None of the above conclusions is inconsistent with the ultimately obvious fact that Deborah was, as most people in her position would have been, simultaneously deeply concerned about her own future financial security as Alan's health declined. Nor are they inconsistent with potentially finding that she occasionally manifested hostility towards her husband's London family and ultimately drove a wedge between them and Alan.

Alan's children their relationship with their father

271. The fairy-tale wedding for Alan and Deborah only foreshadowed an ultimate nightmare as regards the relationship between Alan and his London-based family. Experience suggests that the deterioration was caused by a number of factors linked by one basic human instinct: jealousy.

272. It seems obvious that the children were before too long to some extent jealous of their father's relationship with Deborah and Wilson, especially as his visits to London diminished and then ceased. The wicked stepmother figure in European folklore reflected real-life tensions inherent in paternal relations when a father remarries, tensions which feed a narrative that life was perfect before the interloper came along. Be that as it may, the exclusion of Alan's children as beneficiaries of the Trust and the subsequent distribution of all of the assets to Deborah could not have been a more dramatic exemplification of that traditional narrative from the UK family's perspective.

273. A more careful analysis of the evidence suggests that the animosity pot started brewing even before Alan and Deborah's wedding. Michele, framing her objections as concerns about her father's emotional stability, objected to his marriage. Deborah was closer to Michele in chronological age than she was to Alan; and perhaps closer still in maturity terms. The tensions between daughters and stepmothers close in age are, in my judgment, notorious as a matter of human experience. Neither Michele nor any of her siblings attended the Florida wedding in the summer of 2004. That

was not the ideal way to begin a relationship with a new stepmother. Irrespective of whether Alan or Deborah decided at the last minute not to attend Michele's second marriage in France despite being in Europe at the time, their failure to do so has at least a hint of "tit for tat" about it. Despite this, as I have already noted above, Deborah sought to develop and sustain a good relationship with Michele and the other children because, by her own account, she knew that Alan loved them.

274. Against this background, the most reliable evidence about Alan's relationship with his children is that supported by documentation before hostilities were about to break out in July 2015. That Alan was a devoted father who in general terms had a loving and close relationship with all of his children, especially when they were young, cannot be doubted. This is supported by pictures of family holidays and letters and cards which were impressively retained from years ago. On the face of it, Alan's paternal efforts put to shame the contributions of the archetypal English "average man" living in a semi-detached with one wife and 2.5 kids. It is common ground that, in addition to privately educating his children and supporting their mothers, he devoted his life to a family business in which the majority of his children worked. A family business which provides not just for its founder but for his children as well into their adult years is a powerful material manifestation of love of family, with work and family time becoming closely intertwined. After Alan's connections with Florida increased after the turn of the century, he trusted Michele and Nick to manage operations on the ground with (after 2011) increasingly light-touch guidance from himself.

275. There is no clear evidence that before the surfacing of the FATCA issue in 2015 any significant breach of Alan's love for his entire UK family had occurred in the period after his marriage to Deborah in 2006. It seems inherently likely that the closeness of the relationship between father and children naturally waned somewhat as they became older and more autonomous and Alan stopped travelling to London after 2011 notwithstanding continuing business-related APL ties. On the other hand, the children's suggestion that Deborah actively sought to alienate him from his children and Deborah's suggestion that he was, in effect, generally disappointed with them I regard as equally inherently improbable.

276. These suggestions were also inconsistent with the most reliable available evidence. The human tendency to rewrite history to explain the present is keenest when the storyteller is motivated to recast the past to prove that they are a victim of a recent, heinous "crime". This type of evidence will often, though not always, be unreliable. Where the truth lies will often be revealed by the

fundamentally honest witness and so the Court's task has been facilitated in the present case where I consider all of the family witnesses to be honest at their core.

277. For example, Michele's written evidence probably launched the most sustained attacks on Deborah's character[29]. Yet she admitted under cross-examination that after their marriage, Alan and Deborah visited London about twice a year for seven years[30]. She also, extremely begrudgingly, admitted that Deborah had on occasion sent gifts for Michele's children[31]:

> "*Q. Didn't Debbie used to send presents for your children?*
>
> *A. Occasionally, but that sorry, again, I'm not overly taken by material stuff, so I wouldn't necessarily say that it demonstrated someone was kind. It's quite easy to buy things in America.*
>
> *Q. But she'd send bundles of clothes that she had gone out and bought for your children, didn't she?*
>
> *A. She had sent them T shirts and things, yes.*"

278. James in his Affidavit deposed, somewhat more vaguely: "*22. Given the drama that Deborah was always creating around my father, I kept my distance when she was around. She clearly disliked me, given the unpleasant things she said about me. I did not then know what she was capable of, I do not think any of us did…*" This related to his visits to Florida in 2012 and 2013. It suggested he and Deborah had never got on but implicitly accepted that Deborah's alleged crimes in the last year of Alan's life were on a far higher scale than any earlier misdemeanours. However, his initial seemingly instinctive answer to questioning about his relationship with Deborah cast that relationship in a far more favourable light than his written testimony and I considered it to be far more credible[32]:

> "*Q. My question was: you don't like Deborah very much, do you?*
>
> *A. No, and I said that wasn't the case. Ultimately, now, no, because she - - she - - what she did. And my father wouldn't be very happy her not allowing my father to see the children that he loved at the end of his life. That wouldn't - - he wouldn't have been happy, he wouldn't have liked her*

[29] See e.g. Affidavit dated July 17, 2020, paragraphs 59-82.
[30] Transcript Day 2, pages 126 line 15- 127 line 10.
[31] Transcript Day 2, page 159 lines 4-11.
[32] Transcript Day 7, page 89 lines 7-21.

knowing what she'd done now either, so ... I never had a problem. As I said, I've always spent lots of time with her, and for me it wasn't - - I always wanted to make a happy relationship, and I always got along - - I got along well with Joyce, who was his wife before - - very well - - and I always wanted my Dad to be happy really."

279. Deborah's Witness Statement[33] suggests in comparatively moderate terms that although he had a good relationship with Jamie, Alan's relationship with his other children deteriorated "*over the time we were married*". He expressed disappointment that they did not spend more time together, were jealous of each other and was disappointed by their extravagance and that their work ethic did not match his. She deposed: "*I believe that some of the steps Alan took in relation to his Trust directly corresponded with his children's behavior and, in particular, their disregard for Alan's wishes.*" That Alan expressed some such complaints is entirely plausible. Sibling rivalry is unremarkable in a nuclear family; it is almost guaranteed in an extended family's such as Alan's. Equally unremarkable is the scenario where the founder of a family business, created in part to ensure that his children escape the hardships he had to endure, vainly expects the next generation to replicate the drive which the founder had, absent the same motivation. Working closely with Michele and Nick necessarily created more opportunities for friction with them in contrast with the independent restaurateur, Jamie. Even more commonplace, and perhaps most starkly demonstrated in the divide between the pre-and post-World War II generations, is the notion the younger generation "are too soft". Such observations often reflect a complex mixture of disapproval, envy, pride and/or relief. James and Daisy came of age in a far different world still to Alan and it would be surprising if he did not judge them somewhat too harshly as a result, a matter to which I will return briefly below. In summary though, despite ups and downs in relationships between parents and children over a lifetime, more often than not it is far easier than children tend to believe for each child to be genuinely equally and unconditionally loved by a parent as loving as Alan clearly was.

280. The assertion that the expression of any such ordinary and probably transitory regrets (as Deborah's and Father Pfab's evidence describes) would have contributed to Alan's decision to terminate the Trust and distribute all its assets to Deborah seems inherently unbelievable. More to the point, as the quoted averment in Deborah's Witness Statement acknowledges, is what the children did and/or were understood to have done after the FATCA fire had ignited and terminating the Trust was first selected as the necessary solution. I leave for separate consideration whether Michele's alleged

[33] Paragraphs 45-47.

misdeeds, years earlier, led to a fundamental breach in their relationship as the March 2016 voicemail Alan recorded potentially suggests.

281. In summary, it seemed clear (by way of a strong general provisional impression) by the end of the factual evidence that the ship of Alan's relationship with his children, despite encountering some rough seas along the way, was still afloat prior to July 2015.

Summary of provisional views

282. Overall, my provisional views based on the factual evidence was that the Plaintiffs and D2-D4's respective cases, as set out in their written evidence, in significant respects reflected extreme positions and the heat of battle rather than objective truths. They all attempted, with varying degrees of success, to give honest oral testimony which cumulatively suggested that resolving the main factual controversies required a very careful and nuanced analysis of the evidence. My strong sense was that there was a tragic element to the way Alan ended his life, with those he would have wished to see joined together by the pure emotional love he had for them all instead fighting over the material spoils. In moral terms, neither side appeared to me to be entitled to claim (like Shakespeare's King Lear) to be "*more sinned against than sinning*". In legal merits terms as well, and based on an initial response to the oral evidence, neither side appeared to have an obviously better case for winning.

CLOSING SUBMISSIONS

Preliminary

283. The present trial spanned nearly six weeks, with the first four weeks (and all factual evidence) being heard in January-February 2021 and the final two weeks being heard in the third week of October and the first week of November, 2021 respectively. It was common ground that in a high-stakes family commercial dispute, the oral evidence had to be carefully assessed in light of the extensive contemporaneous documentary record. Even that documentary record, particularly after hostilities broke out in or about early August 2015, had to be read with care. The main claims of incapacity and undue influence added a further layer of legal complexity.

284. Closing written and oral submissions were against this background of greater significance than they would ordinarily be. I was greatly assisted by both counsel for the skilful way in which they marshalled the key evidential areas in support of their clients' cases and distilled the relevant legal issues. My sympathies were pulled first this way and then that, without dislodging my provisional sense that each side deserved equal sympathy from the Court and that resolving the crucial issues required as objective as possible analysis of the evidence informed only by the dominant impulses of the relevant areas of the law.

D2-D4's submissions

Overview

285. D2-D4's Written Closing Submissions ran to a comparatively slender 45 pages but were supported by 11 Appendices dealing in more detail with (1) the factual witnesses, (2) Alan's life and his relationships with the main protagonists, (3) Alan's health and the expert psychiatric evidence, (4) a chronology of key events in 2015-2016, (5) the March 2, 2016 meeting between Alan and the Trustee's representatives, (6) the Declaration of Exclusion Video, (7) Joe Knecht, (8) various overseas proceedings (Florida, IRS and English), (9) the Trust Deed and its evolution, (10) Discovery, and (11) Relevant Legal Principles.

Approach to the factual evidence

286. Mr McPherson QC made the broadly valid criticism that the Plaintiffs' written evidence was overly long and often combined 'evidence' with commentary. I agreed in the course of his oral argument that their written evidence had to be read with care. He also reminded the Court of the fallibility of human memory (*Gestmin SGPS S.A.-v-Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) (Leggatt J, as he then was at paragraphs 15-22)) and the importance of contemporaneous documents (*Simetra Global Assets Ltd-v- Ikon Finance Ltd* [2019] EWCA Civ 1413; [2019] 4 WLR 112 (Males LJ at paragraphs 48-49)).

287. The most important overarching submissions made in relation to the Plaintiffs' own evidence in Appendix 1 were the following:

"*11) Stripped to its bare bones, this case is about*

a) Alan's capacity in 2016

b) Alan's relationship with Deborah

c) Deborah's conduct – and for the alleged conspiracy, Wilson and Christine's conduct.

(12) The evidence that Ps were actually able to give that is relevant to those matters is extremely limited. That is because, certainly after 2011 (and so in the last 5 years of Alan's life)

a) The amount of time that Ps collectively spent with Alan and Deborah is measured in days:

i) Michele saw Alan and Deborah once, in 2012, for a short holiday

ii) James saw Alan twice - in 2012 and 2013, each time with Nick - for a few days while travelling on to holidays elsewhere

iii) Nick saw Alan and Deborah three times – in 2012 and 2013 each time with James while travelling on to holidays elsewhere, and in April 2015 for a few days with Alexandra, also while travelling on to a holiday elsewhere

iv) Jamie saw Alan and Deborah twice – in May 2014 and August 2015 – for a few days as part of longer holidays with his family

v) Daisy did not see Alan or Deborah at all

b) The amount of time each spent with Wilson was even less, and the time spent with Christine was negligible

c) While Michele and Nick were in regular telephone contact with Alan about APL and business matters

i) Their telephone contact with Deborah was minimal

ii) Jamie's telephone contact with Alan and Deborah was less regular still

iii) James' and Daisy's telephone contact with Alan and Deborah was non-existent and (on their own evidence) <u>all</u>

telephone contact (bar an occasional call between Alan and Jamie) ceased in September/October 2015."

288. Unsurprisingly, the Court was invited to approach the Plaintiffs' evidence (and that of Nick's wife, Alexandra Pakenham Poulton) with caution. Vivian Gill was accepted as being "*plainly an honest witness*", while Mike French "*appeared to be doing his best to be fair, to answer the questions asked of him as best he could and to help the Court*". In relation to Evangelina Palmer, by way of introduction to her evidence, it was submitted: "*So poor was her evidence that it is tempting not even to dignify it with any sort of response.*" As regards the written evidence of Daisy and Frank Yates, it was pointed out that this must be ignored as no hearsay notices had been served.

289. In relation to Deborah's evidence, it was argued:

> "*96) We submit that the Court should find that Deborah's evidence was truthful and honest, and should accept it. In saying that, we do not shy from the fact*
>
> *a) That (as we say elsewhere) certain of her contemporaneous correspondence was ill-judged and (as she accepted) ought not to have been sent by her*
>
> *b) That aspects of her evidence may well be tinged with the benefit of hindsight having lived through*
>
> *i) The events of 2015 and 2016, and*
>
> *ii) This case and the Florida proceedings for the past 5 years.*
> *What we do however say is that Deborah plainly has not set out to mislead the Court. She has given her evidence to the best of her ability, and the Court should accept it.*"

290. It was argued that the criticisms made of the motives of Wilson and Christine were unfair and that their evidence, together with that of D2-D4's other factual witnesses, should be accepted. As regards the Trustees' evidence, it was submitted that:

(a) the unchallenged evidence of Carlos De Serpa Pimentel and Robert Lindley of Appleby should be accepted; and

(b) the evidence provided in relation to the March 2, 2016 meeting would likely provide "*substantial assistance*" to the Court.

Alan's life and relationships

291. In Appendix 2, it is uncontroversially submitted that Alan's romantic relationships could be described as "messy" and that his relationship with Deborah was stable to an unprecedented extent. It is also pertinently argued that the Plaintiffs themselves accepted that he was normally the dominant party in his romantic relationships.

292. More controversially, as regards his relationship with his children, it was significantly submitted (at paragraph 6 c)):

> "*In essence, by the time that the Ps had reached adulthood, the relationships between Alan and each of them had (to a greater or lesser extent) ceased to have any significant emotional element and had instead become 'financial'. While Alan plainly never stopped caring for or about the Ps, the evidence shows that by the last year of his life he had become disappointed and frustrated both at aspects of their behaviour generally, and more specifically at the way in which they were behaving towards him; he felt that he had 'done enough' for them financially.*"

293. More specifically addressing the critical 2015-2016 period, it was submitted:

> "*81) The Court will need to consider the serious assertion that the reason telephone contact petered out and ultimately ceased altogether was because Deborah sequestered Alan;*
>
> *a) That is flatly denied by Deborah:* ***Day 12 p31***
>
> *b) It is difficult to fit that with the evidence [**Day 12 pp73-85**] that*
>
> *i) Alan had a phone by him in his chair*
>
> *ii) The phone had big buttons*
>
> *iii) The phone also announced who was calling*
>
> *iv) On occasion others would hear Alan cursing when he realised one of the Ps was telephoning yet again.*

82) So why might Alan cease taking their calls? He was plainly livid

a) That Ps were obstructing him from achieving his intentions

b) That Ps were challenging his capacity

He felt betrayed and deeply angered that, having given them so much during their lives, they were acting as they were. The cessation of contact was thus Alan's choice, and Alan's choice alone."

Alan's medical condition

294. In Appendix 3, to which Mr McPherson QC extensively referred in oral closing, the absence of any evidence of mental impairment in the medical records for the period leading up to March 2, 2016 was persuasively argued. In paragraph 11, the common ground between the Experts was cogently set out:

"c) The experts agree that '*the medical records do not disclose that Alan was clearly suffering from any chronic incapacitating or degenerative ailment that would be relevant to his capacity to make the decisions or execute the documents in issue*' *[**Joint Statement para 8**]. It is difficult to overstate the importance of that common ground in this case. Where the experts differ is because*

i) Dr Silberberg concludes that, just as the medical records show, Alan was not in fact suffering from any chronic incapacitating or degenerative ailment that would be relevant to his capacity to make the decisions or execute the documents in issue

ii) Professor Jacoby refuses to rule out the possibility that, despite the absence of any indication in the medical records to such effect, Alan might in fact have been suffering from an undiagnosed, undocumented chronic incapacitating or degenerative ailment that would be relevant to his capacity to make the decisions or execute the documents in issue

*d) The experts agree that Alan was at no time diagnosed with dementia, a brain injury, Alzheimer's disease, alcohol-induced dementia or other chronic illness that caused a permanent or durable effect on cognition so as to remove the capacities in issue [**Joint Statement paras 7 & 22**]. Where they disagree*

i) Professor Jacoby opines that, just because no such diagnoses were made, one cannot rule out the possibility that Alan might in fact have suffered from one or more such conditions

ii) *Dr Silberberg not only considers that to be most unlikely given the vast number of clinical encounters that Alan had with numerous doctors at the Mayo, he considers Professor Jacoby's suspicion of 'undiagnosed chronic illness causing a durable effect on cognition' to be wholly unsupported by the medical records.*"

Chronology of key events

295. Appendix 4 to D2-D4's Closing Submissions addresses the Chronology of Key Events. Mr McPherson QC went through the highlights of the key events in oral closing. It is common ground that the following events are central to the issues in dispute in the present litigation, although the way the events should be interpreted is hotly contested in various material respects:

(a) Alan's retention of advisers in the first quarter of 2015 to deal with the FATCA issue which was notified to him and Nick and Deborah by the Trustee in December 2014 including the retention of Kevin Packman of Holland & Knight;

(b) the development and implementation of the plan to terminate the Trust and distribute its assets to Alan after he was cleared to make voluntary disclosure to the IRS in the second quarter of 2015;

(c) the development of the conflict between Alan and his children after they refused to cooperate with the termination of the Trust in the third quarter of 2015 including Jamie's visit to Florida in August 2015;

(d) Alan's diagnosis with terminal cancer, the breaking off of communications with his children and the taking of further legal advice in the fourth quarter of 2015;

(e) the March 2, 2016 meeting and the execution of the Declaration of Exclusion and other documents culminating in the transfer of the Cutty Sark shares to Alan and Deborah on May 31, 2016, a week before Alan died on June 6, 2016.

The March 2, 2016 meeting

296. It is submitted in Appendix 5 (at paragraph 20) e)) that:

> "*The Court is likely to derive most assistance about what occurred at the meeting*
>
> *i) From the contemporaneous emails at the time of/immediately after the meeting recording the fresh recollections of the attendees*
>
> *ii) From the conclusions reached by those attendees – separately and independently from one another – about the issues that the meeting was intended to address…*"

297. The process followed by the Trustee's representatives in preparing for the meeting and recording what transpired, as well as the conclusions reached as to the fact that Alan had capacity to execute the Declaration of Exclusion, are fully endorsed.

The Video of the execution of the Declaration of Exclusion

298. The question of when the Video was recorded and what the Court can take from what it shows is addressed in Appendix 6. It is submitted:

> "*25) We invite the Court to draw the following conclusions:*
>
> *a) The Video was recorded on the afternoon of 2 March 2016 shortly after the departure of the Trustees and JAQC*
>
> *b) Alan executed the Declaration of Exclusion on the afternoon of 2 March 2016 shortly after the departure of the Trustees and JAQC*
>
> *c) The evidence of the Trustees and JAQC as to the meeting with Alan on the morning of 2 March 2016 can therefore most certainly be used by the Court when considering whether on 2 March 2016 Alan had capacity to execute the Declaration of Exclusion*
>
> *d) There is nothing in the Video which is indicative or suggestive that Alan was suffering any sort of mental or cognitive impairment on 2 March 2016 when he executed the Declaration:*
>
> *e) In fact, the Video is yet another piece in the jigsaw that shows that Alan did have the necessary capacity to understand and make the*

Declaration (and did in fact understand and make the Declaration) as at 2 March 2016."

Joe Knecht

299. Mr Knecht, a CPA in 2015/2016, is the only unrelated party to form the subject of an Appendix (7) in his own right. Nonetheless, he is described as "*red herring*", someone who became a friend of Alan, whom Deborah did not realise (until late 2015) had a "*shady past*" and with whom Deborah did not have an illicit relationship behind Alan's back and/or conspire to obtain the Cutty Sark shares. Nonetheless, it was accepted that two aspects of Evangelina Palmer's evidence found potential support in the documents before the Court:

> "*a) First, he appears to have been something of a 'Walter Mitty'-type character – an individual who liked to present to the outside world a different picture to reality*
>
> *b) Secondly, given his willingness, even propensity, to be economical with the truth, little weight can be placed on anything that he might have said in emails, save where it can be corroborated from other sources (documents or witnesses).*"

Various Overseas Proceedings

300. Appendix 8 was not referred to in oral argument and in my judgment is of peripheral significance. D2-D4 make the following points:

(a) the Florida Proceedings are evidentially inconsistent with the Plaintiffs' evidence herein and reveal the extent to which they are prone to maligning Deborah;

(b) the IRS Proceedings commenced against Alan's Estate in July 2019 demonstrate the reality and substance of the tax liabilities Alan faced in 2015;

(c) the English Proceedings in which the Plaintiffs obtained a Freezing Injunction on August 10, 2016 suggest they have liquid assets which they were unwilling to reveal to this Court under cross-examination.

The Trusts Deed and its Evolution

301. Appendix 9 was not referred to in oral argument. I have already summarised the Trust documents and their evolution above. The main submissions appear to be that there is no merit to the challenges the Plaintiffs appear to foreshadow making in future proceedings to the removal of Michele as a Protector and the addition of Deborah as a beneficiary (in 2013). As regards the nature of the power of exclusion purportedly exercised by Alan in March 2016, the legal dispute is addressed in Appendix 11.

Discovery and documents

302. While not complaining in Appendix 10 that the Plaintiffs' discovery is inadequate, the fair point is made that it is somewhat surprising how little written communications there were between the Plaintiffs which are discoverable:

> "*9) Thus the fact that the Ps have very few documents other than (in the main) communications with third parties about the Trust and how Alan's attempts to terminate it could be stopped*
>
> *a) Is inconsistent with the picture that they wish to paint of a close-knit family unit concerned for their father, and*
>
> *b) Is entirely consistent with Deborah's description of the familial relationships*
>
> *i) Between Alan and the children, and*
>
> *ii) Between the children themselves.*"

303. Mr McPherson QC then proceeds to address the Plaintiffs' attack on the email practices of Deborah and cautions the Court about accepting the notion that all emails typed by Deborah on Alan's behalf do not reflect his wishes. It is further submitted that there is nothing sinister about Deborah's practice of copying emails intended for third parties to herself or other family members, whether as drafts or otherwise.

Legal principles: general points

304. In Appendix 11 the high standard of proof applicable to allegations of fraud and other serious misconduct is firstly addressed. It is argued (at paragraphs 2) f)-3):

> "*f)* *D2-D4 do not say that the Court need be satisfied that something must be an 'inevitable inference' before a finding can be made which is based on circumstantial evidence, or that in a civil case all other possibilities must be capable of 'elimination' before a finding can be made. However, real care must be taken when considering whether inferences of wrongdoing are to be drawn from primary facts, rather than merely being capable of being drawn, and any attempt to compartmentalise particular points relied on, or to treat points in 'silos', or to adopt a piecemeal approach to evidence relied upon, is to be avoided. Almost anything can be made to look sinister; the task for the Court is to ask whether Ps have proved to the requisite standard that the conduct under scrutiny was in fact sinister – and before doing so, to 'stand … back and consider … the effects of the implication of the facts … found in the round': Bank of St Petersburg PJSC v Arkhangelsky [2020] EWCA Civ 408; [2020] 4 WLR 55 @ para 70 per Sir Geoffrey Vos C*
>
> *3)* *The above principles are most frequently applied in cases of fraud and dishonesty. However, they are equally applicable to all cases of 'other serious wrongdoing' - which (given how Ps have pleaded and put their case against Deborah, Wilson and Christine) plainly encompasses the Ps' pleas of conspiracy, undue influence and unconscionable conduct against D2-D4: Lakatamia Shipping Co Ltd v Su [2021] EWHC 1907 (Comm) @ paras 40-43; Schrader v Schrader [2013] EWHC 466 (Ch) @ para 96 (specifically referencing how an allegation of undue influence 'is a serious one, so the evidence necessary to make out the case has to be commensurately stronger, on normal principles').*"

305. These principles, which were not disputed, clearly have particular importance for the Court's task of assessing the evidence in the present case in relation to the Plaintiffs' undue influence claim. Of somewhat less importance was the question of the principles governing the drawing of adverse inferences from the failure to call witnesses as my initial sense was that these principles were not seriously engaged, albeit that they were raised by the Plaintiffs' counsel. Reference was made to *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324 and the '4 principles' set out in the judgment of Brooke LJ:

"*(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.*

(2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

306. Reliance was also placed on *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) where Cockerill J observed:

"*150. This is not the place to deal with this issue at length but the tendency to rely on this principle in increasing numbers of cases is to be deprecated. It is one which is likely to genuinely arise in relatively small numbers of cases; and even within those cases the number of times when it will be appropriate to exercise the discretion is likely to be still smaller.*"

307. Mr McPherson QC submitted that it was only likely to be appropriate to draw adverse inferences where truly central witnesses were not called, which appeared broadly not to be the case here. In addition (at paragraph 7)):

"*(b) There may well be valid reasons for a witness' absence e.g. proportionality, witness out of the jurisdiction. Here the Court has evidence*

i) That Mr Packman, Mr Ball, Ms Exton and Ms Reynolds (in reality, the entities for which they work) have substantial outstanding invoices

ii) That Deborah has been sued in Cayman proceedings by a previous law firm to recover unpaid legal fees…"

Capacity: burden of proof and legal test

308. In oral argument, Mr McPherson QC placed ultimate reliance on the following passage in his written submissions:

> "*17) In reality, little is likely to turn on the question 'who bears the burden of proof?' in the present case. While in some cases – such as where evidence of capacity/incapacity is very 'thin on the ground' – burdens of proof may play a part, in a case such as the present, where the court has ample evidence from a variety of sources, the Court is unlikely*
>
> *a) To be unable from that evidence to determine the question 'did Alan have capacity?', and so*
>
> *b) To have to fall back on deciding the question of Alan's capacity by reference to who bears the burden of proof.*
>
> *Sharp v Adam [2006] EWCA Civ 449 is an example of just such a case. There the Court of Appeal stated at para 74*
>
> > *'Cases are only decided on the burden of proof if, exceptionally, the court is unable to reach an evaluative decision on the evidence taken as a whole. This is not such a case. The decision may be difficult, but it is neither necessary nor satisfactory to resort to the burden of proof.'*
>
> *And see Goss-Custard v Templeman [2020] EWHC 632 (Ch) @ para 16:*
>
> > *'... the modern approach is to address the question of capacity as an evaluation of all the evidence available to the court at the trial: Burns v Burns at [56]'.*"

309. As regards the degree of understanding required in relation to a particular transaction, the following observations of Martin Nourse QC (as he then was) in *Re Beaney* [1978] 1 WLR 770 at 774e-f (which I cited with approval in *Re O Trust* [2018 (1) CILR 59] at paragraph 37) were commended to the Court:

> "*In the case of a will the degree required is always high. In the case of a contract, a deed made for consideration or a gift inter vivos, whether by deed or otherwise,*

the degree required varies with the circumstances of the transaction. Thus at one extreme if the subject matter and value of a gift are trivial in relation to the donor's other assets a low degree of understanding will suffice. But at the other extreme, if its effect is to dispose of the donor's only asset of value and thus for practical purposes to pre-empt the devolution of his estate under his will or on his intestacy, then the degree of understanding required is as high as that required for a will, and the donor must understand the claims of all potential donees and the extent of the property to be disposed of..."

310. It was essentially common ground that the test for capacity remained the threefold test established in *Banks-v-Goodfellow* (1869-70) LR 5 QB 549 at 565, namely understanding (a) the nature of the act and its effects, (b) the extent of property being disposed of and (c) the claims to which he may give effect. As regards (a), it was submitted:

"*30) Establishing a capacity to understand such matters is not a demanding exercise:*

'*I do not believe that previous authority goes to the length of requiring an understanding of the collateral consequences of the disposition as opposed to its immediate consequences. As Mummery LJ put it in Hawes v Burgess ... "The basic legal requirement for validity are that people are mentally capable of understanding what they are doing when they make their will and that what is in the will truly reflects what they freely wish to be done with their estate on their death.'*[34] "

311. As regards (b), the same authority (at paragraph 46) was relied upon in support of the proposition that understanding the extent of the property being disposed of "*is not a demanding test*". As regards the third limb of the *Banks-v-Goodfellow* test, the following written submission (at paragraph 34) was emphasised in oral argument:

"*c) Gardiner v Tabet [2021] EWHC 563 (Ch) @ para 91:*

'The enquiry is whether, in a particular case, the mind is so unsound or the delusion so severe that the testator cannot understand what he is about ... There is no requirement that the testator be able to remember or recall the extent of his property or those who might have a moral call upon him; the test is whether he is capable of understanding such matters when they are present to his mind.'"

[34] *Simon-v-Byford* [2014] EWCA Civ 280 (per Lewison J at paragraph 45).

312. It was further argued, I felt somewhat ambitiously (for evidential reasons), that the transaction purportedly approved by Alan in March 2016 was simply implementing instructions given when he clearly had capacity during 2015. On that basis his capacity in March 2016 only needed to be sufficient to apprehend that the document he was executing was consistent with his earlier instructions: *Perera-v-Perera* [1901] AC 354 (PC); *Perrin-v-Holland* [2010] EWCA Civ 840; [2011] Ch 270.

313. However, the following judicial guidance on the role played by expert medical evidence, set out in Appendix 11 (at paragraph 46), was of central relevance:

> "*a)* *Zorbas v Sidiropoulous (No 2) (supra):*
>
> *'The criteria in Banks v Goodfellow are not matters that are directly medical questions, in the way that a question whether a person is suffering from cancer is a medical question. They are matters for commonsense judicial judgment on the basis of the whole of the evidence. Medical evidence as to the medical condition of a deceased may of course be highly relevant, and may sometimes directly support or deny a capacity in the deceased to have understanding of the matters in the Banks v Goodfellow criteria. However, evidence of such understanding may come from non-expert witnesses. Indeed, perhaps the most compelling evidence of understanding would be reliable evidence (for example, a tape recording) of a detailed conversation with the deceased at the time of the will displaying understanding of the deceased's assets, the deceased's family and the effect of the will. It is extremely unlikely that medical evidence that the deceased did not understand these things would overcome the effect of evidence of such a conversation.'*
>
> *b)* *In Key v Key (supra) Briggs J reminded himself (at para 98):*
>
> *'... the issue as to testamentary capacity is, from first to last, for the decision of the court. It is not to be delegated to experts, however eminent, albeit that their knowledge skill and experience may be an invaluable tool in the analysis, affording insight into the workings of the mind otherwise entirely beyond the grasp of laymen, including for that purpose, lawyers and in particular judges.' That paragraph was cited with approval in Re Walker: Walker v Badmin (supra) @ para 171*
>
> *c)* *In Burgess v Hawes [2013] EWCA Civ 94 the Court of Appeal cautioned as follows:*

'57 ... it is, in my opinion, a very strong thing for the judge to find that the Deceased was not mentally capable of making the 2007 Will, when it had been prepared by an experienced and independent solicitor following a meeting with her; when it was executed by her after the solicitor had read through it and explained it; and when the solicitor considered that she was capable of understanding the will, the terms of which were not on their face inexplicable or irrational.

...

60 My concern is that the courts should not too readily upset, on the grounds of lack of mental capacity, a will that has been drafted by an experienced independent lawyer. If, as here, an experienced lawyer has been instructed and has formed the opinion from a meeting or meetings that the testatrix understands what she is doing, the will so drafted and executed should only be set aside on the clearest evidence of lack of mental capacity. The court should be cautious about acting on the basis of evidence of lack of capacity given by a medical expert after the event, particularly when that expert has neither met nor medically examined the testatrix, and particularly in circumstances when that expert accepts that the testatrix understood that she was making a will and also understood the extent of her property.'

That passage was recently applied by Fancourt J in Goss-Custard v Templeman (supra) @ para 18."

Undue influence-burden of proof and legal test

314. The main legal issue in controversy in relation to this part of the case is whether or not presumed undue influence arises so that the evidential onus shifts to D2-D4 from the Plaintiffs, who would otherwise be required to establish that the transaction is vitiated by reason of undue influence. As to this, D2-D4's counsel submitted:

"*60. In a case of presumed undue influence, the evidential onus on one or more questions of fact shifts*

a) From the person claiming to have been wronged

b) To the person alleged to be the wrongdoer.

However, as Lord Nicholls made clear in RBS v Etridge (No 2) at p797B, the use 'of the forensic tool of a shift in the evidential burden should not be

permitted to obscure the overall position'. And Lord Clyde went even further at 816F:

'At the end of the day, after trial, there will either be proof of undue influence or that proof will fail and it will be found that there was no undue influence. In the former case, whatever the relationship of the parties and however the influence was exerted, there will be found to have been an actual case of undue influence. In the latter there will be none.'

61) There are 2 prerequisites that must be satisfied before any evidential shift occurs:

a) First, the Court must be satisfied that the complainant reposed trust and confidence in the other party, or the other party acquired ascendency over the complainant. Thus

i) Actual influence does not depend upon some pre-existing relationship between the two parties, while

ii) Presumed influence necessarily involves some legally recognised, pre-existing relationship between the two parties:

see RBS v Etridge (No 2) @ p820D-E per Lord Hobhouse

b) Secondly, that the transaction is to the manifest disadvantage of the complainant and not readily explicable by the relationship between the parties; it must be a transaction that 'calls for explanation': see RBS v Etridge (No 2) @ paras 21-29."

315. As to the merits of whether undue influence in fact occurred, the key submissions advanced were as follows:

"*65) In RBS v Etridge (No 2) @ para 11 Lord Nicholls suggested that relationships that might give rise to a presumption of undue influence might feature 'trust and confidence, reliance, dependence or vulnerability on the one hand and ascendency, domination or control on the other.' Other authorities have also identified as one category of relationship that might give rise to a presumption of influence 'where a vulnerable person has been exploited' or where there is extraordinary mental and physical dependence by one person on another: e.g. Beech v Birmingham CC [2014] EWCA Civ 830 @ para 59. While we will await sight of how Ps put their case in this regard*

a) Ps' case as to why a presumption of influence should be found to have existed as a result of the relationship between Alan and Deborah appears to stem from the combination of

i) Alan's physical illnesses and the consequent impairments on matters such as sight, hearing, mobility and ability to care for himself, and

ii) His consequent 'out of the ordinary' need to rely on Deborah for physical assistance for day to day activities.

However, while such matters might give rise to a presumption of influence in extreme cases, this is not such a case; the evidence shows quite how dominant and 'independent of thought' Alan remained in his relationship with Deborah at all times

b) The true nature and effect of the transaction is a matter that is capable of affecting the assessment of whether or not a relationship of influence is shown to exist: Malik v Sheikh [2018] EWHC 973 (Ch) @ para 45. And so where, as here,

i) The 'transaction' was one that Alan had been desirous of undertaking throughout 2015 and 2016, and

ii) Far from being disadvantageous to him, the 'transaction' was very much to his advantage (and indeed, was one instigated and actively pursued by him) that is a strong pointer against the transaction having been the result of a relationship of trust and confidence.

66) Thus Ps' case that influence on the part of Deborah over Alan in connection with the exclusion of Ps, the appointment of the Trust assets to Alan and her, and the termination of the Trust should be presumed is denied.

67) However, suppose that the Court concludes such an influence is to be presumed in this case from the relationship between Deborah and Alan:

a) That presumption will be rebutted if the Court is satisfied that Deborah did not in fact exercise influence over Alan in connection with the exclusion of Ps, the appointment of the Trust assets to Alan and her, and the termination of the Trust. In that regard

i) The presumption is rebutted if the Court is satisfied that Alan understood what he was doing, was in a position to appreciate what was involved and acted as he did of his

own free will, free from the influence of the alleged wrongdoer: Zamet v Hyman [1961] 1 WLR 1442 @ 1454

ii) The Grand Court recently gave considered thought to the question of 'How can the presumption be rebutted ?' in Gouldbourne v Gouldbourne (8 April 2021, Justice Marlene Carter), which at paras 112-115 followed the approach of the English Court of Appeal in Smith v Cooper [2010] EWCA Civ 722:

'…it is then up to the one party to prove that the transaction was not procured by an abuse of his position of influence but was rather the free exercise of the will of the other party as a result of full, free and informed thought …[to prove that the one party] entered into the transaction of his own free will, independently of, and not in any way as a result of, the influence that [the Defendant] was in a position to exercise over [him].'

iii) Whether that was the case is a question of fact to be determined from the evidence. However, one factor that has been considered extremely powerful, if not determinative, in many authorities is where it is shown that the 'victim' acted with the benefit of independent advice: see e.g. Etridge (supra) Gouldbourne (supra) @ paras 119-120

b) The (heavy) burden still rests with Ps to demonstrate

i) That any presumed influence was in fact undue (i.e. improper) influence on Deborah's part

ii) That there is an absence of any other satisfactory explanation for Alan having acted so as to exclude Ps as beneficiaries under the Trust, to cause the Trust assets to be appointed to him and Deborah and to terminate the Trust

iii) That by acting so as to exclude Ps as beneficiaries, to cause the Trust assets to be appointed to him and Deborah (rather than remain in the Trust structure) and to cause the Trust to be terminated, Alan acted to his own manifest disadvantage

iv) That any undue influence was the cause of Alan acting so as to exclude Ps as beneficiaries, cause the Trust assets to be appointed to him and Deborah and to terminate the Trust

c) That is not something Ps come close to doing on the evidence."

Legal principles relating to conspiracy and estoppel

316. D2-D4's submissions on the law applicable to the Plaintiffs' conspiracy and estoppel claims were not challenged, and as the claims were not seriously pursued at trial I indicated to Mr McPherson QC that he need not address them in oral argument.

Legal principles relating to the un-pleaded submission that the execution of the Declaration of Exclusion constituted a fraud on the power

317. The Declaration of Exclusion was purportedly executed under clause 8(a) of the Trust Deed by Alan in his capacity as Settlor. The Plaintiffs impugned this act on the grounds that, *inter alia*, (a) the power of amendment/exclusion was a fiduciary power, and (b) it was legally impermissible to exercise the power to remove the substratum of the trust, relying on my own first instance decision in *Wong-v-Grand View Private Trust* [2019] SC (Bda) 37 Comm. Mr McPherson QC addressed this issue in written and oral closing submissions with considerable clarity and force.

318. As to the nature of the power of amendment/exclusion vested in the Settlor, it was submitted (at paragraph 111):

> "*b)* *The correct position is to be found in Lewin on Trusts (supra, @ para 33-066):*
>
> *'**Power of Exclusion***
> *...*
>
> *Power vested in person who is not a fiduciary*
>
> *A power of exclusion may however be vested in a third party, including a beneficiary, who is not a fiduciary. If, upon its true construction it is a beneficial [personal] power, one exercisable in the donee's own interests, it may be exercised so as to leave him the sole beneficiary. Such a power is equivalent to a general power of appointment or, if the donee was also the settlor, a power of revocation.'"*

319. As to the proposed restraints on the exercise of the power of exclusion, it was submitted (at paragraph 20) that the relevant legal principles should be derived from, *inter alia*, the Court of Appeal for Bermuda's decision in *Grand View Private Trust Co Ltd-v-Wong* [2020] Bda LR 29

paras 97-102, 185-191 (per Clarke P). In oral argument, Mr McPherson QC referred extensively to Sir Christopher Clarke's comprehensive leading judgment, with which Anthony Smellie JA and Shade Subair Williams JA (Acting) concurred. These submissions all appeared to be irresistible.

The Trustees' submissions

Burden of proof

320. Before the commencement of the trial, counsel for the Trustees offered to address any areas which would assist the Court. I requested assistance on the burden of proof. Mr Said addressed this issue in his written and oral closings. In the Trustees' Closing Submissions, it was most significantly submitted (at paragraph 7(g):

> "*In relation to instruments made under a trust, the party positively asserting that capacity existed has the burden of proving that on the balance of probabilities. The over-complex approach taken to the burden in the testamentary context, where the burden (i) starts with the propounder of the will, but capacity will be presumed if duly executed and rational on its face (ii) shifts to the objector to raise a real doubt about capacity, and (iii) shifts back to the propounder to establish capacity nonetheless, is most recently described in Clitheroe v. Bond*…"

321. In oral argument Mr Said summarised the Trustees' neutral analysis of the law as follows[35]:

> "*So, my Lord, we say there the judge neatly encapsulates the rules on the evidentiary burden shifting based on Re Key, so the court could also adopt that more principled but complex approach, and in doing so, again leaving aside the question of this weight in the final analysis, the plaintiffs have adduced evidence as we have seen, and in our submission that could be treated as shifting the evidential burden to the second to fourth defendants to prove capacity. So my Lord, whether the court takes the practical approach in the O Trust or the principled approach, in our submission the results are the same, just that the second to fourth defendants ought to have the burden, but since both sides say they can satisfy the burden, and the court has sufficient evidence, we say that it is* [un]*likely to turn on it and of course findings will be an overall evaluative judgment based on all the evidence.*"

[35] Transcript Day 28, page 5 line 19-page 6 line 10.

The Trustees' liability in relation to un-pleaded claims and the Trustees' conduct generally

322. Despite reassurances from the Plaintiffs' counsel and the Court that no adverse findings would be made against the Trustees, Mr Said was determined to leave no stone unturned in ensuring that his clients' interests were protected. Quite appropriately, he addressed both orally and in writing an aspect of the Plaintiffs' case which might easily have been overlooked; the un-pleaded fraud on the power claims raised by way of submission which were, somewhat beguilingly, being reserved for future adjudication.

323. The Trustees' counsel in oral argument referred the court to the following written submissions in particular:

> "*34. In the Former Trustee Defendant's submission:*
>
> *a. Despite Mr Lowe's submissions, it is obvious that these new claims raise the prospect of a further claim that the actions of the Trustee in 2016 were invalid, even if none of the Ps' claims succeed in these proceedings i.e. these arguments are not only relevant if the Ps succeed;*
>
> *b. These arguments bear all the hallmarks of having been belatedly identified and developed in Mr Lowe's preparation for trial, when they could and should have been brought forward, if at all, far earlier in these proceedings, and at least following the Ps receipt of the Trustees' disclosure in 2017;*
>
> *c. There can be no reasonable basis for saying that these arguments could not have been brought forward so as to have been determined at this trial.*
>
> *d. In those circumstances, the principle in Henderson applies to any attempt to raise these arguments after Judgment in these proceedings:*
>
> > *'where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires that the parties to that litigation bring forward their whole case, and will not (save in special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in*

contest, but were not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time…' Wigram V-C, in Henderson, cited in the leading authority Virgin Atlantic v. Zodiac Seats [2014] AC 160 at 181B et seq. Lord Sumption JSC.

e. In order fairly to assist the parties in bringing finality to their dispute, and to protect this warring family from themselves (by an ongoing disproportionate cost spend relative to the sums at stake), the Court ought to make a finding to the effect that the Ps new arguments, as foreshadowed in their opening, could and should have been pursued in these proceedings.

f. That finding would likely dissuade any further litigation, and (failing that) would at the very least assist any second Court dealing with another claim on these bases, to swiftly dismiss those subsequent proceedings as an abuse of process on Henderson grounds. All of the Former Trustee Defendants' rights are fully reserved in respect of these newly discovered arguments, first mentioned at the eleventh hour, on the eve of this trial." [Emphasis added]

324. Mr Said concluded his oral submissions by addressing the way the Trustees had conducted themselves overall[36]:

"*My Lord, we do say that at the end of these proceedings we hope that your Lordship can in some sense sympathise or empathise with the position of my client in trying to deal with this in real time in 2015 and 2016 when we say there was less decorum attached to what was going on than there has been in these proceedings, and, my Lord, at paragraph 3 we say that my client and its advisers have acted carefully and respectfully and professionally throughout, and by that I mean both in respect of 2015 and 2016 and with the manner in which they have dealt with these proceedings, attempting to assist your Lordship and the parties. We say Ms Williams- Myers in particular has - - maintained a respectable, even-handed and peacemaker role as it was described. The Trustee believes counsel was involved appropriately when litigation was clearly in the*

[36] Transcript Day 28, page 38 line 15 -page 40 line 2

> *offing. The Trustee took expert advice from two leading trust practitioners, consulted extensively with them throughout the second half of 2015 and the critical [period] around the 2 March meeting. We see the Trustee did manage the meeting professionally with Alan in difficult circumstances on short notice having travelled to Florida to do that. My clients preserved all of the relevant notes, your Lordship has seen I don't know how many versions of handwritten notes, intermediate notes, the final note, and have lengthy and detailed, in my submission, high quality statements in respect of everything that's happened, despite that perhaps being a breach of the English laws that Mr McPherson referred to. My Lord, all witnesses have been tendered for cross-examination and in my submission the two that did give their evidence gave their evidence straightforwardly and honestly, consistent with their oath…my client is happy, there are no pleaded issues or allegations against my client in this case…*"

The Plaintiffs' submissions

Overview

325. The Plaintiffs' Closing Submissions prepared by Mr McLarnon ran to 333 pages supported by two short Appendices. This set out the legal and factual matters upon which the Plaintiffs' relied in a clear and forceful manner. Part 2 ('Summary Chronological Narrative of Main Events') was referred to extensively by Mr Lowe QC in oral closing argument.

326. From their perspective, what the Plaintiffs' case is all about, in human terms, is lucidly distilled in a single paragraph of the Closing Submissions:

> "*4. It is truly heart-breaking for the Plaintiffs that in the last twelve months of his life, his much younger third wife, together with her son and daughter-in-law, who also lived in Alan's home, took control of his life and affairs and Alan apparently came to believe, contrary to actual reality, that his own children had taken advantage of him, stolen from him, abandoned him and cut him off. Although the Plaintiffs displayed a natural English middle class reserve when it came to giving their evidence on the love and affection between them and their father, which stood in contrast to the rather more emotive and expressive performances given by the American Mrs. McMullan-Poulton and her son, it was clear that the Plaintiffs were loving and caring children who found themselves caught up in a situation which would have challenged even the most perspicacious and worldly-wise of people.*"

327. This submission perhaps stands out because it confirms my provisional view based on their oral

evidence that, beneath the obvious commercial foundations for their claims, the Plaintiffs did have a human non-material desire to vindicate the sincerity of their love for their late father. It also indirectly supported my initial sense, having heard the expert evidence, that the undue influence claim should properly be viewed as the stronger plank of the Plaintiffs' case.

Legal capacity-burden of proof

328. Mr McLarnon submitted in the Plaintiffs' Closing Submissions in relation to burden of proof :

> "*251. This Court has recently considered the position of capacity under Cayman Islands law in the case of **Re O Trust** [2018] 1 CILR 59. The Court made clear that although the legal principles applied are universal, the level of understanding required depends on the circumstances of each case. The Court approved and adopted the statement in **Re Beaney [1978] 1 WLR 774***
>
> *The degree or extent of understanding required in respect of any instrument is relative to the particular transaction which it is to effect. In the case of a will, the degree required is always high. In the case of a contract, a deed made for consideration or a gift inter vivos, whether by deed or otherwise, the degree required varies with the circumstances of the transaction. Thus, at one extreme, if the subject matter and value of the gift are trivial in relation to the donor's other assets a low degree of understanding will suffice. But, at the other extreme, if its effect is to dispose of the donor's only asset of value and thus, for practical purposes, to pre-empt the devolution of his estate under his will or on his intestacy, then the degree of understanding required is as high as that required for a will, and the donor must understand the claims of all potential donees and the extent of the property to be disposed of.*
>
> *252. The Court also made clear at paragraph 39 that 'the crucial question is whether capacity existed at the time that the relevant instrument was executed'. The Court held at paragraph 33 that it required the party positively asserting that capacity existed to prove that it did on the balance of probabilities. The Second to Fourth Defendants in their written opening submissions at paragraph 170 stated that the approach of this Court in **Re O** 'potentially conflicts with Banks v Goodfellow.'*
>
> *253. D2-D4 would appear to be unaware of the authorities of **Re Key Deceased [2010] EWHC 408 Ch** and **Markou v Goodwin [2014] WLTR 605**, authorities which were not cited to the Court in **Re O**. These authorities held that notwithstanding a will was rational on its face the burden rested with the claimant to dispel real doubts that had been raised about the testatrix's capacity. In Re Key Briggs J (as he then was) stated: 'I am*

nonetheless satisfied that a sufficient doubt as to Mr. Key's testamentary capacity was raised by the claimants to transfer the burden in relation to it back to the defendants as propounders of the 2006 Will. Mr. Key was both aged and, in psychiatric terms, infirm.' In Markou, Nugee J (as he then was) stated 'On the evidence in the case before me, as I will come to, in my judgment there is no doubt at all that the same is true in this case, that although the will may have been eminently rational on its face, there was a sufficient doubt raised as to Mrs Rand's testamentary capacity by the defendants to transfer the burden in relation to it back to the claimants as propounders of the will, Mrs Rand being both aged and, as I will come to, in psychiatric terms infirm. It is not sufficient to discharge that burden to point to the fact that the will by itself appears to be rational on its face.'

254. The case law is clear - if there is evidence of lack of capacity at a time prior to making the will, the person propounding the will must prove competence at the relevant time, ***Groom v Thomas (1829) 2 Hag Ecc 433****,* ***Smee v Smee (1879) 5 PD 84****,* ***Guerin v Guerin [1962] SCR 550****.*"

The Letter of Exclusion and the March 2, 2016 meeting

329. The following significant submission was made about the absence of any evidence of legal advice being given to Alan about the Letter (or Declaration) of Exclusion:

> "*262. The Letter of Exclusion exercising the Settlor and/or Protector's powers to exclude the Plaintiffs as Beneficiaries of the Family Trust would appear to have been the brainchild of Mr. Corbett of Kobre & Kim and drafted upon his own initiative rather than upon instructions from Alan. There is no evidence of the Letter of Exclusion being discussed with Alan or Alan being legally advised as to its terms and its effects prior to or after executing it, contrary to the express statements in the Letter of Exclusion itself.*"

330. As regards the March 2, 2016 meeting, the lack of experience of the Trustee's representatives in carrying out mental capacity assessments was pointed out. Reliance was also placed on persuasive judicial support for the need for caution about single occasion capacity assessments: *PH-v-A Local Authority* [2011] EWHC 1704 (Fam), Baker J (at paragraph 55). Reliance was placed on the record of the meeting for various matters described as "*Examples of cognitive impairment*" (paragraph 298). This framing of the matters in question (mistakes Alan made and/or things he could not remember) was a gross oversimplification. In reality the matters relied upon were merely illustrative of matters which could potentially be viewed as evidence of cognitive impairment. The Plaintiffs also pointed out that:

"*300. It is further telling that the reasons relied on by D2-D4 to justify the exclusion of the Plaintiffs from and termination of the Family Trust were not even brought up by Alan during the meeting with the Trustee.*"

Advice received by Alan in relation to the Declaration of Exclusion

331. The question of what advice Alan received, which to my mind was more pertinent to the undue influence claim, was a relevant consideration generally which was addressed, inter alia, as follows:

"*306. It is deeply unsatisfactory that Kobre & Kim have been unable to produce any notes of their meetings with Alan on 28 and 29th January 2016 and have been unable to produce attendance notes of telephone calls with Alan and/or Mrs. McMullan-Poulton. They have thereby enabled a situation in which neither the Plaintiffs nor the Court are able to scrutinise fully what may (or may not) have taken place with Alan.*

307. It is further deeply unsatisfactory that at the same time as depriving the Plaintiffs and the Court of full scrutiny of what took place, the Second to Fourth Defendants and Kobre & Kim seek to rely on Mr. Asif's recollection of his meetings with Alan. Mr. Asif's recollection and evidence has been proved by subsequent events to have been erroneous. For example, in his first Witness Statement dated 14 December 2020 Mr. Asif gave evidence which was to the effect that "I did not take a note of the meeting as I was focused on listening to the interaction between the Trustee's representatives and Alan, and I could see that both Mr. Whan Tong and Mrs Myers were taking notes. I have seen Mr Whan Tong's and Mrs Myers' witness statements describing their recollections of the meeting, which broadly coincide with mine." However, Mr. Asif then filed a Second Witness Statement two weeks later, where, contrary to the evidence he gave in his First Witness Statement, Mr. Asif corrected himself and exhibited notes which he said he had taken during the 2 March 2016 meeting on his iPad. This shows that Mr. Asif's memory for what took place in 2016 cannot safely be relied upon. Tellingly, however, Mr. Asif's late disclosure recorded Alan as stating "I don't know what kind of Trust" and "I don't know now about in 2003", in the context of Alan being questioned on the trust. At this point it should have been obvious to Mr. Asif that Kobre & Kim could not act on Alan's alleged instructions in relation to a trust which Mr. Asif had recorded Alan as having no proper recollection of."

The Video Recording

332. In oral closing, Mr Lowe QC referred the Court to the following portions of the Plaintiffs' Closing Submissions in relation to the Video Recording:

"*331. On 20 March 2016, Mrs. McMullan-Poulton sent Mr. Corbett a video recording of the Letter of Exclusion being read to Alan by a public notary, Mr. Griffin. Gate records record Mr. Griffin attending Alan's home at 4:05pm on 20 March 2016. Telephone records show phone calls between Mrs. McMullan-Poulton and Mr. Griffin between the 18th and 20th March [L/IIII/1395 – 1404].*

332. It is submitted that the short 4-minute clip of Mr. Griffin (incorrectly) reading Kobre & Kim's Letter of Exclusion to Alan together with Alan's 8 second response is of no probative value to D2-D4's case. Indeed, far from establishing or showing that Alan had legal mental capacity to exercise the Settlor's/Protector's powers of exclusion and exercised them on a valid legal basis, the recording only heightens concerns as to what events, which the Second to Fourth Defendants were careful not to record, must have preceded it. To use Mr. Knecht's phrase what 'behind the scenes work' had gone on?

333. When considering the short clip, the Court is invited to bear in mind the statement of Mr. Justice Hayden of the Family Division of the High Court of England and Wales in Abertawe Bro Morgannwg University Local Health Board v RY [2017] EWCOP 2. In RY, the Court was invited to view a recording of a patient in order to decide whether a medical procedure was in the best interests of Y. Hayden J said at paragraphs [51] and [52]:

> *51. I have been invited to watch highlighted extracts from these videos. Though I contemplated doing so, I ultimately decided against it. My reasoning on this requires to be stated. Viewing these videos, in my judgement, contains a real risk for the lay person, which of course in this respect includes both the lawyers and the judge. As videoing took place over several days, a selection of 20 minutes or so (which is what it was suggested I might see) runs the risk that I might gain a distorted impression of RY's overall situation. Similarly, I may, as a lay person, struggle to identify what Mr Badwan sees in the videos, informed by his own professional expertise. In both situations and more widely there is the risk that I might substitute my untutored impression for those of the expert. My task, as I see it, is to evaluate Mr Badwan's assessment of the core material, in the context of his evidence as a whole. Some judges, I am aware, have taken a different approach and I can entirely see how there is room for differing views.*
>
> *52. I also feel bound to record some unease with these video recordings more generally. It is axiomatic that they are highly invasive of RY's privacy and that he has no capacity to consent to them. They have been viewed by a variety of professionals. Though Mr Badwan has found them useful here, I do not consider that video recordings should ever be regarded as a routine investigative tool. Both the videoing and their distribution will*

require strong and well-reasoned justification."

333. As regards when the recording was made, the following important written submission was also referred to:

> "*337. Mr. Griffin's evidence was that he had no idea how 2 March 2016 was given as the date of his notarisation for the Letter of Exclusion and that possibly someone gave the date to him.*
>
> *21:13:11 9 Q. Yes, but how did you come to -- how did you come to fix*
> *21:13:14 10 on 2 March 2016 in your statement?*
> *21:13:21 11 A. That's a good question. I have no idea.*
> *21:13:29 12 Q. That's refreshing, thank you.*
> *21:13:33 13 So someone -- I suggest someone must have given you*
> *21:13:38 14 that date in 2020, otherwise it wouldn't be in there.*
> *21:13:45 15 Someone else.*
> *21:13:49 16 A. Possibly. I have no idea.*
> *21:13:53 17 Q. Right, okay.*
> *21:13:54 18 So can we take it that you have no idea about the*
> *21:13:57 19 precise dates in the statement that you set out on*
> *21:14:03 20 pages 3 and 4 because you have no records unless -*
> *21:14:10 21 A. Yes…*"

334. Under re-examination it emerged that Mr Griffin had in fact indicated to the Trustee that he had witnessed the execution of the Declaration on March 2, 2016 in late March 2016, but this did not dispel the distinct impression that I could not safely accept, without careful consideration, that the Video Recording was made on March 2, 2016. This issue initially appeared to me to be potentially more significant to the undue influence claim than to the question of capacity, narrowly circumscribed.

Undue influence: preliminary

335. The central factual matrix upon which the Plaintiffs rely was described in their Closing Submissions in part as follows:

> "*375. The effect of the Letter of Exclusion and the steps which flowed from it formed part of a scheme (Mr. Corbett sent an email to Mrs McMullan-Poulton on 7 March 2016 saying in relation to the Declaration 'That document and the strategy of which it is part has become very important …') which culminated in Mrs. McMullan-Poulton gaining, by virtue of the*

powers of attorney, complete control over the assets of the Family Trust during Alan's lifetime, securing sole legal ownership of the assets of the Family Trust upon Alan's death and put her and the Third and Fourth Defendants in control of the holding company for the family business and the family wealth…

392. There is no evidence that Alan was ever independently advised in relation to the Letter of Exclusion, the Deeds of Amendment and the Deeds of Appointment, Indemnity and Termination which were placed before him by Mrs. McMullan-Poulton and/or D3 and D4 for him to sign. The practical effect of the scheme which involved the Letter of Exclusion, the Deed of Amendment, the Deed of Appointment, Indemnity and Termination and the Powers of Attorney, that came to fruition in 2016 was to give Mrs. McMullan-Poulton complete and sole control over the Family wealth both during Alan's lifetime and after his death. The Plaintiffs' case of undue influence cannot be rebutted. Mrs. McMullan-Poulton co-ordinated and controlled events at a time when Alan was frail, infirm, vulnerable and dependent on her which led to Alan's signing the Letter of Exclusion, the Deeds of Amendment and Deeds of Appointment, Indemnity and Termination"

336. It is common ground that the effect of the key impugned transaction was that Deborah acquired ownership and control of the Trust assets after Alan's death. What is hotly contested is whether (a) Alan was the prime mover or, rather, Deborah directed this outcome, equating her interests to her husband's and (b) whether, in any event, the final result is merely a collateral matter, not directly relevant to the validity of the execution of the Declaration of Exclusion at all. In oral closing submissions, Mr Lowe QC made the following significant submission about the factual matrix[37]:

> "*In 2015, Alan was not known to be terminally ill. On the face of it, he had time to put in place the onshore trust, but Ball had advised him to execute so even if there was argy-bargy about it with Deborah, there was sufficient time to do that, and he could have said to himself, "Well, I could persuade everyone that that was a good thing to do", even though he didn't think so at the time, and the second thing is that the effect of termination in 2015 put the assets all into Alan's hands, and there wasn't any suggestion that they could simply be transferred over to Deborah. In 2016 the difference is obviously that he has only a very short time to go before he dies, with hindsight, but he is also incredibly frail, has a limited life expectancy, and, what's more, he is more or less at the end of his ability to deal with things on a daily basis, so the idea that he could spend months looking at, or thinking about, an onshore trust is simply not there in 2016.*"

[37] Transcript Day 29, page 1 line 16-page 2 line 9

Undue influence: legal principles

337. The two main legal issues are (a) what amounts to undue influence and (b) when does a presumption of undue influence arise. In the Plaintiffs' Closing Submissions, the following introductory legal points were advanced:

> "*376. In the well-known case of Royal Bank of Scotland v Etridge (No 2) [2002] 2 AC 773,454 the House of Lords acknowledged at 801 D:*
>
> *'At the same time, the high degree of trust and confidence and emotional interdependence which normally characterises a marriage relationship provides scope for abuse. One party may take advantage of the other's vulnerability. Unhappily, such abuse does occur. Further, it is all too easy for a husband, anxious or even desperate for bank finance, to misstate the position in some particular or to mislead the wife, wittingly or unwittingly, in some other way. The law would be seriously defective if it did not recognise these realities.'*
>
> *377. Etridge was decided in the context of secured lending transactions involving banks as third parties. The Court, however, should find the cases of Bullock v Lloyds Bank Ltd [1954] 1 Ch 517 and Powell v Powell [1900] 1 Ch 243, Simpson v Simpson [1992] 1 FLR 601 and Mundinger v Mundinger (1*[9]*68) 3 DLR (3d) 338 very helpful in their analysis and application of the law of undue influence as it applies to its jurisdiction to set aside transactions involving family members.*"

338. The first judicial statements in relation to transactions in a family context which were relied upon were the following:

> "*379. Bullock involved a settlement executed by a young lady upon reaching her majority acting on advice from her father and her father's solicitor. Vaisey J, setting aside the settlement in an action later brought by the young lady, stated at [324]:*
>
> *'The expression "undue influence" is, to my mind, one of ambiguous purport. It is not confined to those cases in which the influence is exerted to secure a benefit for the person exerting it, but extends also to cases in which a person of* ***imperfect judgment is placed or places himself under the direction of one possessing not only greater experience but also such force as that which is inherent in such a relation*** *as that between a father and his own child. (See Lancashire Loans Ld. v. Black) If this matter had been considered by someone who was not thinking of the father's embarrassments or of any of the family difficulties except in regard to their*

effect upon the plaintiff herself, I think that a better document might well have been produced. It seems to me that the influence of the father exercised by him and through his solicitor was "undue" in the sense that its exercise had a necessarily constraining effect upon the mind of the plaintiff, who ought to have been placed in the hands of somebody who had been concerned to secure her interests and hers alone.'

380. *Even though Vaisey J expressly found no sinister desire on the part of the young lady's father or his solicitor, Vaisey J had no hesitation in setting aside the transaction.*

*'I am sure that Mr. Pepper explained to her the effect of the document, and that she took in what he said so far as her intelligence and understanding allowed. But the whole thing was, I think, done much too quickly. In the special circumstances of the time much more prolonged consideration should surely have been given to the matter. Even if she understood what she was doing when she executed the settlement, I cannot believe that she was really impressed as she should have been with the fact that it was not obligatory upon her to make any settlement at all. She told me that her idea when she went to see Mr. Pepper was that some arrangement was to be made whereby he, her father, "was sort of got out of his troubles." That, of course, was entirely beside the point. **I am not convinced that her mind was ever brought to the real point**, and accepting Mr. Pepper's entries as a true record (as I do) I think that what was omitted was that she was never told that the settlement was one which she was not obliged to make at all, and gave effect to only one of many alternative arrangements which were open to her to make. Mr. Pepper was only known to her as her father's solicitor, and she had in fact never met him before.*

...

A cut and dried scheme was put before her which was not altogether bad, although, if I may say so, rather crude. I do not believe that she ever understood clearly that she would never be able of her own free volition to, as she says, "touch" her money, and that whatever were the exigencies of her intended theatrical career or otherwise her money was to be placed irrevocably beyond her own unfettered control.

...

*Such a settlement as this is can, in my judgment, only be justified after prolonged consideration, being made, as it was, by a young girl only just of age, and **can only stand if executed under the advice of a competent adviser capable of surveying the whole field with an absolutely independent outlook, and who explains to the intending settlor, first, that she could do exactly as she pleased, and, secondly, that the scheme put before her was not one to be accepted or rejected out of hand but to be discussed, point by point, with a full understanding of the various***

alternative possibilities. *I accept Mr. Pepper's entries as a correct record, but I think that the matter was rushed. I think that Mr. Pepper did his best, and I think that the plaintiff's father did his best, but she was entirely in the hands of the two of them, and she ought to have been advised carefully, deliberately, separately and independently, which she was not.* ***In my judgment she did understand what she was doing up to a point, but her evidence convinced me that her understanding was so imperfect and incomplete that this settlement ought not, in my judgment, to stand.***"

339. Next:

"381. *In Powell, another young lady entered into a voluntary settlement in favour of her step-mother. The Court set aside the settlement for undue influence. Showing that human nature changes little over time or geography, whether it be Victorian England in 1898 or Florida or the Cayman Islands in 2015, the young lady and her step-mother were both advised by the same solicitor at the time of entering the settlement. Farwell J held:*

It has been for many years well settled that no one standing in a fiduciary relation to another can retain a gift made to him by that other, if the latter impeaches the gift within a reasonable time, ***unless the donee can prove that the donor had independent advice, or that the fiduciary had ceased for so long that the donor was under no control or influence whatever. The donee must show (and the onus is on him) that the donor either was emancipated, or was placed, by the possession of independent advice, in a position equivalent to emancipation.***

...

On the authorities it appears to me not to be a question of actual pressure, or deception, or undue advantage, or want of knowledge of the effect of the deed. The mere existence of the fiduciary relation raises the presumption, and must be rebutted by the donee in the way I just stated. *Further it is not sufficient that the donor should have an independent adviser unless he acts on his advice.* ***If this was not so, the same influence that produced the desire to make the settlement would produce disregard of the advice to refrain from executing it, and so defeat the rule; but the stronger the influence the greater the need for protection.***

...

Further, in my judgment, the donee does not discharge this burden by shewing that his own solicitor acted for both parties. *A solicitor who accepts such a post puts himself in a false position; if he acts for both, he owes a duty to both, to do the best that he can for both. But the Court requires that the donor should be placed in as good a position as if he*

> *were in fact emancipated.* ***The solicitor, therefore, must be independent of the donee in fact, and not merely in name****, and this he cannot be if he is solicitor for both. Again, his duty is to protect the donor against himself, and not merely against the personal influence of the donee, in the particular transaction. The necessity for the protection arises in great measure from the natural bent of mind and will resulting from the relation (e.g.) of parent and child during the impressionable period of youth, and* ***the solicitor does not discharge his duty by satisfying himself simply that the donor understands and wishes to carry out the particular transaction. He must also satisfy himself that the gift is one that it is right and proper for the donor to make under all the circumstances; and if he is not so satisfied, his duty is to advise his client not to go on with the transaction, and to refuse to act further for him if he persists.*** *He certainly ought not to go on if he disapproves, simply because, as was suggested in this case, he thinks that some one else will do the work if he does not. The plea that offences must needs come does not exonerate the man by whom the offence cometh. The more foolish and wilful the conduct of the youthful donor appears to the solicitor, the less should he lend the sanction of his countenance to the gift. If it is said that this would prevent some persons who are of age from doing what they choose with their own property, the answer is that they can deal with it, but not irrevocably. It is not the policy of the law to allow the parent to take advantage of his position without giving the child an opportunity of changing his mind within a reasonable time when he has acquired experience and wisdom. The donor is benefited, not injured by this; and the donee cannot be heard to say that it is an unjust rule, because, ex hypothesi, he does not come into court with clean hands, and has no equity. I adopt Bowen L.J.'s words in Allcard v. Skinner, which express better than I can the views I wish to adopt:* ***"This is not a limitation placed on the action of the donor; it is a fetter placed upon the conscience of the recipient of the gift, and one which arises out of public policy and fair play.****"*

340. These passages suggest that the doctrine of undue influence is more fluid than it might initially appear to be, especially if one has only encountered it in limited factual and legal contexts, such as the well-known scenario of the *Etridge* case. They also remind one of the need to avoid confusing the legal principle itself with the way it is applied in particular factual contexts, a 'tail wagging dog' tendency which often flows from a mechanistic interpretation of judicial authorities. The need for this clarity is heightened in the present case where the contending views as to the critical facts not only sharply diverged but also seemed to be cast in understandably partisan, rigid and simplistic constructs of what appeared to be very complex and nuanced events.

341. The Plaintiffs' counsel relied upon two cases to illustrate that a presumption of undue influence could arise in relation to the elderly and infirm and their carers: *Simpson-v-Simpson* [1992] 1 FLR

601 and *Special Trustees for Great Ormond Street Hospital for Sick Children-v- Rushin, Caroline Michelle Billinge & ors (Re Morris (Deceased)* [2001] WTLR 1137. The following extracts from the judgment of Morritt J (as he then was) in *Simpson* (at pages 621-622) were set out (with emphasis supplied) in the Plaintiffs' Closing Submissions (at paragraph 388) and Mr Lowe QC referred to this case in oral argument:

> "***Accordingly, in my judgment, a presumption of undue influence between spouses may arise from special circumstances of illness and dependency.*** *In the words of Ungoed-Thomas J in Re Craig; Meneces v Middleton [1971] Ch 95 at p 104G:*
>
> *'Undue influence and those relationships of trust and confidence which raise the presumption are left, unlimited by definition, wide open for identification on the facts and in all the circumstances of each particular case as it arises.'*
>
> *...*
>
> *The plaintiffs contend that undue influence is to be presumed from the Professor's reducing mental capacity, in consequence of his terminal illness, his increasing dependence on Dr Simpson, the effect of the transfers on the dispositions made by his will, the fact that such transfers were not in keeping with the Professor's normal pattern of behaviour, and the fact that the Professor never consulted, nor, except in relation to the purported gift of half the proceeds of sale of 'Dancer's End', even informed Mr Quinton, his solicitor and friend of many years' standing.*
>
> *These allegations are amply made out by the evidence.* ***Dr Kelly and Professor Murphy agreed that a person in the position of the Professor becomes more and more susceptible to influence from the person looking after him, and less and less aware of those from whom he is parted.***
>
> *...*
>
> *His unquestioning concurrence with what Dr Simpson described as her neutral suggestions is quite out of keeping with his normal disposition of wishing to know full details and reasons for any suggestion that he should part with substantial sums of money before he did so.*
> *His failure to consult or even inform Mr Quinton is very surprising, in view of his normal habit of consulting him on any business matter of any size, exemplified as recently as 10 March 1985 by his letter asking for a power of attorney and seeking advice as to how the joint current account could be funded.*
>
> *The cumulative effect of his dispositions between 20 April 1985 and 11 May 1985 wholly upset the balance of the dispositions made by his will. If this was what he genuinely wanted, the obvious and normal course would have been to send for Mr Quinton and give instructions for a new will. But he did not do so until 20 May*

1985, and then only in apparent ignorance of the transfers he had made (except, of course, for the purported gift of half the proceeds of the sale of 'Dancer's End').

In my judgment, the watershed occurred on 18 April 1985. Debilitated by the progress of the tumour, desperately anxious to be taken home and cared for there, wholly dependent on Dr Simpson for all his needs, in my judgment undue influence from Dr Simpson should be presumed from that point on. By that date, Dr Simpson had acquired actual or potential dominance over the Professor, or, if that test is too high, a capacity to influence the Professor, giving rise to a duty on her to care for him in any transaction between them.

Mr de Lacy contended that the subsequent transfers into joint names were accountable by reference to the Professor's own disposition and that of ordinary men. I do not agree. Both the Professor, in good health, and ordinary men, if they wished their wives to take substantially all their readily realisable assets on their death, would consult their solicitors and make a new will or seek advice how otherwise their wish might be best achieved.

Mr de Lacy also contended that the transactions were not to the disadvantage of the Professor, only to the plaintiffs. I do not accept this submission either. In considering the question of disadvantage, I would have thought the Professor and his estate should be regarded as one. But, in any event, the transfers into joint names meant that Dr Simpson could draw out all the monies on her sole signature the following day. In the case of the investments, the Professor would require her signature in order to deal with them. By doing as he did, the Professor precluded any change in his will having any substantial effect because of the diminution of the estate that would pass under it. In these circumstances, I have no hesitation in holding that, if these dispositions were made with capacity and an intention to confer a beneficial joint interest on Dr Simpson, then it is to be presumed, unless the contrary is shown, that they were procured by the undue influence of Dr Simpson. Mr de Lacy accepts that the presumption is not rebutted. Accordingly, the gifts are liable to be set aside on this ground also."

342. As regards how to approach the evidence in relation to the alleged undue influence, it was further helpfully submitted:

"*391. When considering what weight to give to the Defendants' witness testimony, Courts have often applied the statement of Robert Goff LJ in Armagas Ltd v Mundogas SA (The Ocean Frost) [1985] 1 Lloyd's Rep 1 at 57. Armagas has been applied beyond the context of fraud cases, however, in undue influences cases (which is a species of equitable fraud) his words remain salutary,*

'Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their

testimony, in particular by reference to the documents in the case, and also ***to pay particular regard to their motives and to the overall probabilities****. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case,* ***reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth.***"

343. In light of this guidance, which chimes with D2-D4's encouragement to place reliance on facts supported by contemporaneous documents and independently verifiable facts, I see no need at this stage to set out in detail the Plaintiffs' case on the relevant facts. The essence of their case, forcefully advanced through oral argument, is captured in the following extract from their Closing Submissions:

> "*414. The trial bundle is bursting with contemporaneous evidence of Mrs. McMullan-Poulton strategizing over how best to advance and secure her position to the detriment of the Family Trust and the other Family Trust beneficiaries. As early as April 2015, Mrs. McMullan-Poulton wrote to Mr. Ball:*
>
> *'Alan just mentioned for me to call you and leave homes, etc.…* ***and the shares of Cutty Sark/Trust and Alan Poulton Ltd to me****. The homes are obviously mine,* ***but I think*** *it important to add the other requests.*"

Miscellaneous issues

344. Part V of the Plaintiffs' Closing Submissions addresses Deborah as a witness in considerable detail over 40 pages. Part VI deals with the allegations of wrongdoing against the Plaintiffs. Mr Lowe QC referred to the following passages in oral argument:

> "*529. Finally, the evidence that the Plaintiffs wished to help their father is unassailable. Nick sets out in paragraphs 168, 199, 258, 270 of his trial Affidavit, the attempts that were made to raise additional money to assist Alan and the fact that Mrs. McMullan-Poulton's machinations were actually making it more difficult to help their father.*
>
> *530. On many occasions, the children tried to reason with Mrs. McMullan-Poulton. For example, Jamie sets out some of his emails to her at paragraph 135 of his trial affidavit. On 30 May 2016, he wrote*
>
> *'Are you really just going to stop anyone of Daddies children from even talking to him.*

I don't really understand what you are doing or why you think this is the right thing to do, our Father is very ill I want to talk to him. There are better ways to deal with this.

Please allow me to talk to him.'

531. On 3 March 2016, Michele wrote inter alia to Mrs. McMullan-Poulton.

'We have tried to reach out to you, to help in any way we can, we have tried to reassure you that we will continue to send you money after Daddy's death.

...

I miss Daddy so much – we used to be so close and speak several times a week – we've been told he's ill but we can't reach him. I remember you talking about your father and how you cared for him even though he lives far away. The relationship with a father and a daughter is very important one, and I am sure Daddy would love to speak to us in the same way that your father loves to speak to you.

As a fellow human being, please stop the legal battles. Please stop trying to destroy our lives and please talk to us. I do believe we can find an answer to all this without making it all up.'"

345. Part 7 deals with the Expert Medical Evidence and Part 8, very briefly, the July 2015 Deeds. It seemed to me to be ultimately clear that no party was seeking to rely on the legal efficacy of the July 2015 instruments. In oral argument, Mr Lowe QC went through the Medical Records and related evidence with considerable care. Part 9 dealt with the Plaintiffs' Conspiracy Claim, Part 10 dealt with Fraud on the Power, Part 11 Estoppel and Part 12 Premature Trust Termination.

346. Only the fraud on the power issue was addressed in oral argument, although not (it seemed to me) with great conviction. The following dictum of Sir Christopher Clarke P in *Grand View Private Trust Co Ltd-v-Wong* [2020] Bda LR 29 (at paragraph 219) was relied upon:

"*I would be minded to accept that, if the use of the power, although within its scope, was not within its purpose as originally intended, the fact that, when the power was used, the settlor wanted it to be used in the way in which it was, would not mean that the use was a proper one.*"

347. It was then submitted:

"*651. In Poulton, the exercise of the power of exclusion formed part of a scheme the practical and legal effect of which was to revoke an irrevocable trust. In the Grand View case, the Court of Appeal found at paragraph [314] 'on its plain terms, the GRT was not an immutable dynastic family trust for the benefit only of the children and remoter issue of the economic settlors', and, at paragraph [327] that no revocation which would have resulted in the assets being returned to the settlor took place. In Poulton this is exactly what happened. The effect of the Letter of Exclusion and the steps which flowed from it formed part of a scheme. Mr. Corbett sent an email to Mrs McMullan-Poulton on 7 March 2016 saying in relation to the Declaration, stating 'That document and the strategy of which it is part has become very important …' The power of exclusion was not exercised for a bona fide purpose for which it was granted but for a corrupt purpose, namely to bring the Trust to an end before the end of the Trust Period and to enable the Settlor/Protector (Alan) to take the Trust assets for themselves free of the terms of the Trust. As such the exercise of the power of exclusion was for a purpose wholly foreign to the power and is therefore void.*"

348. The theory that the Settlor, being of full capacity with his will not vitiated by undue influence, could not validly remove his children as beneficiaries with a view to making a distribution to himself and his wife prior to terminating the Trust seemed a surprising one.

APPROACH TO THE CONTENTIOUS EVIDENCE

349. I accept the sensible submission that the Court should be cautious about uncritically accepting the evidence of any of the parties who gave evidence without looking for support in the contemporaneous documents. Whilst the present dispute concerns the validity of the execution of documents relating to the administration of a trust, the underlying human conflict is a typically emotive family dispute. Each side in their written evidence has accused the other of morally reprehensible conduct. Each side in their oral evidence commendably appeared to accept that Alan did genuinely love and want to take care of them all. I regarded these informal concessions as the parties' finest hour.

350. I am reminded that:

"*Decisions and any comments a judge may make on the evidence can have a major impact on the lives of the parties and witnesses. Thus it is incumbent upon a judge to do the best he can to review the evidence fairly and properly.*"

351. The case management objective of "*helping the parties to settle the whole or part of the proceeding*"[38] does not evaporate at the end of a trial. In adjudicating family disputes, more so than in most legal contexts, it is generally recognised that a more sensitive than judgmental approach should be deployed in the adjudicative process. I accordingly attempt to follow the more daunting advice, albeit given in relation to the adjudication of humanly complex public law disputes, to record my factual findings "*with empathic, imaginative tolerance for contradiction and patient persistence in offering help rather than self-righteously commanding obedience*"[39].

FINDINGS: CAPACITY

The legal test

352. As I have already noted above, it was essentially common ground that the test for capacity remained the threefold test established in *Banks-v-Goodfellow* (1869-70) LR 5 QB 549 at 565, namely the capacity to understand (a) the nature of the act and its effects, (b) the extent of property being disposed of and (c) the claims to which he may give effect. It was also essentially agreed, and I find in any event, that the importance of the Declaration of Exclusion made it appropriate to apply the standard of proof applicable to the making of wills: *Re O Trust* [2018(1) CILR 59]; *Re Beaney* [1978] 1 WLR 770

353. However, I do not propose to apply the Banks-v-Goodfellow test in a mechanistic way. In *Re Key* [2010] EWHC 408 (Ch), Briggs J (as he then was) stated:

> "*95. Without in any way detracting from the continuing authority of Banks v. Goodfellow, it must be recognised that psychiatric medicine has come a long way since 1870 in recognising an ever widening range of circumstances now regarded as sufficient at least to give rise to a risk of mental disorder, sufficient to deprive a patient of the power of rational decision making, quite distinctly from old age and infirmity. The mental shock of witnessing an injury to a loved one is an example recognised by the law, and the affective disorder which may be caused by bereavement is an example recognised by psychiatrists, as both Dr Hughes and Professor Jacoby acknowledged. The latter described the symptomatic*

[38] Grand Court Rules, Preamble paragraph 4.2(d).
[39] Robert A. Burt. '*Justice and Empathy: Toward a Constitutional Ideal*' (Yale University Press: New Haven and London, 2017) page 176.

effect of bereavement as capable of being almost identical to that associated with severe depression. Accordingly, although neither I nor counsel has found any reported case dealing with the effect of bereavement on testamentary capacity, the Banks v. Goodfellow test must be applied so as to accommodate this, among other factors capable of impairing testamentary capacity, in a way in which, perhaps, the court would have found difficult to recognise in the 19th century.

96. Banks v Goodfellow was itself mainly a case about alleged insane delusions. Many of the cases which have followed it are about cognitive impairment brought on by old age and dementia. The test which has emerged is primarily about the mental capacity to understand or comprehend. The evidence of the experts in the present case shows, as I shall later describe, that affective disorder such as depression, including that caused by bereavement, is more likely to affect powers of decision-making than comprehension. A person in that condition may have the capacity to understand what his property is, and even who his relatives and dependants are, without having the mental energy to make any decisions of his own about whom to benefit." [Emphasis added]

354. The last sentence of the quoted passages suggests that the clear distinction which might otherwise be thought to exist between capacity to enter into a transaction and whether the will of the relevant actor has been vitiated by undue influence is not so clear-cut after all. Briggs J (at paragraph 100) went on to consider the "*mental energy*" point as factor to be taken into account, together with the fact that the will was made in favour of the testator's carers, when considering whether those propounding the will had discharged their onus of proof as to capacity. The preponderance of the authorities appears to approach capacity as an entirely discrete issue from the questions of "will" and other surrounding circumstances, save for the nature and significance of the relevant instrument or transaction. Since the issue of undue influence is raised head on in the present case, with reference to Alan's medical condition and infirmity, I will consider these contextual considerations when considering that claim.

The role of experts

355. The role of experts as explained, *inter alia*, in *Re Key* was uncontroversial:

"*98. Finally, the issue as to testamentary capacity is, from first to last, for the decision of the court. It is not to be delegated to experts, however eminent, albeit that their knowledge, skill and experience may be an invaluable tool in the analysis, affording insights into the workings of the mind otherwise*

entirely beyond the grasp of laymen, including for that purpose, lawyers and in particular judges. In the present case, both Dr Hughes (in his oral evidence) and Professor Jacoby (in his report) left me in no doubt that they both understood this limitation upon their role. Although they were both forthcoming in expressing their opinions, neither of them made any attempt to usurp the proper function of the court in that respect. Their contribution was of great assistance."

Burden of proof

356. The principles relating to burden of proof, as opposed to their application, were uncontroversial. It is essentially a matter of evidence as to whether in any particular case sufficient doubt has been shown to exist about capacity by the party seeking to invalidate a transaction so as to justify requiring the party seeking to uphold the transaction to prove that capacity did in fact exist. Mr Said commended the reasoning of Briggs J in *Re Key* to the Court as reflecting the strict legal position, and I accept this submission:

> "*97. The burden of proof in relation to testamentary capacity is subject to the following rules:*
>
> *i) While the burden starts with the propounder of a will to establish capacity, where the will is duly executed and appears rational on its face, then the court will presume capacity.*
>
> *ii) In such a case the evidential burden then shifts to the objector to raise a real doubt about capacity.*
>
> *iii) If a real doubt is raised, the evidential burden shifts back to the propounder to establish capacity nonetheless.*
>
> *See Generally Ledger v. Wootton [2007] EWHC 2599 (Ch) per HHJ Norris QC at paragraph 5.*"

357. In the present case I have little difficulty in finding that:

(a) the Declaration of Exclusion was, *prima facie*, duly executed and rational on its face, engaging the presumption of capacity;

(b) the Plaintiffs have raised a real doubt about capacity; and

(c) the evidential burden accordingly shifts back to D2-D4 "*to establish capacity nonetheless.*"

358. The real doubt about capacity as at March 2, 2016 and thereafter was decisively raised on the basis of the following cumulative considerations:

(a) the undisputed evidence that Deborah had concerns about her husband's capacity being challenged for almost a year before the critical document was executed, and sought to have the Declaration executed in the presence of Dr Brinker;

(b) the undisputed evidence that the Trustee was sufficiently concerned about Alan's capacity to carry out its own lay assessment; and

(c) the evidence of the Plaintiffs' psychiatric expert witness, Professor Jacoby.

359. The Plaintiffs raised no real doubts about Alan's capacity to execute the July 2015 Deeds, for the reasons I set out below, but no party relied on those documents as having any positive legal effect. To the extent they did, the presumption of capacity arises.

360. Counsel on all sides appeared to feel that the Court had sufficient evidence to make a decisive finding on capacity one way or the other. In my judgment the evidence on capacity, objectively viewed, in light of the other critical disputed factual matters is far too evenly balanced to justify such an assumption at the beginning of the factual assessment process.

Findings: did Alan possess legal capacity when he executed the Declaration of Exclusion in March 2016?

The key factual issues

361. The key factual issues are:

(a) how complex was the transaction effected by the Declaration of Exclusion and, in particular, was the transaction materially different to that contemplated by the July 2015 Deeds;

(b) whether Alan suffered from any permanent cognitive impairment at the material time which likely deprived him of capacity;

(c) whether Alan suffered from any temporary cognitive impairment at the material time which likely deprived him of capacity;

(d) did Alan execute the Declaration of Exclusion on March 2, 2016 or on some later date;

(e) when was the Video Recording made and what weight should be attached to it in relation to the capacity issue; and

(f) how much assistance do the Expert Psychiatric and Metadata Reports provide in relation to (b)-(e).

How complex was the transaction?

362. The most obvious and striking difference between the July 2015 and the March 2016 transactions was that:

(a) in July 2015 it was contemplated that Alan would terminate the Trust, gain control of the Trust's assets, deal with his IRS obligations (and a potential risk of incarceration) and make provision for both his wife and children through fresh trusts; and

(b) in March 2016 Alan had been terminally ill for several months and it was or ought to have been apparent that the most Alan could personally achieve through the Deed (and the ancillary documents) was to distribute the entirety of the Trust assets to his wife. She would be left to deal with his IRS obligations, which would only be civil in nature. In lay terms, this meant disinheriting his children.

363. The Witness Statements of the Appleby lawyers who were instructed by the Trustee to draft the July Deeds, Carlos de Serpa Pimentel (a Partner) and Robert Lindley (then an Appleby Senior Associate), were unchallenged. The documents prepared consisted of the following:

(a) a deed of amendment enabling a distribution of both capital and income to be made, to be executed by the Trustee at the request of or with the consent of the Protector (Alan);

(b) a deed of appointment, distribution and termination to be executed by the Trustee, distributing the CSLC Shares to Alan.

364. Their retainer in early June 2015 seemingly flowed from a recommendation made by Kevin Packman of Holland & Knight. In mid-July 2015, Mr Packman emailed Mr Pimentel seeking clarification of the deeds. After this communication on July 20, 2015, Appleby's file went to sleep. This supports Deborah's evidence that the first attempt to terminate the Trust was driven by Alan's US tax crisis in relation to which he was being represented by Holland & Knight. The only controversy really centres on whether the selected strategy was in truth primarily driven by Alan's desire to pay the IRS or instead by Deborah's longstanding desire to terminate the Trust and gain control of all of her husband's wealth.

365. The evidence that Alan was advised to pursue this strategy for tax reasons and that he genuinely faced a substantial tax liability for not reporting his income from and failing to disclose the existence of the Trust is overwhelming. The Plaintiffs themselves received similar advice about the extent of the tax liabilities from Nixon Peabody. The controversy as to whether there were other hidden motives will be resolved when considering the undue influence claim below.

366. The advice Alan received may be summarised as follows based on contemporaneous documents. He initially consulted his accountant Dan Worrell of RW Wealth and attorney John Ball of Fisher Tousey, Leas and Ball in February 2015. He was referred to specialist tax counsel Holland & Knight in March 2015 and formally retained that firm (and Kevin Packman) on March 18, 2015 following an initial telephone conference on March 12, 2015. Following a March 20, 2015 meeting, Mr Packman described the scenario in the following terms[40]:

> "*taxpayer contacts me b/c F[oreign] bank sent the FATCA documentation seeking information on beneficial ownership of the structure. It turns out that the TP had not filed FBARs to report individually owned f[oreign] accounts, but also F[oreign] account owned through trust structure. No 3520s to reflect*

[40] D2-D4 Closing Submissions, Appendix 4 page 5

creation, transfers to, distributions from or ownership of Cayman Islands Trust. Similarly no 5471s to reflect connections to UK companies

IRC61 – US taxpayers must report gross income earned worldwide

IRC679 – US beneficiary of F[oreign] trust is grantor trust. Grantor required to report all income associated w trust structure

Options for resolving: (1) prospective compliance (2) do nothing (3) quiet (4) streamline and (5) OVDP

(1) - (3) risk of audit resulting from FATCA (UK & Cayman)

(5) problem is offshore penalty 27.5 v 50. B/c account held through structure includes bad boy bank its 50% making participation cost prohibitive

(4) problem is certification of non-wilful behaviour. Clearly stated in initial telephone call + in initial meeting didn't think IRS would find out. No indication of not knowing.

Rqts [Requirements] of OVDP: file 8 years of correct and accurate tax returns
Pay tax + 20% penalty on tax + interest
Offshore penalty – preclearance + application

Streamline: File 3 years of amended
Pay tax + interest 5% penalty
Certification under penalties of perjury'."

367. Implicit at this stage was the risk of criminal prosecution. The urgency which Holland & Knight attached to the situation is reflected in the fact that on March 23, 2015 they wrote to the IRS Criminal Investigation Lead Development Center for pre-clearance to enable Alan to enter the Offshore Voluntary Disclosure Program ("OVDP"). Also there was a concern that Alan might change his mind. On March 24, 2015, Mr Packman emailed John Ball[41]:

> "*…I did not want to leave Alan an opportunity to change his mind again. It appears as though he is taking advice from friends in Australia and Singapore who are coming up with ideas that if Alan were to follow would constitute a fraudulent transfer…*"

368. It is worth interposing at this stage the fact that in April 2015, Mr Packman seems to have become involved with the separate issue of Alan's estate planning. Deborah emailed on April 14, 2015

[41] G7/1774.

stating in salient part as follows[42]:

> "*Alan spoke at length with Mr Ball regarding the Trust and protecting me etc. He ask [sic] him if he could transfer the shares (or a portion thereof) to me in the Trust. I think he was thinking it would be better regarding gift tax to wife (or inheritance)….*
>
> *Your opinion. If you would like to schedule a phone call Alan and I would like that also.*
>
> *I guess we will be hearing from the IRS in a couple of weeks or so…*"

369. The next day, Mr Packman responded[43]:

> "*Debbie, I reviewed the trust. With a little work it should be possible to have ALL of the shares of Cutty held in the trust distributed to Alan. As such, the trust would be terminated. Once Alan owns the shares of Cutty, he could then terminate Cutty and own the assets outright. If you want it done correctly, I should be involved, and will likely retain other Cayman counsel since you have not been properly advised from the beginning.*
>
> *The key is that everything must be returned to Alan. He cannot start transferring assets to you or the children upon receiving the assets*."

370. Alan personally responded the same day[44]:

> "*Thank you for your email. This sounds very encouraging. Let's speak on Friday. Obviously I intend to follow your advice."*

371. On April 20, 2015, Alan wrote to the Trustee in terms provided in draft by Mr Packman confirming his intention of liquidating the Trust[45]. Subsequent communications involving Mr Ball clearly indicate that the liquidation of the Trust was being treated as primarily part of an estate planning exercise.

372. As far as the OVDP is concerned, the next most significant event was the IRS letter to Holland & Knight dated April 23, 2015 confirming that Alan would be permitted to make voluntary disclosure.

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[42] G8/1995.
[43] G8/1987.
[44] G8/1990.
[45] G8/2018.

May was dominated by information gathering in London as the voluntary disclosure had to be made within 45 days. However, in May, Mr Ball agreed with the idea of terminating the Trust and not waiting for the establishment of a US living trust after Mr Packman wrote on May 11, 2015[46]:

> "*I like the idea of getting the stock out of the Cayman structure ASAP, and liquidating the Cayman Trust ASAP. There is no benefit to waiting based on Alan's health.*"

373. In June, Mr Packman was instructed to replace Mr Ball in drafting estate planning documents. At this stage, however, Kevin Packman's main priority was dealing with the IRS which he seemingly regarded as a freestanding priority matter. Responding to Alan's June 8, 2015 email which stated "*I am also very concerned about what to do with the share certificates going forward. I want very much to protect Deborah and her future income*", Mr Packman responded inserting his comments in the same email:

> "*UNFORTUNATELY, UNTIL THE IRS MATTER IS RESOLVED, IT IS DIFFICULT TO DO PLANNING.*"

374. On June 3, 2015, Alan's Voluntary Disclosure Letter was submitted by Holland & Knight. A Foreign Bank Account Report ("FBAR") was then prepared. On June 24, 2015, the IRS notified Holland & Knight that Alan had been admitted into OVDP and Alan was advised that the next step was to file tax returns. The letter stated, *inter alia*[47]:

> "*This letter is to inform you that the voluntary disclosure of your client(s) has been received and has been preliminarily accepted…a voluntary disclosure will not automatically guarantee immunity from prosecution, however a voluntary disclosure may result in prosecution not being recommended…*
> *Acceptance of the voluntary disclosure … will also depend upon whether it is truthful and complete and whether your client(s) continues to cooperate with the IRS in determining the correct tax liability and making good faith arrangements with the IRS to pay in full the tax, interest and penalties determined by the IRS to be applicable. The required cooperation includes the production of all requested documents and the taxpayer submitting to an interview, if requested, by an IRS agent.*
>
> *The voluntary disclosure … will be forwarded for necessary civil action and the determination of the correct tax liability … please submit the complete voluntary*

[46] G9A/2155; G9A/2186; G9/2190; G9A/2260.
[47] H Vol V/2506.

disclosure package… within 90 days of the date of this letter…"

375. The IRS situation was, quite obviously, "all about money". Until amended tax returns had been filed, the actual liability could not be known with any specificity. However, Kevin Packman was quite blunt about the likely financial exposure in an email to Deborah dated July 16, 2015[48]:

> "*Debbie, I don't know if Alan will do it, or if the children will proceed as requested, but he should begin getting money from the UK. Big money. $1million at a minimum. This won't be sufficient for the IRS debt, but it will be a start. He needs them to understand he will need several million.*"

376. This short email is significant in three respects. Firstly it demonstrates that Alan was advised he needed to raise a significant lump sum to pay the IRS up front (around $1 million). Secondly it demonstrates that Kevin Packman perceived that Alan's commitment to the strategy he had previously agreed to was somewhat wobbly and that he was also concerned about his children's position. And, thirdly, the letter suggests that Mr Packman had no doubt that Deborah was supportive of the strategy and was hoping that she would help to keep Alan on course. In fact, 10 days before the "big money" email, Alan had unsuccessfully attempted to persuade the Sheridans to agree to a special dividend of £100,000. I see no reason to doubt the accuracy of Deborah's July 16, 2015 email to Mike French, which suggested that Alan was feeling extremely pressured by the IRS situation[49]:

> "*Alan has been advised by his attorney that he needs to start getting together at least one million dollars minimum in the US … two preferred in dealing with the IRS for escrow. This will not totally satisfy them but will be a start we were told. Obviously something will have to be sold. We have a conference call again on Tuesday. Alan asked that I forward this info to you but did not want to speak again today. I'm sure he will talk to you Monday or Tuesday after the latest conference … <u>He again says 'I want the weekend off'</u>…*" [Emphasis added]

377. On July 21, 2015, Mr Packman himself assumed the burden of seeking to win over the London APL team to the cash-raising cause. He emailed Nick, Michele and Mr French[50]:

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[48] G11A/3713
[49] G11A/3740
[50] G11A/3984.

"*I want you to know I spoke with Alan earlier today regarding several different issues, which I will summarize below. In the discussion I referenced the importance of keeping you all informed, and he consented. As such I will do my best to keep you updated on issues moving forward.*

1) Tax Matter. Alan was admitted into the IRS offshore voluntary disclosure programme on June 24. This, in itself, was terrific news based on the extent of his noncompliance and current IRS enforcement efforts. Another important benefit is that criminal penalties are eliminated. Alan has 90 days from June 24 in which to have 8 years of US tax returns prepared properly reporting his worldwide income. He also MUST send a check to the IRS to accompany the tax returns. The check is to cover the tax, interest on the tax, 20% accuracy related penalty on the tax due, and interest on the penalty.

There are other amounts due within the program, but those can be paid at a later date. There is no way to calculate currently the amount that will be due, but I have counselled Alan that it is best to generate close to $2million. I do not know what is involved in generating this liquidity or how long it will take, so I want you to have advanced notice. My understanding from Alan is that he has provided you with such instructions already to generate the liquidity.

2) Cayman Trust. We have taken steps to terminate the Cayman Trust. The shares of Cutty Sark will be distributed to Alan.

3) Healthcare. We have prepared a Designation of HealthCare Surrogate by which Alan appoints Debbie to be his healthcare surrogate. This means that at such time as Alan becomes incapacitated, Debbie, who is currently taking care of his health care needs, will continue to do so

4) US Trust. We will be preparing a US revocable trust for Alan. The trust will own his assets, including the shares of Cutty Sark. While he is alive, he will have full ownership of the assets and can make all decisions, including terminating the trust. Upon his death the trust will indicate what is to occur. At present, we do not have anything definitive planned. However, Alan clearly wishes to benefit Debbie while she is alive. You will also be income beneficiaries and upon Debbie's death, you will inherit all of the assets. When Alan decides further details, I will let you know."

378. This communication does, as D2-D4 contended, make it clear that Mr Packman considered that he was acting on Alan's instructions and that no concerns about his capacity existed. However it also frames quite vividly the issues that Alan was required to decide in relation to the Trust:

(a) raising liquidity to pay the IRS was listed first and described in terms which suggested that this was (from Mr Packman's point of view) the most urgent agenda item;

(b) the termination of the Trust was described as a *fait accompli* with no rationale being given for a decision which would clearly be of considerable interest to Alan's children as beneficiaries;

(c) there was no explicit suggestion that the termination itself was viewed as indispensable for raising funds to pay the IRS or formed a central part of a tax strategy. On the contrary, Mr Packman acknowledged: "*I do not know what is involved in generating this liquidity or how long it will take*" ;

(d) there was an implicit suggestion that Alan's acquiring control of the Trust assets and half of APL would facilitate his ability to raise funds for the IRS;

(e) the reference to the establishment of a new revocable trust and Alan's provisional wishes that the children should inherit the remaining assets after Deborah's death made it clear that the Trust termination decision was not intended at that stage to have any irreversible impact on the children's prospects of ultimately benefiting from the wealth created by their father;

(f) the missive implied that Alan wished Deborah to be an income beneficiary for her life (just as he himself was under the Trust), with whatever capital was left being inherited by the children.

379. The email in short made it clear that it was proposed to extinguish the children's existing beneficial interests in the Trust in return for what might fairly have been viewed by them as a 'wing and a prayer'. But from Alan's perspective, the email signified that he was putting off for another day the details of how he would provide for both them and his wife. He was instead focussing in the first instance on:

(a) raising money for the IRS from UK-based underlying assets in ways which had yet to be worked out, but which Alan would direct; and

(b) terminating the Trust with a view to acquiring full control of the Trust assets, which would then be distributed solely to Alan himself.

380. The key Trust-related decision Alan made in July 2015 viewed in its surrounding factual context had no real correlation to a testamentary disposition because he was using his powers as settlor to obtain a distribution back to himself of assets he had originally transferred to the Trust. While this decision had the indirect effect of extinguishing the beneficial interests of his wife and children in the Trust, this was intended to create an interim vacuum which would be filled most likely by a US-based trust from which they would all in due course benefit. He executed two documents on July 17, 2015:

(a) a Deed of Amendment facilitating the distribution from the Trust of capital as well as income; and

(b) a Deed of Appointment, Indemnity and Termination, which was intended to effect the distribution of the CSLC shares to himself and the termination of the Trust.

381. By letter dated August 1, 2015, Alan advised Kevin Packman:

> "*I now wish to benefit Debbie with the assets as well as my children. (I have no intention of disinheriting them unless they continue the path in which they are treading.)*
>
> *We will move forward after the termination of the trust with regard to my estate planning*…"

382. The soundness of Mr Packman's advice as to the scale of Alan's potential liabilities was confirmed by advice Michele and Nick independently obtained, *inter alia*, from a Nixon Peabody tax partner Kenneth Silverberg on August 27, 2015[51]. In response to Nick's query about the plans to effectively move the Trust to the US, Nixon Peabody responded:

> "*The big difference is that in the US, the assets in the trust will be made subject to the IRS claims. If the trust remains in the C.I., it will be difficult or impossible for the IRS to seize the assets.*
>
> *Therefore, if the voluntary disclosure process results in a greater liability than your father can satisfy from his US liquid assets, unless the IRS can reach the trust, it will seize his home, his car and his share of any jointly owned assets to satisfy the debt. If all those are insufficient and the trust can't be attached, the IRS will*

[51] G12/4583a.

then look to any recent gifts or bargain-sales he may have made, and try to collect from whomever received the gift, etc. Failing all of that, he would be forced into bankruptcy so the IRS's rights will be protected in the event he later comes into money…"

383. This advice implied that while terminating the Trust and placing its assets within the reach of the IRS was neither urgent nor the only strategy which could be deployed, it would certainly reduce the risk of Alan's home and personal assets being seized if he was unable to pay the IRS from other resources. And as Mr Pimentel would later depose at paragraph 181 of his Witness Statement he told the Plaintiffs in January 2016:

"*I do come across US advisors who quite often do suggest domesticating the Cayman trust as a solution in order to mitigate a tax liability of US beneficiaries, and I suspect that that's where he's [Mr Packman] coming from…*"

384. Clearly, the decision to terminate the Trust, if part of the strategy to deal with the IRS claim, was a rational one even if reasonable people might differ as to whether it should be pursued. And, on any sensible practical view of Alan's situation, the importance of terminating the Trust would increase in urgency the clearer it became that no other liquid assets would be available to meet the IRS claim. This issue will be considered further in relation to the undue influence claim.

385. At this juncture I merely find that it is obvious that the decision to terminate the Trust which Alan made and expressed in executing the July 2015 Deeds was a far more narrow and simple decision than that which confronted him in March 2016. In October 2015 he was diagnosed with terminal cancer. The IRS claim was, sadly, in reality a claim to be confronted by Deborah and Alan's Estate. The 2012 Will provided for Deborah to be Alan's sole beneficiary. The 2015 Will provided for Deborah's sons to be Alan's sole beneficiaries in the event that she predeceased Alan. Despite having failed to liquidate any assets to make a substantial payment to the IRS on account, no formal assessment or demand for payment had yet been made. If Alan was to proceed to terminate the Trust and distribute the Trust assets jointly to himself and Deborah, this was in substance a distribution to her as there was no longer any basis (as in July 2015) for believing that further estate planning could be designed and implemented at some undetermined future time. The task of managing the IRS claim and the risk of the home and other assets being seized would be Deborah's primary concern. And the extent of those risks had to be reassessed to take into account the implications of Alan's death and any marital or other tax exemptions which might operate in her

favour.

386. In the event, only Alan's personal taxes have seemingly been formally pursued to date; a Statement of Claim was filed against Alan's Estate in the Florida Probate Proceedings in July 2019 and separate proceedings were commenced by the IRS against Deborah, Michele, Jamie and Nick on September 30, 2019 seeking just under $450,000 as at August 2019[52].

387. The reality is that the dominance of the IRS claim became supplanted in importance by the Autumn of 2015 by Alan's health and need to fund legal (and to a lesser extent) medical expenses as the parties, having disagreed on termination of the Trust, 'went to the mattresses' in 'Godfather' terms. The revised assessments for the OVDP years were still, nonetheless, being worked on as well. A six figure IRS assessment for Alan's personal tax for the year 2014 was received during this period too adding to the higher than usual "current" obligations. Forsters in London (Emily Exton) and Ogier in Cayman (Rachael Reynolds) were hired to help raise money from the Trust and advance the termination process.

388. In a November 10, 2015 email, Michele, suggested that she, Nick and Jamie meet with Emily Exton (whom she noted dealt with family disputes) "*to help us understand any issues and try to resolve them amicably*". Emily Exton passed this conciliatory and commercially conservative missive on to "*Alan and Deborah*" observing: "*I would have thought it could be very useful to get a dialogue going.*" The combative and prompt response (signed "*Debbie & Alan*") was put to Deborah in cross-examination[53]:

> "*Alan and I have spoken and don't authorise you to meet with Michele, Jamie, Nick. The children have had several opportunities to resolve this situation amicably and have chosen not to. We would also like to note that we will not be financially responsible for any charges incurred by the children should they contact you, emails, phone calls, etc, bill them separately. Alan's primary concern is being able to pay any fines. He also wishes to resolve the shares situation, regain control of the company. As you are aware, the situation is very time sensitive. Family mediation is the least of his concerns…"* [Emphasis added]

[52] G24/16001
[53] Transcript, Day 14 page 173.

389. This suggested a 'my way or the highway' approach, with no deviation from the path embarked upon in July 2015, despite the fact that Alan was now terminally ill and would require extensive palliative care. Declining to pursue an amicable solution with a view to saving further legal expense was not obviously consistent with the response of a businessman who was generally noted for being opposed to wasteful expenditure. Roughly two weeks after being released from Hospital following major life-changing surgery, Alan was hardly best placed to lead the thinking about how to resolve a major US tax liability and make estate planning decisions when 'his' wealth was in an offshore trust and the underlying UK-based assets were not only jointly owned with non-family members, but also consisted of real estate which could not be immediately liquidated.

390. Alan was medically examined the following day (November 11, 2015) with no cognitive deficits noted, so there is no reliable basis for doubting that the combative response reflected his views in part. However the doctor made it clear that curative treatment was no longer an option and that only palliative chemotherapy would be pursued[54]. By all objective standards, his terminal diagnosis justified at least some consideration of the desirability of changing course and making peace rather than war.

391. There was no deviation from the course that was previously set although there was frustration that there was no straightforward way for Alan to impose his will on events. He may well have had a strong emotional urge to wield the power of the fictional Daemon leader in the 1970s version of the Dr Who series who could fulfil his every desire merely by proclaiming: "*As my will, so mote it be.*" If this was Alan's expectation, this was a puerile and wholly unrealistic aspiration bearing in mind the legal complexities of the Trust, the Trustee's fiduciary obligations and the fact that the "children" were adult beneficiaries whose interests were proposed to be extinguished without any meaningful consultation.

392. Emily Exton was not the only lawyer retained on behalf of Alan to suggest pursuing a compromise. Rachael Reynolds had not been copied with Deborah's robust riposte to the London lawyer's encouragement to seek peace, but was seemingly aware that those seeds had been thrown but had fallen on stony ground. The Caymanian lawyer in an email dated December 4, 2015 wrote:

[54] I Vol. I/321-325.

"*I echo Emily's thoughts about a mediation-and this would be pushing at an open door as far as the trustee is concerned-it very much wants to get everyone together and talking….*

You may feel, Alan, that the time for compromise has passed. But I really think whilst the funds are limited we need to explore the cheaper alternatives to court proceedings to get this all resolved quickly…"

393. On or about December 15 2015, Ogier went further along the road to compromise and queried the need to terminate the Trust. This was an intervention which caused Deborah to complain to Mr Packman and Mr Knecht, prompting the latter in turn to observe[55]:

"*I think it is time for a new Cayman law firm.*
You need a fighter not a lover."

394. By this stage, Alan's direct involvement was obviously limited and Deborah and/or Joe Knecht were the main source of instructions for Alan's lawyers although he was usually copied with email correspondence and occasionally participated in conference calls. Mr Knecht was clearly not simply a man of words; he was also a man of action. The day after his indication to Deborah that it was time for "*a new Cayman law firm*", he was in email contact with Kobre & Kim's Jalil Asif QC. The replacement of Ogier was put in train. On December 17, 2015, Alan had a medical assessment and was noted to be quite coherent and alert and only complaining of physical weakness[56].

395. On January 15, 2016, Rachael Reynolds emailed Deborah explaining that the main problem with raising the money required was the APL structure and the fact that, *inter alia*, the Sheridans had no commercial motivation to assist and that (in effect) even if Alan had full control of CSLC, obtaining cash would not be a straightforward process because real estate would have to be sold[57]. On January 17, 2016, Deborah explained to Rachael Reynolds that the money they urgently needed was to repay credit card debt incurred to pay Forsters, Ogier and Mr Packman, "*still not current*"[58]. She complained in the same email:

[55] G16B/8988-8989.
[56] I Vol I/386-388.
[57] G17B/11007.
[58] G17C/11103.

"*As mentioned many times we have spent well over 100,000.00 +++ pounds to attorneys to receive one dividend payment that was being chased all over the place…And all this was for writing emails… no court or …hearing for relief…* "

396. These complaints were entirely understandable but reflected a failure to understand the complexities of the entire situation and the fact that a very blunt and uncommercial approach was being applied to a dispute which was very nuanced in both human and commercial terms involving protagonists who had limited liquid resources. The complaints ignored the elephant that sits silently in the room of every litigation lawyer whose client has doggedly insisted they "want what they want" and are not willing to compromise, despite having limited means; contentious dispute resolution will inevitably take far longer and cost far more than a negotiated compromise.

397. On January 18, 2016, Kobre & Kim were formally retained by Alan and Ogier's retainer was terminated. The terms of the retainer, which will be considered further below, were defined with reference to achieving specific objectives (terminating the Trust, distributing the assets to Alan and his wife, excluding all other beneficiaries and removing the children as corporate directors) which implied no need to provide any advice as to whether those objectives should in fact be pursued[59]. This was, in effect, a "take no prisoners" brief. I was puzzled when Mr Asif QC was being cross-examined as to (a) why no notes were kept of the January 28, 2016 telephone meeting he and trust specialist Mr James Corbett QC had with Alan, and why (b) his own participation in the events of March 2, 2016 had been so limited. However, such a 'light-touch' approach was entirely consistent with the narrowly defined "*just do it*" impulse which underpinned the Kobre & Kim retainer, a hiring process in relation to which Mr Knecht primarily acted on behalf of Alan (although he would exit the stage shortly after the commencement of the retainer). Notably, the retainer took place with no disclosure that Alan was seriously, let alone terminally, ill[60].

398. Mr Corbett QC is credited with proposing the form of documents which the Trustee was willing in principle to accept in February 2016. Kobre & Kim suggested that the Declaration of Exclusion be executed by Alan in the presence of Dr Brinker. On February 12, 2016, Kobre & Kim advised Appleby that Alan and Deborah had instructed that Mr Knecht should no longer be copied in on correspondence relating to the Trust. Deborah (in a colourfully robust email that reads more like

[59] G17C/11107-11112
[60] Transcript Day 20, pages 138-139.

Mr Knecht than Deborah herself) encouraged Mr Corbett QC to press the Trustee to cooperate, indicating, *inter alia*[61]:

> "*We need to make it clear that Alan isn't asking for a group hug from his family. No one asked the Trustee to reprise the role of Dr Phil. We're not asking for the Trustee to help Alan resolve the issues with his children so everyone is reconciled and finds peace. What good is that if he's being starved out in the process. This is about Alan's survival and his needs being met.*"

399. This forceful communication provides further context as to why it was that Alan was not in February and/or March 2016 invited by his own attorneys to reconsider his proposed termination of the Trust and distribution of its assets to himself and his wife. The narrative was a simple one. His children were starving Alan and the proposed course of action was essential for his "*survival*". They deserved to be "damned for all time" and the idea of considering making provision for them simply did not arise. It was a view that was accepted by Alan's lawyers, who doubtless viewed it as consistent with the fact that they had been retained after the critical decisions had already been made on the basis that their task was not to make progress towards the end zone but to carry the ball across the line for a touchdown. Mr Asif QC explained why he objected to the letter from Alan's children being read out at the March 2, 2016 meeting by the Trustee as follows[62]:

> "*Q.* *Why did you say it was not appropriate?*
>
> *A.* *Because it didn't seem to me that it was part of the trustee's function to be trying to act as peacemaker between two halves of the family when Alan had already made clear that he did not want that to happen, he just wanted to get on and terminate the trust and regain control of the shares.*"

400. On any objective view, however, when he executed the Declaration of Exclusion in March 2016, Alan knew or ought to have known that:

(a) excluding the children as beneficiaries would not provide access to a pool of cash or other liquid assets;

(b) there was a real risk (if not a likelihood) that the transaction of which the Declaration

[61] G18A/12152.
[62] Transcript Day 20, page 168 lines 12-18.

formed an integral part would result in the Trust assets being wholly distributed to his wife upon his death;

(c) this risk/likelihood was a real and substantial one because while he had made provision for his wife in his Will, he had made no provision for his children;

(d) the effect of the Declaration of Exclusion, even viewed in isolation from the related termination of the Trust, was in lay terms to 'disinherit' his children. This is because, assuming that Alan had not at that juncture made a decision to make no provision for his children, the risk/likelihood that he would have insufficient time to do so (as proved to be the case) was a very real one; and

(e) executing the Declaration of Exclusion would likely have the practical effect of disinheriting his children. This only made sense in March 2016, as opposed to in July 2015, if (as appears to have been the case) Alan believed on rational (but not necessarily valid) grounds that his children had abandoned him both financially and emotionally while he lay terminally ill on his sickbed.

401. In my judgment, the circumstances as they presented themselves to Alan did not make the decision in March 2, 2016 more complicated than the decision he made in July 2015 to any material extent as far as mental capacity is concerned. He had warned that he might 'disinherit' his children if they did not cooperate with his proposed termination of the Trust in the summer of 2015 and they both (a) failed to heed his warning, and (b) had abandoned him after he became terminally ill. On this basis, even without an explicit decision to make no provision for them in place of the Trust, it was quite easy to simply 'hasten slowly' on that front and run the obvious risk that they would end up with nothing. (The implications of the fact that his circumstances were in fact quite different are addressed in relation to the undue influence claim below). He clearly believed that his children had abandoned him in his time of need and decided to terminate the trust and gain control of the assets long before the Declaration of Exclusion was placed before him for consideration on or about February 24, 2016. However objectively viewed, the implications of pursuing the broad strategy devised in July 2015 were in reality quite different after his terminal illness was diagnosed in mid-October 2015.

Did Alan suffer from any permanent cognitive impairment at a material time which likely deprived him of capacity?

402. I have little difficulty in concluding that Alan did not suffer from any permanent cognitive impairment in March 2016 or at any other material time before then. I am assisted in this respect by the Expert Report of Dr Silberberg, who reviewed the medical records more fully than Professor Jacoby did. Mr McPherson QC's rigorous cross-examination of the Plaintiffs' Expert on the medical records comprehensibly demolished the foundations for his essentially speculative assertion that Alan may have suffered from permanent cognitive impairments despite the absence of any positive diagnosis. The difference between the Experts on this issue was in any event quite narrow:

> "*7. We agree that Alan was not diagnosed with dementia, a brain injury, Alzheimer's disease or other chronic illness that causes a permanent or durable effect on cognition so as to remove the capacities at issue. However:*
>
> *a) RJ considers that the fact these diagnoses were not made does not mean that Alan did not suffer from a durable effect on cognition as set out in his report; and*
>
> *b) JMS says that Alan had many clinical encounters with Dr Brinker and the doctors at the Mayo Clinic, none of whom ever diagnosed dementia, which JMS considers important and that the experts should defer to the treating clinicians.*"

403. I find that the following conclusions in Professor Jacoby's Report are not supported by any credible evidence:

> "*146. In summary, as regards disorders of mind, I consider that, on the balance of probability, and on the basis of the medical record disclosed in these proceedings, the Deceased did have some degree of chronic cognitive impairment most likely due to a combination of chronic alcohol abuse and vascular brain damage. In my opinion, there can be little doubt or no doubt that he suffered towards the end of his life from hepatic encephalopathy and delirium from other causes than liver disease.*"

404. Under cross-examination, Professor Jacoby conceded (*inter alia*):

(a) that although there was evidence in the records of Alan behaving aggressively in November 2015 during the recovery period following his surgery, there was also evidence of him behaving pleasantly as well[63];

(b) that the view that Dr Brinker expressed to Rachael Reynolds in November 2015 to the effect that he had no doubts about Alan's capacity was a relevant piece of evidence for the Court to take into account that there was nothing remarkable from a cognitive perspective in the medical records through to the end of December [64];

(c) that there was nothing in the medical notes for January and February before March 7, 2016 which he was able to rely on as indicative of cognitive impairment[65];

(d) that although Alan was physically very ill on March 7, 2016, the medical records did not suggest any cognitive impairment[66];

(e) that there was no positive medical record of cognitive impairment until late March-early April when it appeared Alan was suffering from a severe infection which was successfully treated with antibiotics[67].

405. Under re-examination, Mr Lowe QC sought to salvage Professor Jacoby's initial opinion on "*hepatic encephalopathy*", but the Professor was unable to coherently support his initial view that this liver-related disease may have caused permanent cognitive impairment[68].

406. The Plaintiffs sought to place considerable reliance on the impact of Alan's problem drinking. Alcohol abuse is a specialty of Dr Silberberg. I accept his evidence that while Alan clearly was a problem drinker in 2015, this had no material permanent impact on his mental capacity. The general impression given by the medical records in any event is that after his admission to Hospital in October 2015, his previous drinking habits of necessity significantly changed.

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[63] Transcript Day 24, page 4 line 15-page 5 line 6.
[64] Transcript Day 24, page 8 line 19-page 9 line 23.
[65] Transcript Day 24, page 13 line 7-page 14 line 14.
[66] Transcript Day 24, page 22 line 7-page 23 line 8.
[67] Transcript Day 24, page 29 line 23-page 43 line 7.
[68] Transcript Page 72 line 1-page 74 line 4.

Did Alan suffer from any temporary cognitive impairment at a material time which likely deprived him of capacity?

407. The only material time initially appeared to me to be March 2016 when it is common ground Alan executed the Declaration of Exclusion. D2-D4 contend it was executed on March 2, 2016 while the Plaintiffs contend it was March 20, 2016 because Alan was not capable of executing it on March 2, 2016. That dispute will be resolved below and is ultimately of indirect rather than direct relevance to the capacity issue. The first of two prior questions is whether Alan from time to time suffered from cognitive impairments of sufficient severity to impair his mental capacity to make momentous decisions in relation to the Trust. The short answer to that question is that he clearly did. The second prior question is, having regard to my finding that the complexity of the Trust termination decision increased after Alan's terminal cancer diagnosis in October 2015, at what point in time did Alan make the critical decision to press ahead with the original strategy nonetheless? This question does not permit as simple an answer.

408. Deborah with considerable perspicacity anticipated (in an April 8, 2015 email to Mr Ball) that changing Alan's Will might prompt the "*kids*… [to]…*say at this time he was not of sound mind and or alcoholic*". That Deborah was anxious there might actually be cognitive deficits, as plans to terminate the Trust progressed, is confirmed by a July 1, 2015 Mayo Clinic note[69]

> "*His wife…also noted some mood swings, which occur more frequently at nightime. She reports that he also may have some changes in cognition, however this is difficult to assess due to his intoxicated state.*"

409. These anxieties clearly preceded the Plaintiffs becoming aware of plans to terminate the Trust and actually raising the capacity issue themselves. Dr Brinker performed a Mini Mental State Examination (MMSE) on July 30, 2015, and was satisfied that: "*Overall, his cognition seems pretty good.*"[70] The Experts agreed that a MMSE is a screening test. Dr Brinker was unwilling to give an unqualified letter without formal cognitive testing, which never occurred. Nonetheless the broad picture painted by the medical records is that Alan was cognitively functional more often than not when he was examined. For instance, Dr Brinker's November 20, 2015 letter indicated that Alan

[69] I Vol.1/82.
[70] I Vol I/ 90.

was lucid on October 9, 2015 prior to surgery and on October 30, 2015 after surgery. Around the same time Dr Brinker verbally confirmed to Rachael Reynolds that he had no capacity concerns.

410. One reason why Alan's capacity might from time to time be impaired while he was at home is the interaction after his October operation, between his anti-anxiety medication and/or morphine and alcohol, which Dr Silberberg agreed might cause "*drowsiness, perhaps confusion, perhaps disorientation*"[71]. Professor Jacoby also opined that Alan's "*physical frailty would have predisposed him, to fatigue which, in my opinion, probably did impair his decision-making capacity*" (Expert Report, paragraph 178). Earlier in his Report, Professor Jacoby stated:

> "*148. Another important sign of cognitive impairment is executive dysfunction*[72]*…Insofar as one can summarise something as complex as executive function more briefly, it involves the integration of a variety of psychological functions for the purpose of goal-directed action. It requires above all judgment.*"

411. On October 9, 2015 Alan underwent exploratory surgery which resulted in a positive colorectal cancer diagnosis. On October 13, 2015, he underwent an operation described by Dr Silberberg as "*major surgery under general anaesthetic to create a loop bypass and ileostomy.*" (Expert Report, paragraph 75(c)). (Professor Jacoby (at paragraphs 65-66 of his Report) described the surgery more graphically, explaining that its result was that "[i]*ntestinal waste products were, therefore, passed into a bag attached to the stoma (opening) on the abdominal wall."*). In the same paragraph, Dr Silberberg continued:

> "*(d) Over the next few months, Alan underwent a long course of chemotherapy. This is an unpleasant type of therapy, which often carries significant physical side effects with it. The clinical records over this period show a mixture of more positive moments and times when Alan had difficulties (sometimes referred to in medico-legal work as 'good days/bad days')…*" [Emphasis added]

412. It seems obvious that even if the adverse effects of chemotherapy are primarily physical, that a "bad day" also signifies a significantly diminished mental energy as well. For lay people, in fact, the "good days/bad days" phrase is often associated with dementia, a more common illness in recent

[71] Transcript Day 24, page 114 lines 21-22.
[72] A passage from Perry & Hodges [Brain 1999, 122, 383-404] is quoted.

times. So fatigue was another potential factor contributing to the adverse effects of medicines mixed with alcohol, and possibly undiagnosed infections, which might explain why Alan was sometimes lucid and sometimes not. For instance he was "*confused*" on February 19, 2016 and "*clear and coherent*" on February 25, 2016. But that same day, a medical appointment with Dr Brinker was cancelled because "*his chemo therapy went on too long and he was tired*." The appointment was seemingly for Dr Brinker to witness Alan signing the February 24, 2016 Declaration of Exclusion, and the appointment was rescheduled for March 2, 2016. And although the Trustee's representatives came to the Poultons' Ponte Vedra Beach home on March 2, 2016 for their informal capacity screening meeting, Dr Brinker (on legal advice) declined to witness the crucial signing because no formal capacity tests had been carried out. All of these health factors, of course, are clearly indicative of vulnerability to undue influence.

413. In short, Alan did from time to time between mid-October 2015 and March 20, 2016 suffer from temporary cognitive impairments which potentially made him incapable of deciding to effectively disinherit his children. However in my judgment it would be artificial to regard the date in March when he executed the Declaration of Exclusion as being critical. Not because, as D2-D4 contended, the transaction was essentially the same as the one he approved in July 2015 when there was no basis for doubting his capacity overall. But rather because the evidence overwhelmingly shows the decision had effectively been made "by" Alan by the end of January 2016 at the latest. I rely primarily in this regard on the Witness Statement of Mr Asif QC at paragraphs 24 to 74.

414. Through Mr Knecht in a telephone conference on December 22, 2015, Alan's wishes were said to be to, *inter alia*, terminate the Trust, distribute the assets to Alan "*(and possibly his wife)*", to exclude the other beneficiaries and remove the children as corporate directors. These instructions were embedded in the formal retainer letter with the material modification that the Trust assets were indeed to be transferred to Deborah as well as Alan. Deborah emailed a signed copy of the engagement letter on January 18, 2016 which deleted the original reference to Mr Knecht as being authorised to give instructions on Alan's behalf. The last contact the lawyers had with Mr Knecht was on January 22, 2016 when he seemed angry that he had been deprived of his role in the matter.

415. These formal instructions were further implicitly confirmed by Alan personally in a meeting attended in person by Mr Asif QC on January 28-29, 2016 and by Mr James Corbett QC remotely on January 29, 2016. There is no contemporaneous record of these meetings, but the nature of

Kobre & Kim Cayman's instructions and the evidence of Mr Asif QC strongly suggests that Alan's new lawyers after their retainer were primarily engaged in performing the steps being taken to implement his written instructions rather than exploring whether his instructions were consistent with his true wishes and best interests. However:

> "*56. An additional purpose of the videoconference was for James to see Alan for himself and to form his own view about Alan's capacity to give us instructions…*
>
> *59. Once I was alone, I spoke with James to discuss our view regarding Alan's capacity and whether he was subject to undue influence…James and I both agreed that we did not have any concerns about Alan's capacity to give instructions to achieve his goal of terminating the Trust and obtaining ownership and control of the shares in CSLC and Alan Poulton Ltd or that he was being controlled by Deborah (or anyone else).*"

416. This was far from a formal capacity assessment but clearly two experienced lawyers formed the "*view*" that Alan had "*capacity to give instructions to achieve his goal*". Their assumption was that the "*goal*" was indeed Alan's. There is no suggestion that they adverted to the implications of pursuing that goal while he was terminally ill and at risk of not being able subsequently to make any provision for his children. This rough and ready assessment is not "*worthless*" (*Ashkettle-v-Gwinnett* [2013] EWHC 2125 (Ch) at paragraph 54) in the circumstances of the present case; it is supportive of the general picture painted by the medical evidence. As far as undue influence is concerned, it seems that all that they looked for was overt signs that Alan was being controlled, a point which will be considered further below.

417. Updating calls were made to Alan and Deborah on February 11, 2016 and on February 26, 2016, after the Declaration of Exclusion had been forwarded two days earlier. No formal advice was seemingly given about this document, presumably because it was simply an instrument to implement Alan's clearly defined goal as reflected in his formal instructions. And instructions which were substantially unchanged from the conference call Mr Asif QC and Mr Corbett QC had with Mr Knecht on December 22, 2015.

418. It is in my judgment artificial to view the March 2, 2016 meeting and the date of execution of the Declaration of Exclusion as pivotal to the question of Alan's capacity. It is clear that when he executed the document that was merely formalizing a decision which in substance he had already

made several months before. The relevant decision was to exclude the children as trust beneficiaries and distribute the Trust assets to himself in circumstances where, because of his terminal diagnosis in mid-October 2015, there was a real risk, if not a real likelihood, that he would not have time to make alternative provision for his children before he died. The most relevant time period, for both capacity and undue influence purposes, is accordingly from mid-October 2015 until March 20, 2016 by which date it is accepted Alan had executed the crucial document.

419. I am bound to find that, against this background, the degree of capacity Alan required when he executed the Declaration of Exclusion was not as high as it might otherwise have been because there is no basis for finding that Alan lacked capacity (by virtue of temporary cognitive impairment) throughout the preceding five months, no matter how vulnerable to undue influence he may have been. In the event, the best available evidence of his capacity is provided by the Trustee's representatives' record of the March 2, 2016 meeting. The Trustee's representatives' carried out an informal capacity assessment after having taken legal advice and their preparations included reviewing an article by Professor Jacoby. The Trustee met with Alan in the presence of Mr Asif QC and in the absence of Deborah and took contemporaneous notes, transcribed them and discussed them after the meeting and took further legal advice. The Trustee concluded that Alan had capacity to execute the Declaration of Exclusion and set in train the termination of the Trust and the distribution of the CSLC shares to himself and his wife Deborah. Immediately after the meeting Mr Whan Tong and Ms Williams-Myers' shared the initial impression that Alan had capacity and was not under Deborah's control.

420. It is obvious, that the conclusions which they reached took into account the fact that the transaction Alan was about to enter into had been initiated in a different form in July 2015 and that since then his pursuit of termination of the Trust had been attributed by the children to his incapacity and Deborah's undue influence. How did the Plaintiffs seek to undermine this informal capacity assessment? In their Closing Submissions, Mr. McLarnon stridently argued:

> "*296. It was clear that Alan showed significant cognitive impairment when the Trustee carried out its 'lay person's capacity assessment' (whatever that might mean). Below at paras. [298] & [299] are 36 extracts from the transcripts of the examinations of Mr. Whan-Tong and Ms. Williams Myers which show, beyond any doubt whatsoever, that Alan's cognition and memory was seriously impaired. The Court should, therefore, have no hesitation in finding that Alan lacked the requisite legal mental capacity*

to exercise the Settlor's and Protector's powers under the terms of the Family Trust and under Cayman Islands law to exclude beneficiaries from the Family Trust. The Trustee's evidence that it had no doubt that Alan had capacity cannot be safely accepted or given any real weight by the Court in light of (i) Mr. Whan-Tong's and Ms. Williams Myers's lack of relevant experience and expertise and (ii) what is set out below."

421. This was an ambitious submission. In light of my finding that there is no reliable medical evidence of any permanent cognitive impairment and that Alan's condition on March 2, 2016 is not dispositive, it is difficult to see how compelling evidence of incapacity to execute the Declaration of Exclusion can be found based purely on the record of what happened at that one meeting. The most important matters relied upon were the following:

(a) Alan was only able to name three out of five of his children and made no mention of his grandchildren;

(b) Alan was confused about who had set up the Trust and appeared to believe that Nick had both set up the Trust and had "*taken everything*";

(c) Alan did not appear to understand he was terminating a trust he had set up for his children;

(d) Alan did not appear to understand the concept of a trust;

(e) the capacity assessment was general in nature and "*not with specific reference to that document… had we discussed a declaration of exclusion with him I doubt he would have understood what one was*"[73].

422. Those are on their face potentially significant indicators capable of supporting a finding that Alan lacked capacity to decide on March 2, 2016 to execute the Declaration of Exclusion with no prior consideration and decision in principle on his part. These matters also raise important questions such as was this a temporary lack of lucidity on these factual issues or did they reflect longer term confusion on his part? The reason why the Trustee reached the conclusion it did on capacity is based on Alan's lucidity during the meeting overall rather than by focussing on the mistakes that

[73] Witness Statement of Ian Whan Tong, paragraphs 131, 138.

he made in isolation from the broader picture. The meeting lasted for 1.5 hours with a break followed by a further 20 minutes. Ian Whan Tong deposed that "*while Alan occasionally showed himself to be forgetful and confused, this was the exception and not the rule*" (Witness Statement, paragraph 152(l)). The Plaintiffs' main submission on this point relies upon extracts from the cross-examination of Ian Whan Tong rather than a comprehensive critique of the meeting notes. The overall picture is the most important substantive point that emerges from the evidence of the Trustees' witnesses. As Angella Williams-Myers deposed:

> "*98. …my impression of Alan from the meeting was that he was frail, seriously ill, but knew his mind and conversed with us relatively freely given his condition…my sense at the meeting was that he found the process of being interviewed moderately uncomfortable and, given his health, he did not have much in the way of strength reserves to cope with this. However, he was lucid, had a basic grasp of the key matters he was asked about and articulated a coherent desire to exclude the Poulton Children and terminate the Trust.*"

423. In summary, I provisionally find that although Alan may have suffered from periods of cognitive impairment from time to time between mid-October and March 20, 2016, the substance of the decision which the Declaration of Exclusion gave effect to was made over such an extended period of time that it is more likely than not that he had the requisite capacity to a sufficient extent both (a) when the decision was being made, and (b) whenever the document was actually executed. Since the decision was in substance made before the end of 2015, the level of capacity required to formally consummate the transaction would not be very high. The circumstances leading up to the execution of the Declaration of Exclusion raise more cogent concerns about undue influence than they do about capacity.

424. As far as capacity is concerned, it remains to consider whether this preliminary conclusion is affected and, if so, in what respects, by the determination of the question of when the Declaration of Exclusion was executed and filmed.

When was the Declaration of Exclusion executed and when was the Video Recording made?

425. Based on the findings I have reached above to the effect that the precise date in March when these events occurred is not of pivotal significance to the capacity issue, I will deal with this issue more

briefly than might otherwise have been necessary. It is helpful to summarise the undisputed or agreed facts, and the facts which cannot reasonably be disputed:

(a) Mr Asif QC deposes in his written evidence (Witness Statement, paragraph 85) that he recalls suggesting at some point, most likely on March 2, 2016 after the meeting, that it would be useful to have the signing of the Declaration of Exclusion filmed. In his oral evidence, he recalled telling Christine that it would be a good idea to film the execution process;

(b) in a February 24, 2016 email, Pamela Mitchell of Kobre & Kim forwards the Declaration of Exclusion and advises Alan and Deborah to have the signature witnessed "*if at all possible*" by a doctor who should read over the document to Alan before he signs. By even-dated email, Deborah advises Mr Corbett QC that an appointment has been made for the following day with Alan's "*primary care physician*" and queries whether the signing should proceed;

(c) in a February 25, 2016 email sent at 12.42 am, Mr Corbett QC responded to Deborah: "*yes please do go ahead and have it signed and witnessed tomorrow. It would help if the witness could include his title (Doctor) and description (primary care physician) …*";

(d) Mr Griffin who deposes that the signing was witnessed and filmed on March 2, 2016 is recorded as visiting the Poulton home on March 2, 2016, but he has no contemporaneous record of what occurred;

(e) notably, the signature page of the Declaration of Exclusion which bears the date February 24, 2016 on page 1 does <u>not</u> record any date of signature;

(f) on March 8, 2016, Deborah emails Mr Corbett QC informing him that Alan had a severe anxiety attack after the meeting and responds to the query as to whether the Declaration of Exclusion has been signed yet as follows[74]:

[74] G19A/13189. The email mentions limited availability due to multiple Mayo Clinic visits for that week.

"*The Declaration was witnessed by a notary, who read the document in its entirety and asked Alan to explain the contents of the letter. This is, however, a temporary measure, and we plan to visit Dr Brinker ASAP to have him witness Alan signing the Declaration and attest to his competency*";

(g) also on March 8, 2016, Deborah calls Dr Brinker about him reading out a paragraph to Alan and confirming Alan understands it;

(h) on March 14, 2016, a nurse tells Dr Brinker Deborah wishes to discuss a "*psych test*";

(i) on March 18, 2016, Dr Brinker sees Alan. Deborah says they are thinking about pursuing psychometric testing for legal reasons and will get back to him if they decide to proceed;

(j) March 18-March 20, telephone logs show calls between Deborah and Mr Griffin;

(k) Mr Griffin is recorded by security logs as visiting the Poulton home on March 20, 2016, but neither he nor any other witness can recall what he did on that date;

(l) the only version of the Video Recording which exists was created, according to both Forensic Experts, on March 20, 2016 although the possibility that it was created earlier but converted to a new format erasing any earlier metadata cannot be ruled out;

(m) the Video Recording shows Alan apparently wearing the same clothes as he was wearing when the Trustee's representatives photographed him on March 2, 2016;

(n) at 6.42pm Eastern Daylight Savings time on March 20, 2016, Deborah uploads the video Recording to YouTube and forwards it to Mr Asif QC at 7.17 pm (23: 17 GMT)[75];

(o) on March 23, 2016 Deborah advises Kobre & Kim that a copy of the signed Declaration of Exclusion was scanned to Mr Corbett QC on March 20, 2016 and advises that the original will be sent the following day;

[75] D2-D4 suggested that this occurred one hour earlier than the times indicated on the actual emails at G19B/13479 and 13484, before the time Mr Theron says the film was created. I make no finding on this issue.

(p) on April 5, 2016, Ms Williams-Myers called Mr Griffin and "*he said the declaration was signed on 2 March and was also video-taped*". He later confirmed the time was around 3pm.

426. Deborah's evidence as to when the Declaration of Exclusion was signed, witnessed and filmed was given in a very straightforward and non-defensive manner. I initially felt that the look of fright which flashed across Christine's face before she was cross-examined on this topic (in relation to which she was the key witness) implicated her in giving false evidence. On reflection, and in light of all the other relevant evidence properly construed, her apparent fright was simply attributable to the natural anxiety which an honest witness would have about having their credibility impugned.

427. Mr Griffin was entirely credible, admitting to having no present recollection or record of when he notarised the relevant document and very fairly placed reliance on what he told Ms Williams-Myers on April 5, 2016. It beggars belief that Deborah would have told Kobre & Kim on March 8, 2016 that the document had been signed in front of a notary already if that had not in fact occurred. That communication (together with subsequent communications with Dr Brinker) provides a straightforward explanation as to why the executed document was not forwarded before March 20, 2016.

428. Because the legal advice had been that the ideal witness would be a doctor, Mr Griffin's certification was regarded as "*a temporary measure*" until it was eventually decided not to have Alan undergo the psychometric testing which Dr Brinker clearly insisted on if he was to witness the document's execution. Dr Brinker invited Alan and Deborah to make up their minds on March 18, 2016. This decision was reflected in Deborah uploading the Video Recording to YouTube on March 20, 2016.

429. I accordingly find that the Declaration of Exclusion was executed and the Video Recording was made on the afternoon of March 2, 2016 and reject the Plaintiffs' suggestion that D2-D4 sought to mislead the Court in this regard.

Evidential weight to be attached to the Video Recording

430. I place no reliance on my own observations of Alan's appearance and/or behaviour in the Video

Recording in assessing his mental state. The Video Recording does however clearly confirm that Mr Griffin read the document to Alan and asked him what he understood it to mean before he signed it. However I do find that what Alan said his understanding of the effect of the document he signed was supports rather than undermines the case that he had capacity. He said with considerable clarity:

> "*Basically it says none of my children will inherit any of the money left by my family trust…They will not have any money, no*."

431. I find that this supports a finding in favour of capacity for the following main reasons:

(a) it shows that Alan clearly understood that the Trust was "*his*";

(b) although Alan did not manifest an accurate understanding of the legal effect of the Declaration of Exclusion viewed in isolation from the broader transaction of which it formed an important initial part, he displayed an understanding of the bigger legal and commercial picture.

432. The strongest potential factor in favour of a finding of incapacity would have been credible evidence that Alan had not understood the implications of the Deed of Exclusion in the wider context of the Trust termination project as a whole. I find that what Alan said he understood the effect of the document he had signed to be in the Video Recording points decisively in the opposite direction.

Summary of findings on capacity

433. For the above reasons, I find that on the balance of probabilities Alan had sufficient mental capacity to execute the Deed of Exclusion on March 2, 2016 when he signed it. He understood that he was putting in train a series of transactions which would prevent his children from receiving any benefit from the assets of the Trust. I accept the submission of Mr McPherson QC that if Alan had capacity when he gave instructions in relation to steps which he formally approved after he had lost capacity to make the substantive overarching decision, all that was required was (in effect) for him to understand that his duly given instructions were now being carried out: *Perera-v-Perera* [1901]

AC 354 (PC); *Perrins-v-Holland* [2011] Ch 270 (at paragraphs 23, 55-56). Assisted by the expert evidence of Dr Silberberg, I find that Alan did not suffer from any permanent cognitive impairment and that there were no significant transitory impairments to his mental capacity.

434. The evidence traversed in reaching this conclusion does show that (a) from time to time he would have been cognitively impaired (both in terms of a lack of lucidity and diminished capacity to exercise or make fine business judgments) and (b) that his various medical conditions meant that he was clearly heavily dependent on others to act on his part in relation to the management of his personal business and legal affairs. These considerations have potentially greater significance in relation to the question of whether Alan's decision to terminate the Trust and receive the Trust assets for the benefit of himself and his wife was his own independent decision, a question which will now be considered.

FINDINGS: UNDUE INFLUENCE

Legal test

435. Controversy centred on whether or not the facts of the present case triggered a presumption of undue influence. There was broad agreement that what amounts to undue influence is primarily established by the House of Lords decision in *Royal Bank of Scotland-v-Etridge (No 2)* [2002] 2 AC 773. Nonetheless, it is important to be clear as to what the essential elements of this doctrine are. A pithy summary of the principles, upon which Mr Lowe QC relied, is provided by Auld LJ in *Macklin-v- Dowsett* [2004] EWCA 904:

> "*10. To succeed in such a defence, the prima facie establishment of undue influence, Mr Dowsett, in the light of the ruling of the House of Lords in Royal Bank of Scotland v Etridge (No 2) [2001] UKHL 44, [2002] 2 AC 773, had to show two things: (1) that, in entering into the option agreement, he had reposed trust and confidence in the Macklins or that they had acquired some ascendancy over him; and (2) that the transaction was not otherwise readily explicable by the relationship between them. Proof of such matters which – I emphasise – did not require him to prove any misconduct by the Macklins or even that he was disadvantaged by the transaction, would, in the absence of satisfactory evidence to rebut his contention, entitle him to have the agreement set aside for undue influence. Further and more recent authorities of this Court have underlined the rationale of the doctrine of undue influence as the protection of the*

vulnerable in dealings with their property and also the lack of any need to show misconduct on the part of the transferee; see Niersmans v Pesticcio, unreported, 1st April 2004, per Mummery LJ at paragraphs 1, 2 and 4; and Jennings v Cairns [2003] EWCA 1935, per Arden LJ at paragraphs 34, 35 and 40."

436. Lord Nicholls' famous judgment in *Etridge* distilled the pre-existing governing principles as follows:

> "*6. The issues raised by these appeals make it necessary to go back to first principles. Undue influence is one of the grounds of relief developed by the courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused. In everyday life people constantly seek to influence the decisions of others. They seek to persuade those with whom they are dealing to enter into transactions, whether great or small. The law has set limits to the means properly employable for this purpose. To this end the common law developed a principle of duress. Originally this was narrow in its scope, restricted to the more blatant forms of physical coercion, such as personal violence.*
>
> *7. Here, as elsewhere in the law, equity supplemented the common law. Equity extended the reach of the law to other unacceptable forms of persuasion. The law will investigate the manner in which the intention to enter into the transaction was secured: 'how the intention was produced', in the oft repeated words of Lord Eldon LC, from as long ago as 1807 (Huguenin v Baseley 14 Ves 273, 300). If the intention was produced by an unacceptable means, the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or 'undue' influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will. It is impossible to be more precise or definitive. The circumstances in which one person acquires influence over another, and the manner in which influence may be exercised, vary too widely to permit of any more specific criterion.*
>
> *8. Equity identified broadly two forms of unacceptable conduct. The first comprises overt acts of improper pressure or coercion such as unlawful threats. Today there is much overlap with the principle of duress as this principle has subsequently developed. The second form arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage. An example from the 19th century, when much of this law developed, is a case where an impoverished father prevailed upon his inexperienced children to charge their reversionary interests under their parents' marriage settlement with payment of his mortgage debts: see Bainbrigge v Browne (1881) 18 Ch D 188.*

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

10. *The law has long recognised the need to prevent abuse of influence in these 'relationship' cases despite the absence of evidence of overt acts of persuasive conduct. The types of relationship, such as parent and child, in which this principle falls to be applied cannot be listed exhaustively. Relationships are infinitely various. Sir Guenter Treitel QC has rightly noted that the question is whether one party has reposed sufficient trust and confidence in the other, rather than whether the relationship between the parties belongs to a particular type: see Treitel, The Law of Contract, 10th ed (1999), pp 380-381. For example, the relation of banker and customer will not normally meet this criterion, but exceptionally it may: see National Westminster Bank Plc v Morgan [1985] AC 686, 707-709.*

11. *Even this test is not comprehensive. The principle is not confined to cases of abuse of trust and confidence. It also includes, for instance, cases where a vulnerable person has been exploited. Indeed, there is no single touchstone for determining whether the principle is applicable. Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other. None of these descriptions is perfect. None is all embracing. Each has its proper place.*" [Emphasis added]

437. The equitable doctrine of undue influence, therefore, is broadly designed to ensure that when vulnerable persons make significant decisions they have not been improperly influenced by other persons. The law will treat any influence as improper (undue) where, *inter alia*, the influencer has preferred their interests over those of the influenced party. Where a vulnerable person has entrusted the management of their affairs to a trusted person, as clearly occurred in the present case, there is a legal policy need "*to prevent abuse of influence… despite the absence of evidence of overt acts of persuasive conduct.*" It is also clear that undue influence is pivotally concerned with protecting a vulnerable person whose interests have been compromised in the particular circumstances of the

impugned transaction, rather than about attributing blame for why the donor should be granted relief. In *Jennings-v-Cairns* [2003] EWCA 1935, Arden LJ (as she then was) observed:

> "*40. While there can be circumstances where the only claim is in mistake, in my judgment this is not such a case. The judge, was therefore not wrong to conclude that undue influence was established, notwithstanding that he concluded that Penelope was not responsible for the mistake and was unaware of the fiscal consequences of the gift. These are not incompatible conclusions, as Sir Martin Nourse pointed out in the case of Hammond v Osborne. The fact that the conduct of the person exercising influence is unimpeachable is not by itself an answer to a claim in undue influence, though the presumption of undue influence can be rebutted in many ways.*" [Emphasis added]

438. Similar observations were made by Sir Martin Nourse in *Hammond-v-Osborne* [2002] EWCA Civ 885 where the active influencer was a person other than the donee[76]:

> "*1. The striking feature of this appeal has been the revelation of continuing misconceptions as to the circumstances in which gifts or other transactions will be set aside on the ground of presumed undue influence, a class of case in which, as Cotton LJ observed in Allcard v Skinner (1887) 36 Ch. D. 145, 171:*
>
> *'the court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused.'*
>
> *Here it is conceded that there was both a relationship of trust and confidence between donor and donee and a gift so large as together to give rise to the presumption. So the question is whether the presumption is rebutted by proof that the gift was 'the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the court in holding that the gift was the result of a free exercise of the donor's will' (per Cotton LJ, ibid), or, to put it more shortly, whether it is proved that the gift was made by the donor 'only after full, free and informed thought about it'; see Zamet v Hyman [1961] 1 WLR 1442, 1446, per Evershed MR.*
>
> *...*
>
> *32. Even if it is correct to say that Mrs Osborn's conduct was unimpeachable*

[76] Ward LJ expressly agreed with these views at paragraph 61.

and that there was nothing sinister in it, that would be no answer to an application of the presumption. As Cotton LJ said in Allcard v Skinner (see para 1 above), the court does not interfere on the ground that any wrongful act has in fact been committed by the donee but on the ground of public policy, which requires it to be affirmatively established that the donor's trust and confidence in the donee has not been betrayed or abused."

439. A similar approach has recently been taken by Justice Marlene Carter (Acting) in *Gouldbourne-v-Gouldbourne*, Civil G0207 of 2014, Judgment dated April 8, 2021 (unreported), a case which Mr McPherson QC relied upon for another point. For present purposes it is significant that Carter J opined as follows:

> "*116. It is important to note that the Defendant in this case is not been accused of 'wrongdoing' in the ordinary sense of that word. Counsel for the Plaintiff reiterated this in his arguments before the Court. In* ***Hackett v CPS & Hackett****, Silber J. noted as follows:*
>
> > *'…it is not determinative of the issue that the person presumed to exert undue influence did not act wrongfully as it is not an ingredient of undue influence that the wrongdoer cheated the victim because, as was explained by Mummery LJ in* ***Niersmans v Pesticcio*** *[2004] EWCA Civ 372:-*
> >
> > *'20 …Although undue influence is sometimes described as an 'equitable wrong' or even as a species of equitable fraud, the basis of the court's intervention is not the commission of a dishonest or wrongful act by the Defendant, but that, as a matter of public policy, the presumed influence arising from the relationship of trust and confidence should not operate to the disadvantage of the victim, if the transaction is not satisfactorily explained by ordinary motives:* ***Allcard v. Skinner*** *(1887) 36 Ch D 145 at 171. The court scrutinises the circumstances in which the transaction, under which benefits were conferred on the recipient, took place and the nature of the continuing relationship between the parties, rather than any specific act or conduct on the part of the recipient. The court may set a transaction aside, even though the actions and conduct of the person who benefits from it could not be criticised as wrongful.'* " [Emphasis added]

440. I accordingly reject the submission of D2-D4's counsel to the effect that undue influence requires a transaction which is "*wrongful*" because it "*involves persons as being 'victimised' and 'being forced, tricked or misled in any way by others into parting with their property*'": *BCCI-v-Aboody*

[1989] 1 QB 923 at 957. That may well be the requirement in some legal contexts but these are not essential ingredients for every undue influence claim. The equitable doctrine of undue influence is far more fluid than that; and when one is dealing with familial relations in particular, it is more apposite in my judgment to frame the critical question as being "*whether it is proved that the gift was made by the donor 'only after full, free and informed thought about it'*": *Hammond-v-Osborne* [2002] EWCA Civ 885. Professor Jacoby, incidentally, made the wise observation (Expert Report, paragraph 177), which I accept more as reflecting common sense and human experience rather than as an expert opinion, that:

> "*….those who are determined to achieve a particular result, or are convinced of the righteousness of their cause, might not consciously intend unduly to influence their victim, and might not know they are exerting undue influence…*"

441. Admittedly, in many (if not most) cases the undue influence complained of will involve allegations of improper conduct by an influencer. However it is significant in a family context where the key actors are likely to have mixed motives (and no conscious intention of abusing a position of trust) to keep in mind what the fundamental objectives of this flexible equitable remedy actually are. In the present case, therefore, the critical question is whether the circumstances in which Alan decided to exclude the Plaintiffs as beneficiaries and terminate the Trust (with himself and his wife receiving all the Trust assets) diminished to a material extent his ability to freely express his own independent will.

442. In the present case the Plaintiffs' pleaded case alleges that, *inter alia*, the Declaration of Exclusion should be set aside on the grounds that it was "*procured by Deborah's undue influence and/or unconscionable conduct*". No or no discernible reliance was, however, placed upon "*unconscionable conduc*t" as a freestanding claim at trial.

Burden of proof-legal test

443. The critical question as to burden of proof is also whether the circumstances in which the key instrument came to be executed by Alan are such as to engage the evidential presumption that undue influence occurred. What the legal parameters of this onus-shifting rule are must first be determined before the facts are considered.

444. When the burden of proof shifts may fairly clearly be defined. It is common ground that the mere relationship of husband and wife is insufficient alone to engage the presumption and that any presumption which potentially arises in the context of a marital relationship must be a rebuttable one. In *Royal Bank of Scotland-v-Etridge (No 2)* [2002] 2 AC 773, Lord Nicholls opined as follows:

> "*13. Whether a transaction was brought about by the exercise of undue influence is a question of fact. Here, as elsewhere, the general principle is that he who asserts a wrong has been committed must prove it. The burden of proving an allegation of undue influence rests upon the person who claims to have been wronged. This is the general rule. The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case.*
>
> *14. Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. In other words, proof of these two facts is prima facie evidence that the defendant abused the influence he acquired in the parties' relationship. He preferred his own interests. He did not behave fairly to the other. So the evidential burden then shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn.*"
>
> …
>
> *16. Generations of equity lawyers have conventionally described this situation as one in which a presumption of undue influence arises. This use of the term 'presumption' is descriptive of a shift in the evidential onus on a question of fact. When a plaintiff succeeds by this route he does so because he has succeeded in establishing a case of undue influence. The court has drawn appropriate inferences of fact upon a balanced consideration of the whole of the evidence at the end of a trial in which the burden of proof rested upon the plaintiff. The use, in the course of the trial, of the forensic tool of a shift in the evidential burden of proof should not be permitted to obscure the overall position. These cases are the equitable counterpart of common law cases where the principle of res ipsa loquitur is invoked. There is a rebuttable evidential presumption of undue influence.*
>
> *17. The availability of this forensic tool in cases founded on abuse of influence arising from the parties' relationship has led to this type of case sometimes*

> *being labelled 'presumed undue influence'. This is by way of contrast with cases involving actual pressure or the like, which are labelled 'actual undue influence': see Bank of Credit and Commerce International SA v Aboody [1990] I QB 923, 953, and Royal Bank of Scotland Plc v Etridge (No 2) [1998] 4 All ER 705, 711-712, paras 5-7. This usage can be a little confusing. In many cases where a plaintiff has claimed that the defendant abused the influence he acquired in a relationship of trust and confidence the plaintiff has succeeded by recourse to the rebuttable evidential presumption. But this need not be so. Such a plaintiff may succeed even where this presumption is not available to him; for instance, where the impugned transaction was not one which called for an explanation.*" [Emphasis added]

445. These pronouncements remind us that what amounts to undue influence, and when (if at all) an evidential shift occurs, cannot be reduced to a simple formula but is highly context-specific and ultimately dependent upon "*all the circumstances of the case*". In short, the claimant must establish a *prima facie* case of undue influence to benefit from the presumption and will generally be able to do so by establishing (1) that the 'victim' placed trust and confidence in another (i.e. was vulnerable to undue influence) and (2) that the challenged transaction calls for an explanation (i.e. in lay terms, has an eyebrows-raising effect). Implicit in establishing a qualifying relationship of vulnerability is that the impugned transaction gives rise to an actual or potential conflict between the donor's interests and the donee's interests.

446. It is also self-evident that the policy rationale behind this evidential rule is the practical consideration that most undue influence will be difficult to prove through direct evidence and would not be susceptible to relief at all if the normal onus of proof was applied. Accordingly, a claimant need only establish a relationship of vulnerability and a transaction which is on its face inconsistent with a 'normal' state of affairs. The claimant then becomes entitled to receive the benefit of the presumption and to be relieved of the usual full burden of proving actual undue influence.

Burden of proof: principles governing the application of legal test

447. How this presumption has been applied in other cases is instructive. In *Royal Bank of Scotland-v-Etridge (No 2)* [2002] 2 AC 773 itself, some guidance can be found as to how the requirement that the impugned transaction must 'call for an explanation' should be forensically assessed. The factual matrix in that case was quite different to the present case, the somewhat generic situation of a wife

allowing her interest in property to be used as security for her husband's business debts. The House of Lords however more broadly made it clear that there was no essential requirement that the transaction be 'disadvantageous' to the wife because disadvantage was not an apt requirement in the marital relationship context. As Lord Nicholls observed:

> "*28 …Unlike the relationship of solicitor and client or medical adviser and patient, in the case of husband and wife there are inherent reasons why such a transaction may well be for her benefit. Ordinarily, the fortunes of husband and wife are bound up together…*"

448. This point of principle is significant as a guide to the correct approach to the evidence in the present case where the impugned transaction was quite obviously (and on its face) for the benefit of Alan to some extent. I reject Mr McPherson QC's invitation to apply the "disadvantage' criterion applied in *National Westminster Bank-v- Morgan* [1985] 1 AC 686 at 705 on the ground that this narrow approach has been disapproved by the House of Lords in *Etridge*. Lord Scott expanded upon this point in the following manner:

> *159. For my part, I would assume in every case in which a wife and husband are living together that there is a reciprocal trust and confidence between them. In the fairly common circumstance that the financial and business decisions of the family are primarily taken by the husband, I would assume that the wife would have trust and confidence in his ability to do so and would support his decisions. I would not expect evidence to be necessary to establish the existence of that trust and confidence. I would expect evidence to be necessary to demonstrate its absence. In cases where experience, probably bitter, had led a wife to doubt the wisdom of her husband's financial or business decisions, I still would not regard her willingness to support those decisions with her own assets as an indication that he had exerted undue influence over her to persuade her to do so. Rather I would regard her support as a natural and admirable consequence of the relationship of a mutually loyal married couple. The proposition that if a wife, who generally reposes trust and confidence in her husband, agrees to become surety to support his debts or his business enterprises a presumption of undue influence arises is one that I am unable to accept. To regard the husband in such a case as a presumed 'wrongdoer' does not seem to me consistent with the relationship of trust and confidence that is a part of every healthy marriage.*
>
> *160. There are, of course, cases where a husband does abuse that trust and confidence. He may do so by expressions of quite unjustified over-optimistic enthusiasm about the prospects of success of his business*

enterprises. He may do so by positive misrepresentation of his business intentions, or of the nature of the security he is asking his wife to grant his creditors, or of some other material matter. He may do so by subjecting her to excessive pressure, emotional blackmail or bullying in order to persuade her to sign. But none of these things should, in my opinion, be presumed merely from the fact of the relationship of general trust and confidence. More is needed before the stage is reached at which, in the absence of any other evidence, an inference of undue influence can properly be drawn or a presumption of the existence of undue influence can be said to arise." [Emphasis added]

449. Decisions of the lower Courts are helpful in elucidating the practical application of this evidential rule beyond the narrow factual and legal matrix of the *Etridge* case. As regards relationships of trust and confidence, in *Kicks-v-Leigh* [2014] EWHC 3926 (where the incapacity claim was rejected), the claimants placed reliance on the defendant daughter's "*efforts to keep* [her mother] *isolated from the Oxford family*". The principal asset of the mother (the proceeds of sale of her house) was given to the daughter who was supervising her care the year before her death and the other siblings received nothing. A few years earlier, the defendant had encouraged the deceased to move to Maidstone, facilitating the sale of the deceased's home. Stephen Morris QC (sitting as a Deputy High Court Judge) held:

> "*210. In my judgment, the relationship between Mrs Smith and the Defendant was one of trust and confidence and one in which the Defendant was in the ascendancy and Mrs Smith was vulnerable.*
>
> *211. First, I find that, in general, Mrs Smith was frightened of doing things which would upset her only remaining daughter, the Defendant, and that this fear was driven by her experience of having lost her other daughter, Norma. Thus, Ms Treherne, an independent witness, recorded, in the attendance note of the meeting of 26 November that Mrs Smith did not want to be the person to tell the Defendant about her own decision to cancel the appointment of the Defendant as sole attorney. Mr Kicks gave evidence to similar effect that Mrs Smith did not want to tell the Defendant directly that she did not want her and Mr Leigh to have control of her finances and more generally that Mrs Smith was frightened of upsetting the Defendant. I also accept the evidence that the reason why, on New Year's Eve, Mrs Smith had told Kent Social Services and the police that she was happy to remain in Maidstone was that she was worried about the consequences for her daughter if she had told those authorities that she was not content. Since, as I find, Mrs Smith herself had expressed her clear preference to stay in Oxford, I accept that this is the likely explanation for the contrary view she expressed to officials on New Year's Eve. The relationship between the Defendant and Mrs Smith was a loving*

relationship. Nevertheless the Defendant herself was in turn dominated by her husband Mr Leigh. Mrs Smith and Mr Leigh did not get on and Mrs Smith was frightened of doing things contrary to Mr Leigh's will because to do so would cause upset to her daughter. In this way, the Defendant's ascendancy over her mother was driven by her own husband's ascendancy over her.

212. *Secondly, the circumstances surrounding the LPA evidence the relationship of ascendancy. Mrs Smith was initially prepared to give her daughter sole LPA, but when this was explained to her by an independent advisor, she did not wish to do this and signed documents withdrawing the sole LPA and appointing joint attorneys instead. At the same time she expressly told Ms Treherne that she did not want any further influence from the Defendant's side of the family. Most significant in this regard, however, is the fact that shortly after signing the documents, Mrs Smith signed two documents purporting to go back on the decision she had reached in the presence of Ms Treherne. The documents - bearing the dates 28 November 2009 and 4 January 2010 respectively - were manuscript and in the handwriting of the Defendant herself. In the first document, Mrs Smith states that, after all, she did want the Defendant to be sole attorney. This itself clearly suggests that, given the length and detail of Ms Treherne's meeting with her, the document was written at the Defendant's behest and did not represent Mrs Smith's own view. However what confirms that these two documents did not express Mrs Smith's true wishes, but rather were written at the behest of the Defendant and Mr Leigh is the statement in the letter of 4 January 2010 to the Office of the Public Guardian that the objection to the original sole LPA had been 'arranged without her knowledge'. This was wholly untrue, and is evidence of the ascendancy and control of the Defendant over Mrs Smith.*

213. *Thirdly, I find that the Defendant and Mr Leigh caused Mrs Smith to move to their home in Maidstone on 27 December 2009 and that they did so contrary to Mrs Smith's wishes. Both in the period leading up to and in the days immediately prior to that date, Mrs Smith had consistently expressed her view that she did not want to move from her home in Oxford. I refer in particular to Dr Huckstep's evidence of his meeting with Mrs Smith and the Defendant only three days earlier and the fact that he advised the Defendant not to override her mother's wishes. This is supported by the evidence of Ms Treherne's attendance note of her visit on 26 November 2009, and by the evidence of Mrs Allen and Mr Fidler that Mrs Smith had over time consistently expressed her desire to stay at her home. That it was against her wishes is also borne out by the steps taken by the Defendant and Mr Leigh, in the immediately following days, to keep the Oxford family in the dark about what had happened and where she was.*

214. *Fourthly, the Defendant placed Mrs Smith in a care home on or before 13 January 2010. This too was against Mrs Smith's wishes, expressed to Dr Huckstep less than three weeks earlier, that she did not wish to go into a home.*

> *215. Fifthly, once at the Care Centre, the Defendant went to considerable lengths to isolate Mrs Smith from the Oxford family and to prevent them from contacting her, or even finding out where she was, despite the fact that it is clear that Mrs Smith welcomed such contact. The Oxford family did not find out where Mrs Smith for over five months. On 14 January 2010, the Defendant instructed staff that named members of the family were not to visit Mrs Smith. On 22 May 2010, she instructed staff that phone calls were not to be put through. On 29 July 2010, she instructed staff not to let Lisa Martin and her children see Mrs Smith. On 24 August 2010, she and Mr Leigh came to the Care Centre to prevent Mr and Mrs Coppock and Mrs Allen from seeing Mrs Smith. On 11 November 2010, the Defendant instructed the staff in writing that no visitors were to be left unsupervised with Mrs Smith.*
>
> *216. Finally, the marketing and sale of the Property was managed, almost entirely, by the Defendant and Mr Leigh. Mr Leigh changed the locks on the Property on the day that Mrs Smith went to Maidstone. Instructions to Withy King were given by the Defendant or Mr Leigh. The address for correspondence given to Withy King was the Defendant's address, despite the fact that Mrs Smith was, at the time, living at the Care Centre. There was only one occasion when Mrs Smith herself made direct contact. It was Mr. Leigh who expressly authorised exchange.*"

450. The Plaintiffs' counsel relied (Closing Submissions, paragraph 388 and in oral argument) on *Simpson-v-Simpson* [1992] 1 FLR 601. In that case the testator's children by his first marriage sought to challenge transfers of assets made by him to his third wife after he was diagnosed with brain cancer and in the three months before his death. Morritt J (as he then was) held (at page 621):

> "*The plaintiffs contend that undue influence is to be presumed from the Professor's reducing mental capacity, in consequence of his terminal illness, his increasing dependence on Dr Simpson, the effect of the transfers on the dispositions made by his will, the fact that such transfers were not in keeping with the Professor's normal pattern of behaviour, and the fact that the Professor never consulted, nor, except in relation to the purported gift of half the proceeds of sale of 'Dancer's End', even informed Mr Quinton, his solicitor and friend of many years' standing. These allegations are amply made out by the evidence. Dr Kelly and Professor Murphy agreed that a person in the position of the Professor becomes more and more susceptible to influence from the person looking after him, and less and less aware of those from whom he is parted.*" [Emphasis added]

451. As regards whether the transaction calls for an explanation, in *Kicks-v-Leigh* this limb of the presumption test was dealt with almost summarily:

"*218. As I have found in paragraph 193 above, the Proceeds represented Mrs Smith's principal asset and there is no evidence that Mrs Smith had any other asset of substantial value. The effect of making a gift of that asset to the Defendant was effectively to deprive the beneficiaries under her will of all or a substantial part of their inheritance under that will. It would leave Mrs Smith with little money to fund her future life, including her care home and nursing fees. Moreover, given her age, poor memory and poor eyesight, and even though, as I have found, Mrs Smith was capable of understanding the transaction, the nature, size and effect of the transaction was such that it was out of the ordinary and called for an explanation.*"

452. In *Hammond-v-Osborne* [2002] EWCA Civ 885, the donor was a retired 72 year old bachelor who having become physically incapacitated after an accident was grateful to receive extensive assistance from a neighbour he came to regard as a daughter. His mental capacity was diminished but not lost following another fall and he gifted most of his wealth to his caregiver less than 2 months before his seemingly unexpected death. It was conceded that there was a relationship of trust and confidence and that the gift called for an explanation. The concession was no doubt in part at least prompted by the fact that a substantial gift to a 'stranger' is more strikingly and inherently surprising than a substantial gift to one family member at the expense others with whom the donor also has familial ties.

453. As far as rebutting the presumption is concerned, I adopt the principles commended to the Court by D2-D4's counsel. This Court considered the rebuttal requirements in a case where the operation of the presumption was conceded, *Gouldbourne-v-Gouldbourne*, Civil G0207 of 2014, Judgment dated April 8, 2021 (unreported) (Carter J, Acting). The following passages in Carter J's Judgment are again particularly instructive:

"113. *In **Hackett v CPS & Hackett**[77], the issue before the Court was an application relating the ownership of a house brought by the 2nd Defendant's mother who claimed that the transfer of the house from her to the 2nd Defendant for no consideration should be set aside on the grounds of presumed undue influence of the 2nd Defendant and/or non est factum on the basis that when the claimant signed the transfer of the house, she did not know what the document was. The 2nd Defendant supported the claimant's application but the Revenue and Customs Prosecutors Office, [now the Crown Prosecution Service ('CPS')] contested it on the basis first, that the house was purchased with the*

[77] [2011] EWHC 1170 (Admin).

proceeds of the 2nd Defendant's criminal activities and second, that the claims of presumed undue influence and/or non est factum cannot succeed.

114. *In its consideration of the question: 'Can the CPS (as the party seeking to counter the inference of undue influence) discharge the evidential burden and provide a satisfactory explanation for the transfer so that the presumption in favour of undue influence can be rebutted?", the Court referred to the case of* ***Smith v Cooper***[78] *in which Lloyd LJ explained in relation to the presumption of undue influence: -*

> *'61. If that is shown, ...the presumption of undue influence applies, that is to say, the court will presume that the transaction was procured by undue influence exercised by one party over the other, in other words by the abuse by the one of the position of influence that he has over the other. In such a case it is then up to the one party to prove that the transaction was not procured by an abuse of his position of influence but was rather the free exercise of the will of the other party as a result of full, free and informed thought.*
>
> *...*
>
> *He would normally discharge that burden - as, for instance, now at least occurs in husband and wife cases - by showing that the Defendant entered into the matter with his will fully unconstrained, usually with the benefit of independent legal advice'"*

115. ***Smith v Cooper*** *is also authority for the proposition that it is not sufficient for there to be a reasonable explanation for the transaction or that it was not manifestly to [the donor's] disadvantage.*[79] *Rather what must be considered is whether it had been proved the Defendant '...had discharged the burden of proving that [the donor] entered into the transaction of [his] own free will, independently of, and not in any way as a result of, the influence that [the Defendant] was in a position to exercise over[him].* " [Emphasis added]

Standing

454. D2-D4 did not formally advance by way of their defence that the Plaintiffs lacked standing to challenge the validity of the Declaration of Exclusion. Mr McPherson QC raised the point in oral

[78] [2010] EWCA Civ 722.
[79] [2010] EWCA Civ 722, paragraphs 65-66.

closing submissions in a somewhat tentative manner. The point was not ultimately pursued[80]:

> "*MR MCPHERSON: Perhaps I'm saying no more than this; one needs to take real care in this case to avoid giving the impression that anyone that has a bit of a grumble about a potential right as a beneficiary being impacted in some way, shape or form, giving them suddenly an entitlement to come in and pursue litigation through the courts. That's really the full extent of our complaint here.*
>
> *MR JUSTICE KAWALEY: I mean, if you had a case of beneficiaries who were simply really objects of a discretionary power, that would perhaps be going too far, whereas here, these are actual beneficiaries with interests, aren't they. Interest in the capital.*
>
> *MR MCPHERSON: Yes. As I say, my concern is more of a point of principle here --*
>
> *MR JUSTICEKAWALEY: Yes. Okay.*"

455. Mr McPherson QC posed the question of whether a third party could impugn a transaction where the victim was alive and did not wish to bring a claim. It seems right to assume that either the victim or someone standing in his shoes (such as an executor) are the only obvious parties whose standing to bring such a claim would ordinarily be unimpeachable. He implied that it was unusual for someone other than the actual victim to be bringing an undue influence claim. It may well be more common in current times for the victim of undue influence themselves to assert the claim. This was not always the case. In *Kumari-v-Public Trustee of Fiji* [1981]UKPC 32 (a case which was not referred to in argument), Lord Diplock observed:

> "*….Unusually for undue influence cases, which are generally brought after the victim's death, the judge had the opportunity of seeing the old lady in person, hearing her evidence, forming his own opinion as to how senile she was and how susceptible to victimisation by anyone she trusted she must have been…*"

456. As I observed in the course of the hearing, the law ought to be that any beneficiary of a trust who is removed by a deed of exclusion (or heir who has been disinherited by a new will) possesses the requisite standing to complain that the legal act which interfered with their actual or contingent entitlement is invalid. The standing point was tentatively raised by reference to *Re Riviera Trust* [2018] JRC 210. In that case, where the standing issue was formally argued, Sir Michael Birt

[80] Transcript Day 29, page 95 line 22-page 96 line 4.

disposed of the point with the following cogent analysis:

> "*31. We accept that, in the vast majority of cases, it is likely to be the victim who will bring an action to rescind a transaction entered into under undue influence as the transaction is likely to be disadvantageous to him and advantageous to the other party. However, that is not the position in relation to the revocation of a trust. There, the disadvantage rests entirely with the beneficiaries of the trust. They will have lost the ability potentially to benefit from the trust fund. Conversely the settlor will have benefitted as the assets will now belong to him absolutely.*
>
> *32. In our judgment, the law allows a beneficiary to seek to impugn the revocation of a trust on the ground that the settlor exercised the power when under the undue influence of another. We summarise our reasons for so concluding as follows:-*
>
> *(i) If a beneficiary cannot challenge the revocation of a trust, it is likely to mean that a revocation will not be challenged by anyone, even if carried out as a result of undue influence.*
>
> *(ii) Suppose that a settlor is found to have exercised a power of revocation of a trust at the point of a gun (i.e. under duress). He may decide not to seek to rescind the revocation as he may remain fearful of the person who threatened him with the gun and he will of course in any event now be the absolute owner of the assets. Is it really the case that a beneficiary (who has been prejudiced by such revocation) cannot seek to impugn such a revocation on the ground that it was effected under duress? In the circumstances envisaged above (i.e. that the settlor remains in fear) no one would be able to challenge the revocation despite it being effected under duress. We would be surprised if the law required such an outcome.*
>
> *(iii) It seems to us that the position must be the same where the settlor revokes the trust as a result of undue influence rather than duress. In both cases his free will has been overborne, albeit by different means. In both cases, it must surely be right that a beneficiary who has been disadvantaged by the revocation should have the ability to challenge the revocation on the ground that it did not reflect the free will of the settlor.*
>
> *(iv) In England, duress is a common law doctrine whereas undue influence was developed by the courts of equity to supplement the law of duress. The different historical roots of the common law and equity have sometimes led to difficulties in connection with remedies under English law. However, this Court is untroubled by such history and is free to approach the matter as one of principle. In our judgment, there is no principled reason for*

refusing to allow a beneficiary to challenge a revocation where that revocation is said to have been carried out by the settlor as a result of duress or undue influence.

(v) In any event, there seems to be no inherent difficulty in allowing a person who has been disadvantaged by the act of a person acting under undue influence to challenge that act. Thus, even under English law a person who considers that he has been disadvantaged by the terms of a will (because under intestacy or a previous will he would do better) may challenge the validity of the will on the ground that it was made as a result of undue influence exercised by another over the testator. We accept that under English law, the doctrine of undue influence in relation to wills is distinguished from the equitable doctrine in relation to inter vivos transactions, but that again is an accident of history. The law has clearly considered it just that a potential beneficiary should be able to challenge the validity of a will on the basis that the testator was acting under the undue influence of another. If it is satisfactory in connection with wills, we see no principled reason why it should not also be possible in connection with actions such as the exercise of a power to revoke a trust."

Findings: has the case for a presumption of undue influence been made out?

457. It is helpful to firstly return to the Plaintiffs' pleaded case on undue influence. The case as to why the relationship qualified as one of trust and confidence is pleaded in summary as follows in paragraph 75 of the ASOC:

> "*(i) their relationship as husband and wife; (ii) Alan's severe ill-health as at the date of the February 2016 Letter; (iii) Alan's vulnerability due to his failing eyesight, terminal cancer and excessive alcohol consumption; (iv) Deborah's ability to control Alan's access to and communications with his family, friends and professional advisers, Deborah assumed a position of trust, confidence and control in relation to Alan's personal and financial affairs.*" [Emphasis added]

458. Reliance is not placed merely on the relationship of husband and wife, but in conjunction with the allegations that:

(a) he was severely ill;

(b) he was vulnerable because of, *inter alia,* failing eyesight and terminal cancer; and

(c) his wife assumed a position of trust, confidence and control of his personal and financial affairs.

459. In addition to that summary paragraph, the case is developed with more particularity in paragraph 75.2 which makes to my mind the following most significant plea in this regard:

> "*75.2M. Deborah took control of, coordinated and channelled all the legal advice and ensured that Alan was never independently advised…*"

460. The case as to why the transaction requires an explanation is pleaded in summary as follows:

> "*75.3 The effect of the declarations contained in the February 2016 Letter further calls for explanation in circumstances where:*
>
> *(i) Alan's apparent wishes therein contained were at odds with his apparent wishes contained in the August 2013 letter to the effect that a principal reason for setting up the trust was to benefit his five children, and that it was his wish that 'the Trust must always be kept intact'. These earlier wishes accorded with the Plaintiffs' own understanding of Alan's original motivation for establishing the Trust and his long-standing wishes held thereafter as expressed from time to time, including his letter of wishes.*
>
> *(ii) The production of the February 2016 Letter came a number of months after the Plaintiffs were erroneously told by Mr Packman that the Trust had already been 'dissolved', whereas it had not been. The exclusion of all of the Plaintiffs as beneficiaries, whilst Deborah remaining as a beneficiary, was also inconsistent with the proposals put forward by Mr Packman and the letter received on or around 12 August 2015 by the directors of CSLC, under which the shares in CSLC would be distributed to Alan alone.*
>
> *(iii) On the few occasions on which the Plaintiffs were able to speak with Alan, he did not appear to understand the extent of his IRS liabilities or to support the termination of the Trust.*
>
> *(iv) Deborah deprived the Plaintiffs of any opportunity to discuss the February 2016 Letter with Alan, or of any opportunity to communicate with him at all between the date of the February 2016 Letter and Alan's death, notwithstanding the Access Petition. This followed a period going back to around August 2015 since which time Deborah had almost entirely deprived the*

Plaintiffs the means of communicating with Alan.

(v) Shortly after the February 2016 Letter, the voice messages and allegations of wrongdoing were made against Michele and Nicholas which, for the reasons stated above, should be inferred were the produce of Deborah's influence and would not have freely been made by Alan.

75.4 In those circumstances, it is to be presumed alternatively to be inferred that Deborah caused the February 2016 Letter to be produced and signed by Alan by undue influence and/or her unconscionable conduct." [Emphasis added]

461. D2-D4 sensibly did not ultimately pursue the hopeless plea that the Trustees had the unilateral right to determine whether undue influence had occurred (RAD paragraph 95) at trial. However, it is noteworthy (but not necessarily dispositive) that paragraph 75.1 of the ASOC (which alleged a relationship of trust and confidence and dependency) was not expressly pleaded to directly at all. Only the detailed pleas in paragraph 75.2 about how Deborah allegedly actually exercised control were expressly denied. Mr McPherson QC, quite understandably, struggled by way of submission to advance a coherent case as to why the striking circumstances of the present case did not meet the requirements for the first limb of the presumption of undue influence:

"*(a) Ps' case as to why a presumption of influence should be found to have existed as a result of the relationship between Alan and Deborah appears to stem from the combination of*

(i) Alan's physical illnesses and the consequent impairments on matters such as sight, hearing, mobility and ability to care for himself, and

(ii) His consequent 'out of the ordinary' need to rely on Deborah for physical assistance for day to day activities.

However, while such matters might give rise to a presumption of influence in extreme cases, this is not such a case; the evidence shows quite how dominant and 'independent of thought' Alan remained in his relationship with Deborah at all times

(b) The true nature and effect of the transaction is a matter that is capable of affecting the assessment of whether or not a relationship of influence is shown to exist: Malik v Sheikh [2018] EWHC 973 (Ch) @ para 45. And so where, as here,

> *(i) The 'transaction' was one that Alan had been desirous of undertaking throughout 2015 and 2016, and*
>
> *(ii) Far from being disadvantageous to him, the 'transaction' was very much to his advantage (and indeed, was one instigated and actively pursued by him).*
>
> *that is a strong pointer against the transaction having been the result of a relationship of trust and confidence.*"

462. It was further argued:

> "*We acknowledge that Ps also add (1) the alleged sequestration by Deborah of Alan from Ps and friends (sic), and (2) Deborah having allegedly falsely told Alan that Ps had abandoned him. If the Court were to find that Deborah had in fact acted in those ways towards Alan, then we accept that that would be likely to tip the relationship into one where influence could be presumed. But of course Deborah's position is that such accusations are simply untrue.*"

463. In my judgment these submissions put the bar too high for the purposes of determining whether the relationship is capable of triggering the operation of the presumption in the Plaintiffs' favour, assuming the separate transaction-focused requirement is also met. I acknowledge the force of the following observations of Fancourt J in *Malik-v-Shiekh* [2018] EWHC 973 in general terms:

> "*45. As to the first, the true nature and effect of the transaction is a matter that is capable of affecting the assessment of whether or not a relationship of influence is shown to exist. A transaction that is seriously and inexplicably detrimental to a disponor is plainly likely to lead to a conclusion that it can only have been the result of a relationship of trust and confidence on the one side and influence on the other side. I agree with Ms Anderson QC that there is a connection between the two separate factual assessments, which themselves are aspects of undue influence generally, such that the more disadvantageous and inexplicable the transaction the more easily a relationship of influence will be established to exist.*"

464. *Malik* concerned a commercial transaction where property was conveyed as security for business credit. The *dictum* relied upon by D2-D4's counsel does not support the wider proposition that one must show (to benefit from the presumption) any more than a relationship of vulnerability as opposed to going further and proving that undue influence actually occurred. The main purpose of the presumption is to relieve a claimant of a burden which will often be difficult to meet. This is confirmed by the pivotal finding of Fancourt J later on in his judgment in *Malik*:

> "*Accordingly, in my judgment, the Judge came to the wrong evidential conclusion on the existence of a relationship of influence between the Maliks and Mrs Malik in January 2013. He asked himself whether there was positive evidence of a relationship of trust and confidence in relation to financial matters, but that is a narrower question than that envisaged by Lord Nicholls of Birkenhead in Etridge: see Thompson v Foy [2009] EWHC 1076 (Ch) at [100], per Lewison J. The principle is not confined to cases where trust and confidence is reposed, either financially or generally, but extends to cases where there is evidence of dependence or vulnerability: Beech v Birmingham City Council [2014] EWCA Civ 830 at [59], per Sir Terence Etherton C, referring to Etridge. Particularly having regard to the true nature of the transaction, the evidence that was before the Judge proved an evident vulnerability of Mrs Malik in relation to dealings for the benefit of the Company and her sons at that time, when HIS was in financial difficulties and Mrs Malik would not benefit directly from the Company's business."*[Emphasis added]

465. In my judgment, the evidence that Alan was vulnerable in relation to dealings for the benefit of Deborah on March 2, 2016 (and in the preceding 5 months at least) is compelling when the relevant transaction is properly understood. After Alan's terminal cancer diagnosis in mid-October 2015, the decision to terminate the Trust for his sole benefit was materially altered by the fact that, when distributed, the Trust assets were unlikely to be, for very long, of any personal benefit to him. When the proposed distribution recipients became Alan and Deborah instead of just Alan in or about December 2015, and the plans for Alan establishing two separate Florida grantor trusts slipped off the agenda, the primary result of the transaction became extinguishing the Plaintiffs' beneficial interests in the Trust and transferring those interest to Deborah. This created a sharp tension between his original rationale of reserving the right to make provision for his children and consummating a transaction from which only his wife would likely benefit and which effectively disinherits his children. I reject D2-D4's contention that the aim of the transaction in March 2016 was essentially the same as in July 2015. The "effect" of the transaction lies at the heart of the 'disadvantage' limb of the Plaintiffs' claim and is pleaded explicitly in paragraph 75.2 of the ASOC, supported by uncontested pleas to the effect that Alan had not decided to 'disinherit' them.

466. Not only was Alan in a position where he ought obviously to be contemplating the need to make provision for all of those whom he would leave behind, he was also in a position of extreme dependency on Deborah for both his personal and financial needs. Due to his eyesight and mobility problems, which surfaced early in 2015 and worsened leading up to his operation and terminal diagnosis in October that year, which added transitory mental capacity impairments as well, his dependency necessarily became quite extreme as the medical reports (mentioned above) make

clear. Against this background, I am bound to find that Alan was vulnerable to undue influence because at all material times:

(a) he was legally blind, suffered from anxiety, had a recent history of chronic alcohol abuse and was both physically incapacitated and occasionally mentally incapacitated and/or impaired by major surgery, and by the combined effects on his mental clarity and energy of his terminal illness and an array of medicaments including anxiety pills, chemotherapy, morphine and/or other pain-reducing drugs;

(b) he was\, on any practical and realistic view of the undisputed facts, heavily dependent on his wife to manage his affairs, which required making high-level commercial judgments against a multi-jurisdictional background involving US tax law, Cayman Islands trust law and a UK-based property portfolio held by a company jointly owned by the Trust and a non-family joint venture partner;

(c) the decision to prefer the interests of his wife to those of his children after terminating the Trust was only clearly expressed after he became heavily dependent on his wife. Prior to that, he intended to terminate the Trust and make provision for both his wife and his children. The post-dependency decision was inconsistent with his prior longstanding plans as reflected in the Trust and related Letters of Wishes;

(d) the Trustee was not initially willing to implement Alan's plans to terminate the Trust in July 2015 after his children objected to the plan;

(e) it is common ground that Alan never saw any of his children in person after August 2015 and the last child who visited Alan (Jamie) was ultimately locked out of Alan and Deborah's home. The effects of isolation from his children on Alan's ability to remember them are illustrated by his incomplete and/or mistaken recollections of them at the March 2, 2016 meeting;

(f) invitations from Forsters in London and Ogier in the Cayman Islands to consider a compromise were rebuffed on Alan's behalf and when Ogier questioned the need to terminate the Trust, the firm was replaced by Kobre & Kim (Cayman) which was

specifically retained to implement a decision which had already been purportedly been made by Alan;

(g) it is clear beyond sensible argument, that Alan had a very limited role in instructing lawyers in Florida, Cayman and London and received no (or no sufficient) independent advice about the implications of the Declaration of Exclusion in light of the fact that (1) he was unlikely to be able to personally benefit from receiving the Trust assets for very long and (2) he had neither decided to nor had any valid reason to 'disinherit' his children and descendants;

(h) written requests to visit their father by Jamie and/or Nick after his terminal diagnosis and an oral request by Michele to speak to her father over Christmas 2015 were all rebuffed. Yet Alan told the Trustee on March 2, 2016 he would be surprised to know his children wished to see him. His lawyer objected to the Trustee reading an email to Alan from his children at the March 2, 2016 meeting on the grounds that it was inappropriate for that context. However, there was no evidence that this email was communicated to Alan at any point thereafter;

(i) although there is no evidence that Alan and/or Deborah were specifically told how long Alan had to live, the vigour of the efforts which were expended on Alan's behalf to consummate the termination of the Trust and assuage the Trustee's concerns about his children's entreaties not to do so, after his terminal diagnosis, suggests a keen appreciation that his life expectancy was limited. In the event, Alan died one week after the CSLC board approved the registration of the Trust's CSLC shares in Alan and Deborah's name.

467. These findings are all supported directly or inferentially by contemporaneous documentary evidence which is either undisputed or incapable of sensibly being disputed. They do not depend on any finding at this stage that Alan was deliberately "sequestered" from his London family as it is clear that he had no in-person contact with them after early August 2015 and very limited telephone contact after October 2015. These findings are also supported by the unchallenged Expert Psychiatric evidence of Professor Jacoby. In Table 3 of his Expert Report, Professor Jacoby set out a series of risk factors or "Red Flags" in relation to undue influence which he considered might be present including:

- Emotional and physical dependency on someone in a position of trust;
- Family conflict, isolation and change in family relationships;
- Physical disability, substance abuse; and
- Making a disposition inconsistent with previous wishes.

468. That these factors constituted potential red flags was not disputed with Mr McPherson QC rightly pointing out that the presence or absence of these factors in the present case were ultimately matters of fact for the Court, not matters for expert opinion evidence. This is why counsel properly challenged Professor Jacoby's assertion that Alan "*was a vulnerable to undue influence in 2015-2016 by reason of physical illness, mental illness and sequestration from his family*" (paragraph 174). That conclusion is entirely a matter for the Court and I place no reliance upon any such factual conclusions on the Plaintiffs' Expert's part. Professor Silberberg did not address undue influence at all. Accordingly, I do find that the Red Flags identified by Professor Jacoby are (a) factors which will generally be indicative of vulnerability to undue influence and (b) (based on my own evidential assessment) I find that these vulnerabilities were present in this case. Morritt J (as he then was) approached expert evidence about potential vulnerabilities to undue influence in this way in *Simpson-v-Simpson* [1992] 1 FLR 601 at 621 as noted above.

469. The main thrust of the legal arguments advanced by D2-D4 against finding that a qualifying relationship existed were as follows:

(a) Alan was in fact a dominant personality, so any suggestion of vulnerability which might otherwise be found to exist was unsupportable;

(b) the transaction was one which Alan had actively pursued through 2015 and 2016 and was positively for his benefit.

470. In my judgment, the first argument is properly a ground for potentially rebutting a presumption of undue influence rather than a basis for refuting the existence of a qualifying relationship of trust

and confidence. For the presumption to have any meaningful practical effect, it must suffice to show circumstances which *prima facie* suggest either a relationship of trust and confidence or vulnerability. The fact that the allegedly influenced party in fact had personal qualities which allowed him to resist pressures the ordinary person would be vulnerable to amounts to a positive defence rather than a matter the Plaintiffs have to disprove by way of establishing a *prima facie* case of undue influence. It is a point which is ultimately not supported by the evidence in any event.

471. The second argument, that Alan had consistently pursued the transaction for several months, is more relevant to the second limb of the presumption test, but one which I would summarily reject in any event at this stage. The transaction changed in its character after Alan's terminal diagnosis as the likelihood that he could personally benefit from receiving the Trust assets and make provision for his children and Deborah after the Trust was terminated was greatly diminished if not extinguished altogether.

472. However, I ultimately have little difficulty in finding that:

(a) The potential risk factors described by Professor Jacoby were in fact present at all material times in the present case; and

(b) that the cumulative effect of their presence, having regard to the relationship between Alan and Deborah and the consequences of the Declaration of Exclusion, established both (1) a relationship of trust and confidence and (2) evidence of both dependence and vulnerability.

473. The first limb of the test for the application of the presumption of undue influence is accordingly very clearly met.

474. Does the transaction, the execution of the Declaration of Exclusion and the related consequential actions, call for an explanation? In my judgment it clearly does. In reaching this conclusion I do not ignore the fact it appears to be entirely coincidental that the Declaration of Exclusion came to be executed only 3 months before Alan died. However, having found that Alan possessed mental capacity most of the time after his terminal diagnosis, he must be deemed to have known that there had been a major shifting in the tectonic plates as far as his life expectancy was concerned. The July 2015 plan of terminating the Trust and distributing the assets solely to himself with a view to

(a) meeting the IRS FATCA claim, and (b) creating separate US trusts in favour of his wife and children had to be revisited. This was because there was no longer any reason to expect that Alan would have the health, vigour or longevity, after the uncertain date when the now controversial termination of the Trust was consummated, to make separate subsequent provision for his wife and London family.

475. The proof of the pudding is usually in the eating. The July 2015 proposed transaction was revisited in one explicit respect. Deborah became a joint donee together with her terminally ill husband. The effect of that was that if he died before any of the Trust's proceeds could be placed in new trusts, Deborah would simply become the owner and controller of the CSLC shares which were the Trust's principal assets. It seems fanciful to suggest that so significant a change in terms of securing his wife's financial interests articulated in writing for the first time (it appears) in late 2015 after his doctors had decided to provide only palliative care was not materially influenced by concerns about how long Alan had left to live. It was articulated in a draft retainer letter for Cayman Islands lawyers who were being retained with specific instructions to work through a predetermined action list rather than advising Alan on the merits of various possible ways of proceeding. On a related front, Alan was encouraged to make the 2015 Will. This was an extremely precautionary step ensuring that in the unlikely event that Deborah predeceased Alan, his estate would pass to her own two children, his step-children.

476. The new lawyers were instructed in place of lawyers who had both (a) suggested using mediation to achieve a cost-effective and expeditious global settlement, and (b) queried whether it was necessary to terminate the Trust at all and whose services were apparently terminated as a result. With Alan spending most of his time on his sick-bed, obviously physically diminished and highly dependent on his wife and with his judgment and powers of concentration likely impaired, his purported decision to plough forward with this modified Trust termination plan relentlessly, eschewing any consideration of making peace with his children before he died, cries out for an explanation. Was that what Alan freely and independently himself chose to do?

477. In short, although the Plaintiffs' undue influence case, narrowly circumscribed, strictly focuses on their purported removal as beneficiaries (a legal act they undoubtedly have standing to challenge), I find that it is wholly artificial to assess the claim stripped bare of its surrounding factual and commercial context. In July 2015, the proposal was for the Trustee to terminate the Trust and

exercise its discretion to appoint all the assets to one beneficiary, Alan. That the Trustee was understandably reluctant to do. The only similarity between the 2015 and 2016 transactions was the ultimate commercial result. By March 2016 it was proposed to exclude the Plaintiffs as beneficiaries as an initial step, leave Alan and Deborah as sole beneficiaries and then terminate the Trust and make the distribution to the two of them. But while on August 1, 2015, Alan was clear that he did not propose to disinherit his children ("*unless they continue the path in which they are treading*") and that "*I now wish to benefit Debbie with regard to assets as well as my children*"[81], seven months later, after Alan's children had not seen him in person at all despite his terminal illness, the modified transaction implied a decision taken in the interim to disinherit the Plaintiffs and expressly contemplated that in the event of Alan's death his wife would receive all of the Trust assets. He died only days after the Trust assets were distributed jointly to himself and his wife with the result that his wife received all of the assets and the transaction was (subject to the present challenge) in substance for Deborah's sole benefit.

478. Despite the fact that Alan clearly had a falling out of some sort with his children over his initial decision to terminate the Trust, and might perhaps (on a superficial preliminary analysis) appear to have freely decided to disinherit them, their removal as beneficiaries in the circumstances which appertained in March 2016 was nonetheless an eyebrows-raising event in undue influence terms. Yet D2-D4's formal position, somewhat beguilingly, was that Alan had not when he executed the Declaration of Exclusion decided to disinherit his children. This is a position which itself begs the question as to why he so diligently made provision for his wife but not his children in the event of his imminent demise. Accordingly, bearing in mind Alan's manifest vulnerability to undue influence between mid-October 2015 and March 2, 2016 for the various reasons set out above, I find that the presumption of undue influence properly arises. Or, to put it another way, I find that the largely undisputed evidence establishes a *prima facie* case of undue influence.

479. For the avoidance of doubt I reject D2-D4's following submission in Appendix 11 to their Closing Submissions[82]:

> "*We acknowledge that Ps also add (1) the alleged sequestration by Deborah of Alan from Ps and friends (sic), and (2) Deborah having allegedly falsely told Alan*

[81] H Vol II/H384.
[82] At page 34 footnote 8.

that Ps had abandoned him. If the Court were to find that Deborah had in fact acted in those ways towards Alan, then we accept that that would be likely to tip the relationship into one where influence could be presumed. But of course Deborah's position is that such accusations are simply untrue."

480. In my judgment the combination of (a) a relationship of trust and confidence (based on the presence of multiple factors suggestive of vulnerability to undue influence, including the mere fact of isolation from the Plaintiffs) and (b) a transaction entered into by Alan, without the benefit of relevant independent legal advice, and which ultimately solely benefited Alan's wife at the expense of his children, suffices to support a *prima facie* inference of undue influence. As Lord Nicholls observed in *Etridge:*

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

481. This conclusion as to the operation of the presumption is not dispositive, however. The Plaintiffs must practically be viewed as bearing the ultimate burden of satisfying the Court that the execution of the Declaration of Exclusion should be declared to be invalid by reason of undue influence. Mr McPherson QC aptly relied upon *Royal Bank of Scotland-v-Etridge* [2002] 2 AC 773 at 816F where Lord Clyde observed:

> "*93 ...At the end of the day, after trial, there will either be proof of undue influence or that proof will fail and it will be found that there was no undue influence. In the former case, whatever the relationship of the parties and however the influence was exerted, there will be found to have been an actual case of undue influence. In the latter there will be none."*

Should the decision to execute the Declaration of Exclusion be viewed narrowly or in the context of the broader Trust termination decision of which it forms part?

482. An important but controversial submission was advanced by Mr McPherson QC in oral closing argument in relation to the capacity issue. He contended that the relevant decision which required analysis was the decision effected by the Deed of Exclusion, and not the wider collateral consequences of it. He relied on the following dictum of Lewison LJ in *Simon-v-Byford* [2014] EWCA Civ 280:

> "*45. I do not believe that previous authority goes to the length of requiring an understanding of the collateral consequences of a disposition as opposed to its immediate consequences. Nor do I think it desirable that the law should go that far. As Mummery LJ put it in Hawes v Burgess [2013] EWCA Civ 74; [2013] WLR 453 at [14]:*
>
> *'The basic legal requirements for validity are that people are mentally capable of understanding what they are doing when they make their will and that what is in the will truly reflects what they freely wish to be done with their estate on their death.'*"

483. Based on my overall factual findings as to capacity, the issue of the relevance of the collateral consequences of the Deed of Exclusion did not have to be directly addressed. For completeness, and in light of D2-D4's attempt to frame the transaction in March 2016 as being substantially the same as what was proposed in July 2015, I briefly explain why I would reject any suggestion that the collateral consequences of a transaction should be ignored in the undue influence context. In brief:

(a) it would be inconsistent with the broad and flexible nature of the equitable doctrine of undue influence to construe the impugned transaction in a narrow de-contextualised manner;

(b) in the factual matrix of the present case, the Declaration of Exclusion was understood by all concerned as forming part of an interlocked series of transactions designed to achieve a specific commercial result. This is not merely reflected in Kobre & Kim's terms of retainer. D2-D4's central thesis was that the "transaction" which started with the Declaration of Exclusion and culminated with the Trustee distributing the Trust assets to himself and

Deborah was not only beneficial to Alan, but was instigated by him with a view to achieving that beneficial final distribution; and

(c) the central controversy surrounding the transaction, and the reason why it was only consummated after a protracted process, was its potentially adverse impacts on Alan's children. Accordingly, whether Alan would have freely wished to terminate the Trust without making alternative provision for his children was (or ought to have been) an important aspect of his decision-making process;

(d) the video of Alan explaining the effect of the Declaration of Exclusion records his understanding of the Declaration as being to deprive his children of the benefit of the Trust assets. Alan himself understood the document he signed as being part of the wider Trust termination transaction of which it formed a significant part.

484. It would be highly artificial to ignore the direct and obvious consequences which flowed from the Declaration of Exclusion and the consequential and interlinked termination of the Trust and the transfer of the assets into Alan and Deborah's joint names without first (or simultaneously) making alternative provision for the Plaintiffs. Although only one transaction was impugned in *Simpson-v-Simpson*, the Court's findings were clearly based on an analysis of the substantial effect of the transaction. As Morritt J held (at page 622, in a passage more fully set out above):

> "*the transfers into joint names meant that Dr Simpson could draw out all the monies on her sole signature the following day. In the case of the investments, the Professor would require her signature in order to deal with them. By doing as he did, the Professor precluded any change in his will having any substantial effect because of the diminution of the estate that would pass under it…*"

Rebuttal of presumption of undue influence: preliminary

485. The central question is whether D2-D4 have shown that the Declaration of Exclusion was executed by Alan of his "*own free will, independently of, and not in any way as a result of, the influence that* [Deborah] *was in a position to exercise*"*: Smith v Cooper* [2010] EWCA Civ 722 (Lloyd LJ at paragraph 66). They sought to do so by advancing the following main, broad factual assertions:

(a) Deborah was not capable of influencing Alan because of his strong will. He was always the dominant party in their relationship;

(b) Deborah was at all material times a dutiful wife primarily motivated by carrying out Alan's instructions and never preferring her interests to his wishes. Alan was involved to a sufficient extent in instructing lawyers and receiving advice so as to demonstrate that the critical decisions made were freely made by him;

(c) Alan's primary motivation in terminating the Trust from 2015 to 2016 was gaining control of the Trust assets to be able meet the claims of the IRS. The transaction was very easily explicable; and

(d) Alan himself cut off communications with his children in the summer of 2015 and thereafter because he was angry at their refusal to honour his wishes, their failure to provide financial support and (as regards Michele and Nick) their abuse of his financial trust.

Was Alan's will so strong that he was not vulnerable to undue influence on the part of Deborah?

486. D2-D4's counsel identified as a threshold factual question in relation to the Plaintiffs' undue influence claim: "*Did Deborah have the capacity to influence Alan in connection with the decision to recover the assets from the Trust?*" In Deborah's Witness Statement, she deposed:

> "*The allegation that Alan was subject to my undue influence is categorically false. I have only ever acted in Alan's best interests and carried out his wishes. Alan was not vulnerable to my influence, rather he appreciated my support and constant companionship.*"

487. In her oral evidence, Deborah reinforced the idea that Alan was in no way vulnerable. Initially, she was understandably over eager to exculpate herself as regards the undue influence complaints. There was an inconsistency between her somewhat careful assertion, in her examination-in-chief, that she never discussed the Declaration of Exclusion with Alan before he signed it, which seemed designed to avoid any suggestion of undue influence and her breezy declaration under cross-

examination that "*Alan and I talked about everything. We shared no secrets.*"[83]. It beggars belief that she did not discuss the document with Alan as it was fundamental to the transaction that she had been involved in seeking to consummate for several months. Deborah was so keen to paint a picture of a perfect marriage that she incredibly suggested that a nurse's note of her complaints about Alan being verbally abusive while drunk dated February 27, 2015[84] recorded a conversation which "*did not take place*". However, she had already accepted in her examination-in-chief that after the FATCA issue surfaced at the end of 2014, Alan's drinking "*increased*". His health was also declining. On February 27, 2015, Deborah reported to Nick that Alan had been busy "*with his private nurse and physiotherapist*" and that their main credit card had been compromised[85]. These were stressful times and Michele credibly testified that her father drank when stressed. The 'verbal abuse whilst drunk' complaint must have been actually made by Deborah and supports in a general way the idea that Alan was ordinarily the dominant party in their relationship. One year later at the March 2, 2016 meeting, the Trustee's representatives' observations of the interactions between Alan and his wife supported the same conclusion.

488. It seems more likely than not that part of the secret of the success of Alan and Deborah's marriage was that he enjoyed being the dominant party and she enjoyed (like her mother) being the dutiful wife. Michele disagreed that Alan was in all respects the dominant party in his relationship with her mother, insisting that at home her mother "*ruled the roost*". Vivian Gill, the only former partner of Alan's to testify, may well have been financially dependent on Alan but she appeared to me to be far from a "wilting flower". It is impossible to avoid the suspicion that Alan's former partners viewed him as something of a lovable rogue whose wilder instincts they mistakenly felt they could tame. Not only was Deborah 18 years' Alan junior, but she was also by her own account raised in a traditional patriarchal home and was regarded by many friends as having a similar personality to her mother. Deborah appeared to me to be the sort of person who has the rare ability to love a romantic partner in a non-judgmental way for who they really are.

489. The mere fact that Deborah would not publicly show anything other than deference for Alan and that he was the dominant party in general terms does not, of course, mean that she was not capable of influencing Alan more subtly. Deborah's oral evidence sought to convey the impression, it

[83] Transcript Day 13 page 19 lines 3-4.
[84] I Vol. V/1993.
[85] G6/1568.

seemed to me, that her motives were entirely pure. In the Judaeo-Christian tradition, man is innately susceptible to being influenced against his better judgment to commit a grave moral transgression by a female's innate and almost child-like innocent charm. The English poet Milton, in '*Paradise Lost*', writing in the mid-1600s, evocatively describes Adam's fateful decision thus:

> "*Against his better knowledge; not deceived, but fondly overcome with female charm…*"

490. Within this moral construct (innately sexist in modern-day gender equality terms), the manipulative woman who plays the dutiful wife in public but in private provokes her husband into dark deeds, superimposing her own ambitions onto his, is an evil figure indeed. Shakespeare's Lady Macbeth, conceived in the early 1600s, is an archetypal 'wicked woman' who provokes her husband to kill his host in order to become king by famously saying, amongst other things: "*you are too full of the milk of human kindness*". The Plaintiffs' broad case theory, beyond the narrow confines of their pleaded case, clearly sought to cast Deborah as a Lady Macbeth-type figure. This prompted Mr McPherson QC to submit in his Closing Submissions:

> "*She was accused (as she has been repeatedly by Ps in recent years) of some of the most despicable conduct imaginable, over an inordinate period of time…*
> *The Court will also no doubt ask itself whether it considers Deborah to be a person*
>
> *(a) Who was capable of formulating the plan that Ps attribute to her*
>
> *(b) Who was capable of recruiting others to assist her to implement that plan*
>
> *(c) Who was capable of implementing that plan – and deceiving countless professionals and third parties along the way*
>
> *(d) Who was willing to subject Alan to terrible hardship to achieve the outcome for which (on Ps' case) she had been scheming for so many years.*
>
> *We say plainly not. Deborah was no evil mastermind; she was a loving wife trying to do her best to help her ailing husband to achieve his intentions.*"

491. I agree that Deborah is far removed indeed from an archetypal 'evil mastermind'. In my judgment an objective assessment of whether or not Deborah was capable of unduly influencing Alan during the critical period when he was acutely vulnerable to such influence does not depend on a stark

choice between viewing Deborah as acting solely as a "*loving wife*" or solely as "*an evil mastermind*". There is no inherent contradiction between the notions of a loving wife who is far from an evil mastermind being capable of unduly influencing her vulnerable husband. Human beings are far more complex than that. The doctrine of undue influence, after all, is not designed to deal with relations between fully functioning parties whose faculties are entirely intact. And judicial experience teaches that undue influence does not always manifest itself in overt, crude acts of domination. I accordingly place no weight on the fact that the Trustee observed no visible signs of undue influence; the relevant representatives appear to have been in reality looking for signs of coercion or duress. The fact that overt signs of control need not be proven is clearly demonstrated by the various authorities placed before the Court.

492. This incontrovertible legal position is further illustrated by this Court's decision in *E(C)-v-E(B)* [2016 (1) CILR 179], where Williams J helpfully set out the following guidance in relation to assessing the evidence in undue influence cases:

> "*45. As the matter before me appears to be the first case in which the Grand Court has been asked or has been required to conduct a detailed review of the law in relation to making a decree of nullity on the ground that the marriage is void due to duress, I make no apology for now replicating in full herein the portion of Munby, J.'s judgment*[86] *containing his analysis of his raised subsidiary points, as they may guide others in the future. He outlined the subsidiary points as follows ([2007] 1 FLR 444, at paras. 32–38):*
>
> > *'[32] The first is that, as Sir Jocelyn Simon, P. pointed out in* Szechter (orse Karsov) *v.* Szechter *[1971] P. 286, at 297, although in the nature of things the source of the fear and the agent of duress will generally be the other party to the marriage, this is not necessarily so.*
> >
> > *[33] The second is that there are, of course, many ways in which such duress or coercion may be brought to bear, a point illustrated by the well-known passage in the summing up of Sir J. P. Wilde to the jury in* Hall *v.* Hall *(1868) L.R. 1 P. & D. 481, at 482. That was a probate case, but the point is equally applicable in the present context:*
> >
> > *"pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no*

[86] In *NS-v-MI*.

valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes, is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led but not driven; and his will must be the offspring of his own volition, and not the record of someone else's."

[34] To this I would only add that, as Lindley, L.J. observed in a famous passage in Allcard *v.* Skinner *(1887) 36 Ch. D. 145, at 183, 'the influence of one mind over another is very subtle.' Moreover, one has to have regard to the relationship between the parties. As I remarked in* Re SA (Vulnerable Adult with Capacity: Marriage) *[2005] EWHC 2942 (Fam), [2006] 1 FLR 867, at para [78], where the influence is that of a parent or other close and dominating relative, and where the arguments and persuasion are based upon personal affection or duty, religious beliefs, powerful social or cultural conventions, or asserted social, familial or domestic obligations, the influence may, as Butler-Sloss, L.J. put it in* Re T (Adult: Refusal of Treatment) *[1993] Fam. 95, [1992] 2 FLR 458, at 120, and 477 respectively be subtle, insidious, pervasive and powerful. In such cases, moreover, very little pressure may suffice to bring about the desired result.*" [Emphasis added]

493. I am bound to find that Deborah was capable at the very least of asserting a "*moral command*" to Alan which might be "*yielded to for the sake of peace and quiet*". I further find that his children were also capable of doing precisely the same thing, given equal rights of access to their father. There is an abundance of substantially undisputed evidence which supports a positive finding that, despite being in many respects a strong-willed dominant 'Alpha male', Alan was also an extremely sensitive man who was quite averse to family conflict and prone to being influenced by others into changing his mind. Only a few noteworthy examples need be recorded here:

(a) Alan suffered from anxiety and took medication for this condition;

(b) according to Michele Alan drank when stressed and Deborah agreed that he drank more after the FATCA crisis began and was extremely stressed about the IRS position;

(c) although Vivian Gill described Alan as a being the dominant party in relationships, he

refused to admit his overlapping relationship with Joyce and allowed Ms Gill to travel to New Zealand expecting him to join her. He instead flew to join Joyce in America. I infer that Alan avoided directly breaking off their relationship because of an aversion to relational conflict;

(d) Father Pfab deposed in his Witness Statement (at paragraph 18) that although Alan expressed concerns about things his children had done, "*because Alan did not want to cause any conflict, he would just let things slide*";

(e) Mr Packman expressed concern on March 24, 2015 that Alan might "*change his mind again*" about paying the IRS;

(f) in a July 28, 2015 telephone conference with Deborah, Mr Packman advised Deborah how to justify refusing Alan's children permission to stay at the home which was already legally hers: "*tell them Alan isn't up for it. It's your house.*"[87] He also told her: "*Kids lead his life*", apparently with reference to their control over the underlying business. This provides strong support for the inference that there was concern on the part of Deborah and Alan's tax lawyer about the potential ability of his children to divert him from the Trust termination course, through interacting with him extensively on an interpersonal basis;

(g) after Alan's terminal diagnosis, his children never saw him before he died despite requests on their part to do so. At the March 2, 2016 meeting, before the Declaration of Exclusion had been executed, Alan's Cayman Islands lawyer objected to the Trustee reading a letter from his children. I infer that this objection was at least in part based on the concern that this communication from Alan's children might cause him to change his mind about the legal steps Kobre & Kim (Cayman) had been retained to ensure were actually achieved.

Were the key instructions given and legal steps taken substantially expressive of Alan's true wishes and interests as opposed to Deborah's?

494. There are two competing narratives as to why Alan pursued the termination of the Trust:

[87] G11B/4187b-c.

(a) the Plaintiffs essentially say that termination of the Trust was from beginning to end Deborah's goal, and she persuaded Alan to succumb to her wishes and key legal steps were pursued in service of her interests; and

(b) D2-D4 essentially say that termination was Alan's clear desire and that at all material times he gave instructions to lawyers who acted on his wishes alone, save to the extent that Alan and Deborah's interests were aligned.

495. In assessing the extent to which (if any) the goals of the Trust termination transaction were shaped by Deborah's interests as opposed to Alan's and/or their common interests, it is necessary to keep in mind two important considerations. Firstly, and most broadly, it was clearly possible and to some extent inevitable that the interests of Alan and Deborah as husband and wife would be aligned. The mere fact that Deborah may have favoured terminating the Trust does not without more mean that she influenced Alan to sublimate her wishes for his. Secondly, it is important to analyse the evidence taking into account the level of vulnerability which Alan had at different periods of time.

496. It is obvious that before the FATCA issue surfaced in December 2014, the Trust was a potential source of conflict between Deborah and the children. The establishment process began in late October 2003, possibly before Alan and Deborah had even met, but clearly before they had become seriously romantically involved. The Second Schedule to the Trust Deed listed himself, each of his five children, their lineal descendants and Vivian Houghton-Norris (as she then was) as "The Beneficiaries". The 2003 LOW contemplated that Alan would receive all of the income in his lifetime and thereafter to his children (20% each with the then infant Daisy and her mother receiving 10% each). When Deborah married Alan, she was understandably a stranger to the Trust. It is equally understandable that as time went on, Deborah would expect to be brought within the ambit of the Trust's beneficial class.

497. The 2007 LOW proposed that Deborah receive 20% of the income after Alan's death and the 2012 LOW provided for her to receive 40%, at the expense of the other Beneficiaries. She was herself still not yet a Beneficiary. On the same date he gave all of his estate to his wife under the 2012 Will. On August 20, 2013, Alan wrote to lawyer Kay Carter mistakenly describing Deborah as a Beneficiary and expressing concern that if the Trust was dissolved and the assets divided, this would not make commercial sense "*as all the assets are interlinked*". The following month Alan

appointed himself as First Protector, promoted Nick to Second Protector and demoted Michele to Third Protector. On October 24, 2013, Deborah was finally added as a Beneficiary of the Trust and Daisy's mother was removed since Daisy had attained the age of majority. By the same Deed of Revision and Amendment Deborah (but not her children) was given further protection, because clause 4 then provided that the Trustee held the Trust Fund:

> "*(d) Upon trust during the Trust Period and after the lifetime of the Settlor, to pay, appropriate and apply forty percent (40%) of the income of the Trust Fund for the benefit or advancement of Deborah Poulton for her lifetime and not thereafter, PROVIDED THAT Deborah Poulton survives the Settlor and is at the death of the Settlor validly married to the Settlor and is not at that time an Excluded Person, and to pay, appropriate or apply the part of the income then remaining after such appropriation of the Trust Fund to Deborah Poulton as the Trustees may in their absolute discretion think fit for the benefit or advancement of all or such one or more exclusive of the other or others of the Beneficiaries, other than Deborah Poulton, on such shares and proportions if more than one or otherwise in such manner as the Trustees in their absolute discretion think fit.*"

498. This clause was further reinforced by, *inter alia*, an amendment to Clause 8(a) to expressly provided that the power to exclude beneficiaries could not be used to "*derogate from…Deborah Poulton's entitlement in and to forty percent (40%) of the income of the Trust Fund on the provisions described in Clause 4(d) above*". The proviso to the amended version of Clause 9(d) of the Trust Deed made it clear that the power to appoint beneficiaries could not be exercised to interfere with Deborah's 40% income entitlement after Alan's death. The 2014 LOW confirmed the 2012 distribution allocation which the Trustee was requested to consider following after Alan's death, reiterating the original request that the capital not be distributed until the end of the Trust period. However, by this time Deborah had a positive entitlement to 40% of the income for her lifetime under clause 4(d) of the Trust Deed. The children and their descendants had mere discretionary interests.

499. Before the FATCA issue surfaced in December 2014, therefore, the Trust formed the focus of Alan's need to balance the provision he made for his children and his wife respectively. It is impossible to believe that Deborah did not at the very least draw attention to the risk that after Alan's death his children (as successor Protectors) could remove her as a beneficiary and deprive her of her income entitlement under the Trust. It is unremarkable that Alan would want to protect Deborah against this risk and to provide some certainty by providing a fixed interest, rather than

leaving what she received to the discretion of the Trustee.

500. Despite these iron-clad protections, it would be surprising if Deborah did not harbour a secret resentment that while Alan was alive she was receiving the indirect benefit of 100% of the Trust income and that this would have to be shared with his children after his passing. They and their descendants would benefit from the capital in the long term. They would have significant input in the administration of the Trust as Protectors after Alan was gone. More significantly still, she must have been keenly aware that Michele and Nick very much had the goose which was laying the golden eggs under their control. While Alan was alive she and his children had to do their best to be on good terms. But after his death, what could prevent them from massaging the accounts to ensure that her income entitlement became no more than a pittance? This was an anxiety she would actually voice. This was an anxiety which Michele by March 2016 clearly understood.

501. In summary, the Trust documents (as well as the 2012 Will) clearly show that Alan was mindful of the need to protect Deborah's financial security after his death and amended the Trust Deed with a view to providing such protection. He did so on the condition that Deborah was still married to him at his death. Her fixed income entitlement meant that his children would receive less income, but the predominant character of the Trust as a fund designed to benefit his children and their descendants (as far as capital and future income) remained intact. And his two older children who were both employed by APL were very much in control of the underlying investments, albeit with a 50% joint venture partner.

502. There was a very sharp tension between two sets of interest in the Trust. On the one hand, Deborah had a clearly defined lifetime 40% income entitlement in the Trust (in the event of Alan's death), income which was almost invisibly generated in a far off land. On the other hand, the Plaintiffs had a long-term multi-generational emotional and financial interest in the Trust and its underlying family-run business, a business with which all but Daisy had been familiar since their childhood. These interests were like two horses, each competing for attention and pride of place and which Alan manfully strove to ride at the same time.

503. Cayman National sent a *pro forma* FATCA notification letter to Alan and Deborah on November 26, 2013 and December 1, 2014, recommending legal advice be taken. The Trustee on December 11, 2014 wrote to Nick who forwarded the letter to Alan and Deborah, prompting the taking of

legal advice. This spurred Alan to action and by February he was consulting Alan's longstanding local lawyer John Ball. Alan's health was already declining as he had mobility problems and had lost sight in one eye altogether. Mr Lowe QC drew attention to the following statements made by Deborah at an early stage of the FATCA process before any conflict with Alan's children had surfaced:

(a) in a March 17, 2015 email to Mr Ball, she explained she had a fixed income interest in the Trust Deed itself: "*My only concern was the kids raising their salaries so high to eliminate the income as such…among other things*"[88];

(b) Kevin Packman's note of a March 20, 2015 meeting with Alan and Deborah records a gratuitous attack on Michele, which could only seemingly have come from her (but which she denied making): "*she forged dad's name-overdue account by 3M he covered liability…4 years ago*"[89];

(c) A Holland & Knight telephone conference note of March 23, 2015 recording a conversation between the tax lawyer and Deborah alone states: "*-spoke w/Debbie-interested in estate plan-wants to dissolve trust*"[90]. She denied saying this;

(d) in a March 31, 2015 email Deborah wrote (explicitly articulating her own concerns as well as explaining how new she was to managing Alan's financial affairs in light of "*eyes and deteriorating health*"): "*All of this has been quite stressful on me as well as the forthcoming fight with the IRS, i.e. family and my future security…Alan's accountant in the UK called and I spoke with him and did mention that no transfers, etc. needed to be done as this could be looked on by the IRS as fraud…just protecting Alan as his kids are capable of anything*"[91]. Under cross-examination Deborah denied having already characterised the children as the enemy and explained that she was concerned about what they were capable of based on events in the past. The following exchange then took place[92]:

[88] G7/1698.
[89] G7/1722e.
[90] G7/1722b.
[91] G7/1902.
[92] Transcript Day 16 page 62 line 14-page 63 line 2.

"*Q. Isn't this what all this was about, initially, that you realised that what you were planning to do with the estate would obviously create opposition or challenge from the children when they learned about it?*

A. They were –

Q. You knew that?

A. They were already challenging their father at that time.

Q. How were they challenging their father in March 2015?

A. When we went to Miami his son Nicholas was calling him non-stop.

Q. You are saying he was calling him non-stop. What was -- do you know anything about those conversations?

A. No, he was just questioning his father and Alan didn't like it."

504. These contemporaneous documents support the following findings. Deborah in March 2015 was beginning to assume greater responsibility for Alan's basic financial affairs and played an active role in interfacing with Alan's lawyers in relation to his IRS problems from the outset. Although she clearly had Alan's interests both at heart and in mind, she was also not reticent about raising her own distinct "security" concerns and was keen to have Mr Packman, a lawyer with no previous relationship with Alan, handle Alan's estate matters as well as the front burner tax issue. Deborah had clearly already, perhaps subconsciously, characterised the children as the enemy although the documents and her oral evidence do not satisfactorily explain why this should be. The suggestion that Nick was already "challenging" his father in March 2015 sounds like a view coloured by hindsight. No clear plan of action had yet been formulated. Preliminary advice was still being received. It is more likely there was high anxiety on the London front. On April 1, 2015, Deborah asked Mr French to keep discussions about the US tax situation confidential because "*Alan would not want his children unnecessarily worried.*"

505. The most striking statement made by Deborah during this period is the reference in her March 31, 2015 email to the "*the forthcoming fight with the IRS, i.e. family and my future security*". This does not, fairly read, suggest an elision of the IRS and the children; rather it suggests that Deborah viewed the forthcoming IRS battle as a threat to the security of both her family (most obviously Alan and the Florida family) and herself. Viewed from this perspective, the "fight" was for a noble and not entirely selfish cause and anyone who opposed the cause could only logically be viewed as

the enemy. Looked at from the other side of the Atlantic, of course, it may well have seemed blindingly obvious that Alan's first true priority, unless led astray by a flighty young wife, would be to kick the IRS in the shins and preserve the Trust and the family business that was his children's birth-right. Based on the advice the Plaintiffs would themselves receive, that was not in real world terms a viable response. And it also ignored the far more obvious reality that Alan would also be deeply concerned about the wellbeing and financial security of his wife, by then of more than 10 years' standing.

506. Correspondence in April 2015 between Deborah and Mr Ball and Mr Packman about estate planning matters also reveals Deborah being actively concerned about her own financial interests. As early as April 8, 2015, she was expressing concern about Alan's health and was naturally anxious as to her own position as his dependent. It is undoubtedly the case that it is in this context that Mr Packman first engages with the idea of terminating the Trust. After initially asking Mr Ball about amending Alan's will to include leaving the CSLC shares to her, which he said was not feasible, she emailed Mr Packman on April 14, 2015[93]:

> "*…spoke at length with Mr Ball regarding the Trust and protecting me, etc….Alan wants to speak with him again this week and I requested that we speak with you also as you were going to review the Trust documents to make sure I am protected*…" [Emphasis added]

507. Mr Packman responded the next day:

> "*Debbie, I reviewed the trust. With a little work, it should be possible to have ALL of the shares of Cutty held in the trust distributed to Alan. As such, the trust would be terminated. Once Alan owns the shares of Cutty, he could then terminate Cutty and own the assets outright…The key is everything must be returned to Alan. He cannot start transferring assets to you or the children upon receiving the assets.*"

508. This was a skilful lawyerly response. Deborah's attempt to put her personal security ahead of Alan's tax interests are smoothly brushed aside. Mr Packman insists, in effect, that protecting Deborah must play second fiddle to Alan gaining control of the Trust assets, which (implicitly) (a) Alan will use to meet his IRS obligations, and (b) thereafter take care of his wife and children with the net proceeds, which will be easier to achieve if Alan has personal control of the assets. So there

[93] G8/1980.

is no suggestion that terminating the Trust is necessitated for US tax reasons, but it is implied that Deborah's concerns can more readily be addressed post-termination of the Trust. However ultimately, Mr Packman seems to have formed the view that there were indeed tactical advantages in on-shoring all of the Trust assets in addition to Deborah's personal estate planning concerns. I reject the Plaintiffs' contention that Kevin Packman was at this juncture solely concerned with protecting Deborah's interests. On May 11, 2015, he emailed Deborah and Mr Ball:

> "*1)…*
>
> *2) I like the idea of getting the stock out of the Cayman structure ASAP, and liquidating the Cayman trust ASAP. There is no benefit to waiting based on Alan's health.*"

509. These further early exchanges between lawyer and client demonstrate that Deborah wished to gain control of all of the Trust assets for her own financial security and although this legal objective was not viable in a direct sense, the idea shaped the ultimate decision to terminate the Trust. Alan's health was also visibly declining and the goal of terminating the Trust was explicitly linked with ancillary estate planning. There is no or no clear evidence that Alan did much more than 'go along with the programme', a programme which was drawn up with heavy input from his wife, while he struggled to cope with the stress of the situation and the undoubtedly heavy emotional burden of being torn between satisfying the expectations and hopes of his wife, on the one hand, and his children on other. By the early summer of 2015, Alan was already quite dependent on Deborah and quite vulnerable to her influence and the concomitant risk that she would confuse her interests with his. The fact that Deborah from an early stage perceived a conflict between the interests of Alan and herself from the existing Trust structure is illustrated by the email she sent to John Ball on May 11, 2015, before any cash crisis had actually arisen but at a point when Alan himself may well have had (because of the FATCA issue) financial concerns:

> "*I think time is of the essence so to speak as Alan's son is speaking with attorneys abroad and asking about his health (never been concerned before). I would hate to see his greedy kids take control and put Alan on an even more restricted 'allowance' than what he has now…*"

510. These were partisan remarks indeed, passed on as her own views rather than Alan's in the context of a joint retainer. Alan's health had visibly declined and Nick had visited in April and observed this. It was entirely logical and natural for him to have concerns about Alan's health, as Deborah

herself had at this stage. It is unclear what basis there was at that juncture for characterising Alan's children as "greedy". Michele speculated (in another context) that Deborah was angry about Alan giving his daughter the CSLC shares in JA Poulton Building Contractors. This is plausible. It is also possible that Alan may have at an early stage made a casual remark about the fact that his children would not be keen to lose their existing entitlements under the Trust. This would have been an accurate assessment. Whatever the basis for the "greedy kids" jibe may have been, such a view would likely have made it easier for Deborah to convince herself that her own desire to ultimately benefit from all of the Trust assets (which was in perfect alignment with Alan's goal of gaining control of the Trust assets after terminating it) was a just one.

511. There is no reliable evidence as to precisely whom or what thinking was the driving force behind the somewhat odd 'attack by stealth' strategy which was seemingly deployed towards terminating the Trust. By any objective measure, having regard to the respective interests in the Trust, it is difficult to apprehend why it would have been anticipated that the majority Beneficiaries would simply do what their father wanted when presented with what amounted to a *fait accompli*. Michele and Nick had been managing APL with light-touch supervision from Alan for several years. In 2015, Michele was nearly 50, Jamie was in his mid-40s and Nick was seemingly a mature young man despite only being in his mid-30s. They would reasonably have expected to be consulted about the decision to terminate the Trust and for attempts to be made to persuade them to agree to such a momentous decision. The decision was not just momentous for adults who had planned their lives around the existence of the Trust and the underlying family business. It was to anyone other than a US tax lawyer or someone motivated for collateral reasons to terminate the Trust an at first blush counterintuitive way to respond to the IRS/FATCA dilemma. Even other tax lawyers might reasonably have questioned the termination strategy.

512. That the case for terminating the Trust was not an obviously compelling one, even purely from a US tax perspective, is best illustrated in a general sense by the fact that the termination idea (I infer) came from Deborah and was raised for reasons entirely collateral to the tactics for dealing with the IRS[94]. At a more legalistic level, it is noteworthy that Kenneth Silverberg of Nixon Peabody advised

[94] This interpretation of the evidence seemed to me to form part of the Plaintiff's case and I accepted it for reasons explained in various parts of this Judgment. I declined the invitation made by D2-D4's counsel (when suggesting editorial corrections) to revisit this finding on the basis that it was incorrect. It is my practice only to any correct factual errors which are both (1) plainly wrong and peripheral to factual findings on controversial issues. The "error"

the Plaintiffs on August 27, 2015 that "*If the trust remains in the C.I., it will be difficult or impossible for the IRS to seize the assets*"[95]. That the step was an inappropriate one for Alan to seek to implement on a non-consensual basis is best illustrated by the fact that the Trustee was unwilling to rubber stamp Alan's decision (which it was required to implement) in light of the Plaintiffs' initial objections, despite the powers he formally enjoyed in relation to the Trust.

513. Was Alan, the man who did not like conflict or wasting money, the driving force behind adopting the most confrontational possible strategy towards dealing with his already stressful IRS situation? In my judgment it is inherently improbable that if he was presented with a reasoned analysis of the pros and cons of adopting a consensual and cost-effective approach and an aggressive and costly 'winner takes all' approach that he would have chosen the latter, left entirely to his own devices. He was clearly the sort of man 'whose bark was worse than his bite', quick to 'talk tough' and threaten rash acts, but easy to mollify. I am bound to find that even before he became particularly vulnerable in October 2015, the instructions given to lawyers on his behalf and the strategy deployed in his name, notably the decision to terminate the Trust and acquire control of the CSLC shares, were to a material extent already influenced by Deborah's understandable concerns about her own future financial security.

514. A significant character entered the stage in August, 2015 and played a leading role, initially behind the scenes: Mr Joseph Knecht. While he may have contributed to a blunter and more aggressive approach to the emerging dispute, prior to October 2015 Alan was still clearly essentially in charge. Kevin Packman's August 3, 2015 letter to the Trustee made it clear that as regards Alan's wife and children, "*he intends to provide for them*". On August 8, 2015, Mr Knecht emailed Deborah offering to speak to Kevin Packman and to "*prepare your last 5 years income tax returns*". Deborah explained that someone else was already preparing the accounts[96]. When Deborah forwarded an email to Kevin Packman querying whether the shares could be transferred to Alan by Court order without the other directors' consent to Mr Knecht, he responded[97]:

"*Perfecto!!*

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complained of in my view fitted into neither of these two categories. However I did clarify that the finding was inferential in character.

[95] G12/4583a.

[96] G12/4344.

[97] G12/4357.

We need to make sure Alan can freely transfer the shares once they are in his name without any other signatures needed."

515. The role of Mr Knecht will be elaborated upon further below. These emails nonetheless suggest that, from an early stage, Joe Knecht was not simply assisting Deborah, but looking for some form of compensation as well. The interest in Alan being able to freely transfer the shares after he received them from the Trust clearly goes beyond Kevin Packman's suggested goal, of which Mr Knecht may at this stage have been unaware, of placing the shares in Alan's control and postponing any transfers to avoid any potential preference claims by the IRS. Later in the same email chain, Joe Knecht firmly suggests a "*drop date*" for the other directors to sign by and queries why Jamie needs to meet with Kevin Packman. He was most likely the source of the court order idea, hence his enthusiastic response to Deborah reporting that she had raised the issue with Mr Packman. At this juncture, it seems clear that Mr Knecht is (a) keenly supportive of Deborah's previously articulated personal goal of acquiring the Trust assets for herself, and (b) viewed this outcome as "*nothing to do with…taxes*". At 8.37 am on Saturday August 8, he had emailed Deborah as follows[98]:

> "*What I am saying is that a court order that requires the trust company to issue the shares to Alan without directors signatures…Then he fir[e]s directors and appoints you director and then issues shares to you…Has nothing to do with disclosure or taxes…Strictly legal maneuvering*…" [Emphasis added]

516. During Jamie's visit to Florida with his family, it is clear that Alan personally authorised Kevin Packman to meet with Jamie. That is because the lawyer emailed Jamie on Monday August 10, 2015 and confirmed that he had just spoken to Alan and been authorised to discuss "*the IRS issue, the Cayman structure, the proposed new US trust, and related issues involving your siblings.*" It is obvious that Jamie's mission was in broad terms to protect his and his siblings' interests and to advance their then view that options other than terminating the Trust should be found. He had seen his father on the Saturday afternoon and complained to Deborah that evening of his frustration at calling his father that evening and receiving no answer. A Sunday meeting at the family home was scheduled but was seemingly converted into a Monday restaurant lunch engagement which Deborah (in an 11.15 am email) said she and his father could not make. This prompted Jamie to say he would drop by to see his father at home. Before Jamie's meeting with Mr Packman, he was

[98] G12/4334.

unceremoniously prevented from having a follow-up meeting with his father (further to Saturday lunchtime discussions) and which Jamie said his father wanted to have. Jamie responded to Deborah's email just over 2 hours later at 1.33 on Monday August 10, 2015[99]:

> "*Hi Deborah,*
> *I don't understand why you wouldn't open the door to me?*
> *I have come to Florida to see my father and help him with his tax issues.*
> *I had a conversation with him yesterday about seeing him today so he can tell me his wishes in order I can speak to Kevin Packman tomorrow. He was very happy that I did that and wanted to make some notes for me to take.*
> *He was also happy when I spoke to him that I would discuss the trust as the two are not inseparable and we need to deal with them together.*
> *I am not trying to change anything, I just want his wishes to be protected and carrie[d] out.*
> *He has spent his life building his company and I know he doesn't want to loose [sic] it to any tax bill or it to end up in the hands of his business partner or indeed Wilson.*
> *You saw me through the door and heard me. I saw Emma hiding behind the counter when she saw I was there?*
> *You specifically asked the gate to stop ME to come and see my father this morning and I know he would want to see me...*
> *I don't believe that was his wishes at all… I only want the best for him.*
> *Please allow him to speak to me. And see me and his grandchildren Jamie*".

517. That Jamie was prevented from seeing his father is common ground. Deborah insisted that Alan did not want to see Jamie and he was locked out at his father's request. Jamie's evidence that his father wanted to see him to brief his son prior to the Tuesday meeting with Kevin Packman is supported by the email he sent not long after the incident occurred. I found Jamie's oral evidence on this issue entirely credible although I felt he sought to minimise how angry he had been at the time. When he was questioned about the fallout from his exclusion, the fact that his father had clearly been at least aware of it and the failure to seriously pursue any elder abuse complaint, he very honestly admitted that he did not really know at the time what was going on. His demeanour suggested to me (although this was mere speculation on my part) a nagging unarticulated fear shared by him and his siblings that the truth might be that his father had forsaken his children in favour of his wife and her son. Be that as it may, Deborah's account of how angry Jamie was about being denied access to his father supported Jamie's evidence that he believed his father wanted to see him.

[99] G12/4426.

518. I find it inherently improbable and impossible to believe that Alan would, left to himself, have instructed Deborah to shut out Jamie in such a dramatic and callous fashion. Jamie's outrage (which he sought to downplay as simply being "upset") doubtless caused him to make the hurtful remark that Alan would not have wanted the business to end up in her son's Wilson's hands. One hurt person was, it seems, hurting another and unwittingly adding fuel to a simmering fire. On the other hand, I find it equally improbable that Deborah would have brazenly mistreated Alan's son in such a callous way without some form of tacit approval from Alan, prospectively or retrospectively. By the time Jamie next spoke to his father, Alan was angry with him because Deborah had reported that Jamie had complained to Kevin Packman that Deborah was not taking care of his father, something which Kevin Packman reassured Jamie he had not relayed. It is difficult to avoid the suspicion that Deborah was keen to drive a wedge between Jamie and his father at this juncture to buttress her decision to lock Alan's son out.

519. While there are various points of detail such as these which cannot and need not be decided, a clear picture emerges that Deborah had mixed motives for viewing Alan's children as adversaries. One reason was that she felt they should unquestioningly yield to their father's wishes about terminating the Trust. This was entirely consistent with Alan's best interests. The other reason was that she felt that she deserved to receive the ultimate benefit of the Trust assets rather than his children in the event of Alan's demise. This was inconsistent with Alan's true desire, which she admitted very honestly under cross-examination was to take care of "all of us". Deborah clearly took active steps at this time to prevent Jamie from being able to have free discussions with his father about the IRS and Trust termination issues, partly because she felt Alan wished to gain control of the Trust assets and partly because she felt her own position would be more secure when that occurred.

520. Did Alan mention to Deborah that he had talked business with Jamie and was going to brief him in advance of the Tuesday meeting on Saturday evening? If he did, he would have revealed the fact that he was still open to exploring ways to meet the IRS claim without terminating the Trust. Did Deborah immediately go into battle mode, ducking out of the planned Monday lunch and warning Alan about the dangers of allowing his children to take him off course? Did Alan for the sake of peace agree that he would not take Jamie's calls or see Jamie if he visited? The precise details are matters of speculation. However, this August 10, 2015 event provides an example of the course of conduct of Alan's affairs, and the instructions given to his lawyers, being influenced to a material extent by Deborah with his children battling to deploy their own potentially powerful influence

over their father. Alan's wife had of course been canvassing for terminating the Trust for several months. And on the Saturday morning before Jamie's lunchtime chat with his father on August 8, 2015, she had been actively advancing the termination cause with moral and tactical support from Joseph Knecht. At 5.12pm on the same Monday, she emailed Jamie explaining that his father had told him personally that "*he wanted the day off*" and that in not letting him into the house she was merely "*following Alan's wishes*". The email was a more measured version of a draft that she sent to Joe Knecht at 4.49 pm on the same day and which he presumably edited. If so, this was a rare display of moderation on his part perhaps influenced by the fact that he had yet to secure a formal role as Alan's representative.

521. It is also noteworthy that Alan, speaking to his lawyer directly on August 10, 2015, gave the lawyer a very wide mandate as to the matters which could be discussed with Alan's son. This was in stark contrast with the email sent under Alan's name to Kevin Packman at 9.01 pm (responding to the lawyer's 8.22 pm request for instructions) on the Saturday night after he had had lunch with his son and agreed to meet again for further discussions[100]:

> "*The children should only be informed on factual information dealing with the IRS. All other matters concerning the Trust and my personal assets are to be private at this time.*
>
> *I know you will use your best judgment on revealing only what is necessary.*"

522. These are somewhat odd instructions for a father to be dictating (without prompting) on a Saturday night after spending rare time with his visiting son whom he was keen should meet his lawyer. Was the Saturday night email reflective of Alan prompted by Deborah and/or Mr Knecht or not Alan's voice at all? Jamie testified that the language did not sound like his father's at all. His broad oral instructions confirmed in writing by Kevin Packman himself are more consistent with Jamie's account of what his father's wishes were at the time. On balance, I find that the contents of the Saturday night email did not originate from Alan himself. I make no positive finding on whether Alan did or did not authorise the email being sent. At the very least, the apparent change of position suggests that far from being fixed on the termination course, Alan was still keen to explore other options and would have welcomed a free and balanced debate rather than being on the receiving end of a barrage of self-interested and partisan 'spin', as it may well have appeared to him at the

[100] G12/4386.

time. Bearing in mind Alan's declining health, he would have been wearied by dealing with not just the complexities of the IRS' looming claim, but also by the obvious emotional burden of trying to meet the clearly conflicting demands of his wife and children as to how he should resolve the issue.

523. In the aftermath of Jamie's departure from the Poulton property escorted by the security guard (who also recorded that he found Jamie banging on doors and windows), Kevin Packman reassured Jamie on August 11, 2015 that he had told Deborah "*there was no reason to not let you visit. I explained we got along great and I trust that you would be sharing the discussions with your siblings. Further I explained that you were going to see if the siblings could generate the cash to satisfy the IRS liability*." The tax lawyer's main priority was clearly protecting Alan from civil and potentially criminal penalties by raising monies to meet the claim. The cooperation of Alan's children was for him clearly something to be nurtured rather than scorned. Although Mr Packman was on holiday when he received this email from Jamie on August 15, 2015, he does not seem to have directly responded to the following query: "*Is there some outside reason other than perhaps pressure at home to sign the trust over in such a hurry?*" [101]

524. With that question left hanging in the air, the legal battle continued on two main fronts, attempts by the Plaintiffs to explore means of raising monies to meet the IRS claim without terminating the Trust, and attempts to terminate the Trust on the assumption that in some ill-defined way this would assist in meeting the IRS liability. In September 2015, Mr Knecht played a significant role in purportedly representing Alan's interests in three respects. Firstly, on September 1, 2015, he emailed Deborah under the subject heading "*Poa*" the following suggested wording in addition to "*all the standard language*"[102]:

> "*Authorize and specifically direct Deborah Poulton to take all actions necessary, and execute all documents required to transfer 100% of all shares in Alan Poulton ltd, j Alan Poulton contractor and cutty sark land to…sole name and ownership of Deborah Poulton*".

525. This proposal was not entirely legally coherent and went beyond the goals Kevin Packman was working towards under Alan's direct instructions. There is no suggestion that this proposal

[101] G12/4480-4481.
[102] G13A/4681.

emanated from Alan himself. Alan executed a Specific Limited Power of Attorney dated September 11, 2015, but it merely empowered her to transfer the CSLC shares "*to James Alan Poulton and Deborah S McMullan Poulton, as joint tenants by the entirety*". This was, theoretically at least, from Deborah's perspective some advance on what was previously contemplated which merely was that the CSLC would be transferred solely to Alan.

526. Secondly, on September 15, 2015, Joseph Knecht asked Deborah how they could get more information about Nick and Michele's properties and began the process of instructing private investigators. Deborah wrote to Joe Knecht[103]:

> "*… Alan better get control soon!! ... Maybe if we can show what Nick is doing he will charge forward! My POA is worth nothing if I have no money.*"

527. I find it inherently improbable that Alan would have initiated an investigation of his own children and, if he authorised it, this would have been in response to encouragement from others. By September 25, 2015, Mr Knecht's involvement had been elevated to direct interactions with Alan and communicating with Alan's children on his behalf (and serving as a buffer between them to the indignation of Nick). The third significant legal matter with which he was involved was defining the scope of Emily Exton's retainer on September 26, 2015, which included "*finalization of trust termination and revocation*", "*liquidation of Alan Poulton, ltd*" and "*possible pursuit of embezzlement and fraud*"[104]. The latter item I find more likely than not was proposed by Mr Knecht and/or Deborah, even if Alan formally approved the instructions in general terms.

528. The critical period from October to January 2015 when Kobre & Kim were retained on a very tight leash can be explored more shortly because the incontrovertible medical evidence makes it clear that Alan was during this period very vulnerable to undue influence and that his ability to manage his own affairs was seriously impaired. The course of Alan's affairs was being influenced by two conflicting currents, and his ability to keep his own head above water without assistance was clearly waning. The influence of his children was clearly the weaker current as their contact with him had been significantly reduced.

[103] G13B/5503-5504; 4980-4987
[104] G13B/5236.

529. Even before Alan's mid-October diagnosis, it is clear that Deborah (perhaps herself influenced by the combative spirit of Joe Knecht) was prone to being oblivious of any sense that Alan had any interests or wishes that were different to her own. An October 5, 2015 email somewhat sarcastically suggests both that she felt justified in denying Alan's children contact with their father and that Mr Knecht was deliberately being deployed to achieve that end[105]:

> "*Joe…Maybe you should tell them that daddy and I are on a long deserved holiday…They are basically blackmailing him and withholding $$ until he speaks so they can manipulate and whine…And record him as being at some bogus board meeting of the directors. Like they did before when Michele stole the building co…*"

530. This was also a somewhat hyperbolic email to a 'comrade in arms' who himself frequently authored colourfully partisan emails. In fact the best available evidence suggests that Michele had been given the building company. In emotive family conflicts involving financial matters, there is often a wide divergence between subjective and objective reality with each side sincerely convinced not only that their view of events is the only 'real' one, but also that their cause is an utterly righteous one. The real point to be inferred from this communication therefore is that Deborah clearly believed that Alan's children had exploited him in the past and were now seeking to get more than they deserved. If they were not stopped from seeking to "manipulate" him, they would steal what rightfully belonged to Alan and herself. The following day Joe Knecht, who had the previous day claimed authority from Alan and Deborah to communicate with lawyers, wrote to Emily Exton and Rachael Reynolds in the following salient terms:

> "*…I will defer to Alan and Deborah as to the final word on the fami[li]al issues, but I will offer the following observations based in part on my long history and association with them. They are both very caring and generous people. Whatever that is needed they will provide if possible. This is true of Alan's 5 kids and Deborah's 2. All have been spoiled to some degree. Alan has put 2 kids in the business in various forms. They have made some missteps along the way. Some of the Poulton children have committed forgery, embezzlement and other issues. They live way above their reported incomes which trouble me. They resent Deborah greatly. 2 of them have refused to sign documents terminating the trust which infuriates Alan. The Poulton children are simply out for the most financial gain possible, irrespective of Alan's wishes. Deborah has been protective of Alan and his generosity, and has been very vocal to Alan about the kids abuse and misuse, to the point of sometimes being too vocal and overbearing. It is my understanding*

[105] G14A/5467.

that Alan wants to leave 100% of what is left after the IRS to Deborah, his feeling is that by hook or by crook his kids have been fairly compensated…"

531. The quoted passage is a striking one because Mr Knecht appears to be openly going beyond his role as Alan's representative to share with Alan's London and Cayman Islands' lawyers his own personal judgment of the moral merits of the dispute as an informed and impartial observer who has known Alan and Deborah for 15 years. The key points advanced are:

(a) Alan's children are spoiled and have been guilty of serious misconduct in relation to the family business;

(b) Alan is rightly furious with their selfishly preventing him from terminating the Trust;

(c) Deborah has been steadfastly loyal (implicitly with no interest in her own personal gain) to Alan and has perhaps gone too far in pointing out the children's misdeeds;

(d) quite rationally, Alan intends to ultimately ensure that Deborah is the only person to benefit from the net proceeds of the Trust after its termination and after the IRS has been paid.

532. Under cross-examination, Deborah understandably disagreed that she had been "*too vocal and overbearing*" with Alan about his children's "*abuse and misuse*". This is one instance where, as Mr McPherson QC submitted, I should be cautious of accepting the truth of what was written by Joe Knecht. This assertion by Mr Knecht was completely at odds with her insistence that she could never come between Alan and his children, evidence which I accept. On balance I infer that Mr Knecht exaggerated the extent which Deborah complained to Alan about his children, just as he exaggerated the extent of their own past misconduct. I find it more probable, taking into account the fact that Deborah was only prone to criticising the children in email correspondence with third parties, that Deborah was more vocal on this topic in discourse with Mr Knecht than with Alan himself.

533. Suggesting that he, Mr Knecht, was the temperate one seeking to be a moderating influence was perhaps being deployed as a form of "spin", to portray himself as an impartial level-headed observer. Other emails suggest, as the Plaintiffs' counsel suggested, that in fact Joe Knecht was the driving force behind Alan taking a more adversarial stance towards his children after early

August 2015. Clearly Mr Knecht had no appreciation that his October 6, 2015 email asserting that Deborah had gone too far in criticising her husband's children was potentially incriminating for Deborah from an undue influence point of view. His aim was seemingly to cast Deborah in a positive light (an almost excessively loyal wife) and to support a case for her 'getting it all' at the end of the day. In his own mind perhaps, he was like a mediaeval knight, jousting while secretly carrying the favour of a fair lady.

534. I am bound to find that Joe Knecht and/or Deborah must have on more than one occasion shared with Alan their own views that his children were selfish and had no interest in his own welfare. Mr Knecht himself was clearly an active participant in investigating Alan's children and had no qualms about recording in writing an allegation that they had committed serious offences. It is more plausible that he went too far in trying to turn Alan against his children (or in painting them as villains) than that Deborah did. It is entirely credible as Deborah expressly testified, that she did not dare come between Alan and his children. His natural love and affection for them is a straightforward explanation for why she viewed them as rivals in both emotional and financial terms. I doubt that Alan did more than to threaten to leave nothing for his children if they did not cooperate and I find it impossible to believe that Mr Knecht did not encourage him in some way to believe that his children were undeserving of any inheritance, as opposed to encouraging Alan to reach an amicable cost-saving compromise with them.

535. From a truly objective standpoint, the suggestion that Alan wished to effectively disinherit his children would have been a surprising if not a shocking one. As Cockburn CJ observed in *Banks-v-Goodfellow* (1869-70) L.R. 5 Q,B. 549 at 563 in a passage upon which the Plaintiffs unsurprisingly relied, albeit in the parallel context of mental capacity and the making of a will:

> "*The instincts and affections of mankind, in the vast majority of instances, will lead men to make provision for those who are the nearest to them in kindred and who in life have been the objections of their affection. Independently of any law, a man on the point of leaving the world would naturally distribute among his children or nearest relatives the property which he possessed. … To disappoint the expectation thus created and to disregard the claims of kindred to the inheritance is to shock the common sentiments of mankind, and to violate what all men concur in deeming an obligation of the moral law*…"

536. Deborah, to her credit, declined to suggest that Alan ever made any such decision. However, it is

almost as shocking to contemplate that any father would at any juncture want to record in writing to recently-hired lawyers in more than one overseas jurisdiction allegations of criminal misconduct on the part of his children. It is unclear precisely what effect Mr Knecht's October 6, 2015 communication had on its recipients, but two days later (on October 8, 2015) Rachael Reynolds explained that the evidence they would need for the proposed Cayman Court application included medical evidence to deal with the issues of capacity and influence. She also said she would need to meet separately with Alan "*to clear my KYC requirements and get confirmation as to who are your agents in terms of giving us your instructions (will only take a few minutes)*" as well as with his GP to deal with the capacity/influence issues. In my judgment any reasonable lawyer acting for Alan and receiving the October 6, 2015 email would have been quite alarmed and concerned about whether Joe Knecht was really acting in all respects upon Alan's instructions. Although this email was not directly referred to in oral argument, and could not be put to its author, who was not called as a witness, I infer from this (and other evidence which was canvassed) that Mr Knecht was to a material extent motivated by a desire to promote Deborah's financial interests and was not an impartial mouthpiece for Alan himself.

537. The next day Alan was admitted to the Mayo Clinic where he is recorded as reporting: "*over the last 2-3 weeks that the pain has got more noticeable. He attributed this to being under a lot of stress*…" The CT scan results were said to "*likely represent widely metastatic cancer of colorectal origin.*"[106] He would undergo life-altering surgery, receive a formal terminal diagnosis and be released from hospital on October 22, 2015, nearly 2 weeks later. Accepting that Alan had not lost mental capacity overall, these events clearly increased his dependency on his wife and (for a man already being treated for anxiety) must have been a significant psychological blow as well. Objectively viewed, Alan's terminal diagnosis was an opportunity for Alan's Florida and UK families to rally around Alan and put his emotional wellbeing ahead of all other considerations, even assuming that no medical indication at all was given as to how much time he had left. In hindsight, Deborah effectively accepted (in response to questions from the Bench) that this should have been the case, but offered no explanation as to why she did not take the initiative to ensure that at least one of his children came to see him before he died[107]. Instead, Alan became stuck in an adversarial paradigm which resulted in the doors to compromise being firmly shut and in money

[106] I Vol. I/101-105
[107] Transcript Day 19, page 40 line 24-page 41 line 19.

being wasted on litigation with no effective efforts being made to raise money to meet the IRS claim or to facilitate Alan's undoubted desire to take care of both his wife and his children. It is difficult to believe that Deborah would have sustained this pattern of conflict without being supported by Mr Knecht.

538. Alan's children were not promptly told of Alan's terminal diagnosis; yet from Deborah's perspective they were deliberately seeking to dissipate assets which were needed for medical expenses. For instance on October 26, 2015, Deborah complained to Emily Exton that Jamie spoke on the telephone to his father about financial support for a new project of his, commenting[108]:

> "*They want to use up cash so Alan has none to put towards his medical care. You don't know how devious they are. Horrible and greedy.*"

539. This communication is noteworthy for the following reasons:

(a) it suggests that Deborah's main concern after Alan's terminal diagnosis initially was medical expenses rather than tax liabilities;

(b) although the reality was that most of Alan's medical expenses were covered by insurance, Deborah herself was clearly not aware of this herself at this juncture so any suggestion that she deliberately misled Ogier into believing that money was required from the Trust for medical expenses is not justified;

(c) there was no objective basis for her believing the children were seeking to divert money which Alan needed for medical expenses. Accordingly, Deborah's "catty" remarks about Alan's children in a communication with one of his lawyers reveal the extent to which she had convinced herself that they were 'enemies" of herself and her husband;

(d) the fact that similar emails between Deborah and Joe Knecht were disclosed is a credit to the extent to which she honestly complied with her discovery obligations. It also undermines any suggestion that she was (1) involved in a secret romantic relationship with Mr Knecht and/or (2) engaged in any deliberate covert campaign to unduly influence Alan.

[108] G14B/6268.

A person engaged in such deceptive behaviour would in my judgment be unlikely to disclose (without any apparent prevarication) potentially incriminating correspondence[109].

540. At this juncture Alan's children were seemingly not aware of his terminal diagnosis and not aware of any medical expenses which needed to be covered from private sources. Alan was insured and in fact did not have any significant medical expenses which needed to be funded out of pocket, although Ogier Cayman were initially misled into thinking that no medical insurance existed. Any cash-flow problems at that juncture were quite obviously attributable to legal expenses which could have been avoided through pragmatic compromise as Alan's lawyers in London and Cayman would both suggest should be pursued. Cross-examined about this harsh criticism of Alan's children, Deborah was visibly embarrassed and honestly admitted that what she wrote reflected what she felt at the time. What she wrote, I infer, was an emotional outburst at a time when she was under extreme stress, having reasonable grounds to fear the loss of her husband and to fear for her own financial security after his passing if her future means of support was trapped in a Trust she could not control. In my judgment there was no objectively identifiable basis for Deborah to fear that Alan's children would seek to stem the flow of distributions to Alan in his lifetime and to her after his death. However it seems obvious that she genuinely feared this was the position, and it seems possible that she found it easier to view fighting for her own 'rights' as a just cause by demonizing Alan's children.

541. If the Plaintiffs had disclosed their own intra-sibling communications (it is difficult to accept their contention that no such written communications exist), one might well have seen equally harsh judgments being made about Deborah's character. It seems obvious that they viewed Deborah as a threat to their own financial security, because terminating the Trust from their perspective would have seemed to be an attempt by their father's young wife to steal their 'birth-right'. So, while Deborah became fixated on terminating the Trust and placing the assets under the control of herself and Alan, his children became fixated on preventing the Trust from being terminated. The undue influence claim, however, turns on an analysis of the influence Deborah may have exerted over Alan during a period when he was terminally ill and had limited contact with his children. And that influence must be viewed in the context of the trust termination decision and its ramifications after

[109] The Plaintiff's counsel pointed out in comments on a draft of the present Judgment that the emails were only recovered following a forensic examination of Deborah's computer. This does not undermine the broad thrust of the findings recorded above.

Alan's terminal diagnosis.

542. Continuing along the Trust termination track (which made sense in IRS terms in the absence of some alternative fundraising initiatives), and ignoring the need to make simultaneous provision for his children, was stacking the deck of cards in favour of Deborah and against the children. Creating the impression that this was the only path available to avoid falling off a fiscal cliff, in the mind of a man whose vision was both literally and figuratively impaired, could only be very impactful on his decision-making faculties. In my judgment it is ultimately obvious that the circumstances in which Alan decided to resolutely remain on the Trust termination track made it impossible for him to make a free and independent decision in this regard. Two factors are in my judgment pivotal considerations in assessing the extent to which Alan was potentially unduly influenced to sign the Declaration of Exclusion some three months before his death:

(a) the fact that he was misled into believing that his children had no interest in seeing him and were starving him of financial support; and

(b) the fact that he was denied access to independent advice about the wider implications of terminating the Trust before he executed the Declaration of Exclusion.

543. The most reliable evidence that Alan had been misled into believing that his children had in effect abandoned him in his time of greatest need is the evidence of Ian Whan Tong and Angella Williams-Myers about what Alan told them at the March 2, 2016 Meeting. According to Ian Whan Tong in his Witness Statement:

> "*123. We asked Alan about his children. On this subject Alan was particularly lucid and coherent. It struck me that he had strongly-held views and it was clear he felt his children had wronged him…He spoke of being starved of money, with barely enough to buy a 'tin of sausages'…He said his children had once sent him money, but this had stopped. He said he had tried to call the children, but they had not taken his call. I asked Alan if it would surprise him that his children wanted to speak to [him], and Alan said he would be surprised. I asked him if he would like to speak to them and he said 'yes I think so'.*
>
> *124. I asked Alan if he agreed that the Trust was set up for the benefit of his children, and Alan said it was. I then asked if he felt his children had treated him poorly, and he replied 'really poorly.' I asked him if he*

intended not to provide for his children, Alan said the only reason for this was that they did not provide for him. " [Emphasis added]

544. Angella Williams-Myers' written evidence was different on the question of whether Alan wished to provide for his children:

> "*97 ....a…Alan said that he wanted to provide for his children (which was consistent with the message that we had received from Mr Packman of Holland & Knight and Ogier/Forsters) although he did not say how he would do that…*"

545. Ms Williams-Myers' file note is the most contemporaneous typed record of what transpired and Mr Whan Tong agreed in his oral evidence that she was the assigned note-taker. This records[110]:

> "*IWT asked if he wanted to provide for his UK children and he said yes. IWT asked how do you plan to do so? AP replied f*** don't know… IWT asked AP if he knew his children were trying to contact him and that if they did not withhold money from him would it make a difference. AP said it would. IWT asked AP if he would like to speak to his children in the UK. AP said yes….IWT asked if he would like to meet the children? AP said yes…*"

546. This evidence supports the following findings. Alan wanted to provide for his children but had not decided how he would actually do so because he felt they were both ignoring him and withholding financial support. He wanted to both speak to them and meet them on March 2, 2016, before he executed the Declaration of Exclusion. However, when Mrs Williams-Myers attempted to read out an email from Michele (which in general terms contradicted the view Alan had of his children's disposition towards their ailing father, Mrs Williams-Myers' evidence suggests), Alan's lawyer and Mr Whan Tong prevented the email from being read out. Mr Asif QC testified that he did not consider it "*appropriate*". Mr Whan Tong essentially agreed, for reasons which are immaterial. What is material is the stance taken on behalf of Alan. The view that hearing from the children was not "appropriate" only makes sense, from Alan's point of view, if Alan's lawyer considered that his brief was to 'close the Trust termination deal' rather than to advise Alan about the implications of his terminating the Trust in the wider context of his estate planning overall. As I have already noted above when initially considering the terms upon which Kobre & Kim Cayman were instructed by Mr Knecht on Alan's behalf, the scope of the retainer was very narrowly defined. On

[110] G19A/12946.

the face of it, Mr Asif QC acted entirely in accordance with the letter and spirit of his firm's retainer, which required him to, in the words of the 'Nike' commercial, "just do it".

547. It is noteworthy that Deborah would later report that Alan had a "panic attack" after the meeting with the Trustee's representatives. She provided no detail as to what occurred. But this is certainly consistent with the Plaintiffs' implication that he may have been upset by confronting the possibility that he was seriously mistaken about his belief that his children had forsaken him.

548. Would it have made a difference to Alan's estate planning decision-making if he had known that his children had not forsaken him? Yes it would, Alan himself expressly replied at the March 2, 2016 meeting when asked by independent professionals who had no 'skin in the game'. Why was he, despite being aware that he was terminally ill, proceeding to terminate the Trust in circumstances where, upon his death, his wife would acquire all of the Trust assets and his children would inherit nothing? Because, he implicitly replied at the March 2, 2016 meeting, he was angry that his children had withdrawn both personal contact and support. Whether the decision to instruct lawyers to terminate the Trust and distribute the assets to himself and Deborah, without considering the need to make provision for his children in light of his inevitably approaching death, reflected Alan's true wishes must be considered in light of the fact that he clearly wished to provide for his children and would have done so but for the mistaken belief that they had effectively abandoned him.

549. Alan did not dream up the notion that his children were disloyal while in a transitory post-operative delirious state. The campaign to discredit Alan's children by hiring a private investigator and investigating bank accounts had been launched before his surgery. The campaign was continued after Alan's terminal cancer diagnosis of which his children were not promptly told. By late October, however, the HSBC bank statements had arrived and been reviewed. It is clear that, with Mr Knecht's 'assistance', Alan had determined that Nick had been misusing his father's account. Joe Knecht passed on Alan's instructions only to use the account for insurance purposes on October 28, 2015. As a result of Mr McPherson QC's penetrating cross-examination of Nick on this topic, it seems clear that Nick had been for some time using his father's account-linked credit card as if it was his own. In circumstances where there was no shortage of funds, this would not likely be controversial in most father and son relationships. However, Nick (in October 2015) was understandably apoplectic that a complete stranger was communicating these commands in

circumstances where he could not even speak properly to his father. He fumed[111]:

> "*I want to speak to my Father and I do not believe my Father doesn't want to talk to me. You are a ruthless evil person to not allow me to speak to him especially since you are telling me he is ill….*"

550. Alan had only recently returned home from Hospital, and Deborah in her oral evidence said that she would not have asked Joe Knecht to speak to Alan about these matters at this time. It is quite plausible that Joe Knecht was taking the initiative in this matter overall. Deborah apologised to Emily Exton for Mr Knecht "*overstepping the mark*" when he sent a letter without the lawyer's approval. During this same time period, Rachael Reynolds reported to the legal team on a telephone call with "*Alan, Debbie & Joe…Joe was running the proceedings*" and asking Alan whether she should accept directions from both Deborah and Joe Knecht. In an October 27, 2015 email, Deborah seemed to be seeking direction from Mr Knecht[112]:

> "*I really don't know what the plan is…?? Other than no communication with the kids…I did most of the talking. They are still calling nonstop now and lying about Alan saying he wanted to speak with him, etc…*" [Emphasis added]

551. Mr Knecht replied to Deborah:

> "*We need to stop pussy footing around here wasting time, lawyers fees etc……There needs to be a sense of urgency here…*"

552. There was admittedly, therefore, a "plan" to prevent Alan from communicating with his children while pressing ahead with Court proceedings to achieve the goal of terminating the Trust and distributing the assets to Alan (and ultimately) to Deborah. With Deborah undoubtedly overwhelmed by being primary caregiver for Alan, the presumably emotionally detached and assertive Joe Knecht was able to play a pivotal role. The "plan" is wholly inconsistent with the idea that Alan simply did not want to talk to his children. It is entirely consistent with a desire to (a) avoid Alan from changing his mind about terminating the Trust and gaining control over the Trust assets and (b) reduce or eliminate any motivation on Alan's part to make provision for his children. When seeking to investigate alleged impropriety, it is often instructive (as observed in the film '*All*

[111] G14B/6441.
[112] G14B/6290.

the President's Men') to "*follow the money*". It is rarely entirely coincidental when a questionable transaction is consummated and one of many potential beneficiaries of a fund ends up with the entire pot. The way in which Alan's affairs were managed in the last quarter of 2015 with an inflexible focus on a non-consensual termination of the Trust was, in hindsight at least, questionable for the following main reasons:

(a) terminating the Trust was not the only rational way of responding to the IRS/FATCA issue. Tax advice went both ways;

(b) the risk of criminal prosecution was the most obvious reason for bending over backwards to appease the IRS. Alan's terminal diagnosis arguably eliminated any risk of criminal prosecution in practical terms and, arguably at least, weakened the tax case for termination;

(c) Alan's terminal diagnosis made it important for him to consider sooner rather than later what provision to make for his children if the Trust was going to be terminated even if his life expectancy was not amenable to precise calculation. He had already provided for Deborah in the 2012 Will and made provision for her own children (his step-children) in the event that she predeceased him in the 2015 Will;

(d) both Forsters in London and Ogier in Cayman recommended an economical and potentially comprehensive settlement through mediation on November 10, 2015 and December 4, 2015, respectively. They both knew that Alan did not wish to disinherit his children and presumably believed that he would favour a comprehensive resolution;

(e) it is inherently improbable that Alan, a businessman who did not like wasting money, would have wanted to 'make the lawyers rich' rather than pursue a commercially rational compromise;

(f) absent the mistaken belief that they had abandoned him, it is inherently improbable that Alan would have freely decided to have no meaningful contact with his children when he knew he was terminally ill and/or to assume the real risk that he would effectively disinherit them if he terminated the Trust without making appropriate alternative provision for them;

(g) apart from achieving the result which was achieved (the Trust being terminated and its assets being distributed solely to Deborah after Alan's death), the "plan" to prevent communications between Alan and his children despite his terminal illness makes no rational sense.

553. It is important to record that Deborah clearly had her own non-financial motive for limiting contact between Alan and his children, to some extent at least. On October 22, 2015, she sent a draft email to Kevin Packman, Emily Exton and Rachael Reynolds which proposed advising Jamie and Nick that their father had been "*diagnosed with colorectal cancer*", had been extremely stressed before his admission and inviting them to "*let him recuperate in peace*". Deborah was legitimately concerned to prevent Alan from being stressed by engaging with his children about the merits of the Trust termination decision. It may well have been entirely coincidental that Deborah's concern for Alan's medical welfare and Joe Knecht's evident enthusiasm for a 'take no prisoners' litigious approach were aligned. Under cross-examination Jamie agreed that around this time he definitely knew that Alan had cancer but not that it was Stage IV. It is unclear why the severity of Alan's condition was not communicated to his children by Deborah; they learnt this through the Trustee some weeks later. However, it is also important to note, that while Deborah was requesting that his children let Alan recuperate, Mr Knecht was still seemingly discussing business matters with him in Hospital. In an October 21, 2015 email to Nick, Joe Knecht referred to meeting Alan and being quizzed about a transaction. A seemingly surprised Nick replied the following day: "*Did you go meet him in the hospital? How is he doing please? I almost got to speak to him but couldn't hear much. I am proposing to come out in the next week or two.*"[113]

554. It seems clear that Mr Knecht was the driving force behind terminating the retainer of Ogier and replacing them with Kobre & Kim. But before his "*you need a fighter not a lover*" email in December, he had already on November 3, 2015 colourfully demonstrated his own fighting prowess in an email to the various lawyers. This may well have provoked their subsequent warnings about the high costs of pursuing a litigious solution and prompted their warning about the costs of contentious approach:

> "*Bluntly stated, these children are opportunists, extortionists, obstructionists and finally terrorists. As such, in my meeting with Alan this afternoon there is no grey*

[113] G14B/6142.

area. There will be no negotiation, compromise or settlement. He is extremely adamant on this point, and Deborah and I have committed this result to him."

555. It makes no sense that Alan would have harboured such hostility towards his children, whom he never said he wanted to disinherit. I do not exclude the possibility that he may have himself vocalised harsh feelings about them. However, any anger Alan did harbour towards them at this juncture would have been fuelled by a serious misapprehension as to what his children's true position was; because (at the very least) he was being denied contact with them. It seems more plausible that Joe Knecht was an overly enthusiastic advocate in Alan's cause and that Alan himself was too weak to give sustained attention to the legal stratagems that Mr Knecht seemed to relish engaging with. The day before Joe Knecht reported meeting with Alan and receiving uncompromising instructions, an occupational therapist relayed to the Mayo Clinic concerns that Alan was "*extremely ill and weak*" and "*wife is extremely overwhelmed*"[114]. The disjuncture between Mr Knecht's hyperbolic articulation of Alan's wishes and the way in which Emily Exton and Rachael Reynolds construed Alan's wishes is the best explanation as to why both lawyers, in different firms and different jurisdictions, pushed back firmly against Mr Knecht's uncompromising battle-cries. They must have shared an intuitive sense that Alan did not truly wish to pursue an uncommercial litigation battle against his own children and determined that they could not ethically adopt a 'take the money and run' approach.

556. It is against this background that the engagement of Kobre & Kim Cayman by Mr Knecht on terms which expressly required them to pursue termination of the Trust and distribution of the assets to Alan and Deborah, and implicitly forbade the firm from giving any broader legal advice, must be viewed. It was not suggested that the confines of this retainer were inappropriate, and it is only in hindsight that the brief looks a somewhat unbecoming one. But at the material time and in ways that were probably not obvious, the persons on whom the terminally ill, bed-ridden and legally blind Alan was heavily dependent for personal care and business needs were each (perhaps in somewhat different ways) committed to a strategy which (a) had the effect of alienating Alan from his children and (b) had the unconditional goal of terminating the Trust and transferring the assets to Alan and Deborah. This was a 'who dares wins' strategy, because termination would result in Deborah sweeping the board and leaving the children out in the cold. Demonizing Alan's children would ensure that he had no motivation at all to urgently address making alternative provision for

[114] I Vol. 1 280.

his children in place of their interests under the Trust. On the other hand, if termination did not occur before Alan's death, Deborah's worst nightmare would be realised. She would be exposed to the risk that Alan's children conspired to minimize her lifetime income entitlement. It would be naïve to believe that she was blind to these very practical and readily apparent considerations.

557. The inference that this fear on Deborah's part underpinned the decision to isolate Alan from his children is not merely the product of abstract and retrospective judicial analysis. The inference was first drawn, with considerable emotional intelligence, by Michele in March 2016. In her plaintive (and perhaps belated) 'woman-to woman' email to Deborah of March 3, 2016, Michele reminded of Deborah of the importance of the relationship between father and daughter. She also observed[115]:

> "*… We have tried to reach out to you, to help in any way we can, we have tried to reassure you that that we will continue to send you money after Daddy's death….*
> *As a fellow human being, please stop the legal battles. Please stop trying to destroy our lives and please talk to us. I do believe we can find an answer to all this without smashing it all up…it's easy to get caught up in a battle where the sole objective is to win at all costs…*"

558. Deborah responded on Sunday March 6, 2016 indicating that she had now read Michele's email to her father and setting out his response. This included the following observations which I accept Deborah accurately conveyed:

> "*You state that, 'we have tried to reach out to you, to help in any way we can'. This is unequivocally false other than when you tried to contact us in December, we have heard nothing from you since last February…he finds it odd that you make no effort to contact him unless it involves your personal finances…Your father, once he regained control of his assets, was making plans to ensure that everyone was taken care of in the unfortunate event of his passing. It was, and always has been, his decision to terminate the Trust…It was solely your decision not to agree to your father's wishes, and it is that decision that led to the situation now. As you know your father is not somebody who can be forced into making decisions which are not his. We do not appreciate the inference that this is something I am pushing your father to do. Your father finds the way you have treated him 'f***ing disgraceful', and wishes to have no further contact with 'any of [you]' until this matter is resolved and his wishes are adhered to. Maybe then, bridges can start to be rebuilt…*"

[115] G19A/13295-13296.

559. This email shines a bright light on Alan's thinking around the time he executed the Declaration of Exclusion and supports the following inferential findings:

(a) Alan's belief that his children were treating him in a "*disgraceful manner*" was central to his decision to postpone making any provision for them;

(b) Alan was both upset that his children had seemingly not been getting in touch with him and expressing concern for his welfare yet also too angry to speak to them (on March 6, 2016 at least);

(c) Alan's militant objection to having any contact with his children until "his wishes are adhered to", communicated through Deborah, contrasts noticeably with his indication to the Trustee's representatives on March 2, 2016 that he would like to see his children;

(d) Alan believed that the termination decision was his own free and independent decision and one which he was entitled to take regardless of his children's views;

(e) Alan was oblivious of the possibility that there would be no opportunity to rebuild bridges and make provision for his children if he died shortly after the Trust was terminated.

560. In my judgment it is ultimately clear that Alan believed that his decision to persist with the Trust termination decision he had first made in July 2015 was what he wanted but that his wishes were to a large extent shaped by a view of the world inevitably heavily shaped by Deborah and Joseph Knecht. It is entirely plausible, that at many (if not all) material times Deborah and Mr Knecht believed that they were facilitating what Alan genuinely wanted to do. From the outset, however, the idea of terminating the Trust and gaining control of the assets was prompted by Deborah's concerns about her own financial security. The subsequent "plan" to limit contact with his children, which began with shutting Jamie out of the family home in August 2015, helped to fan the flames of whatever anger Alan might have naturally had about his children's resistance to terminating the Trust. It matters not if this occurred by accident or design.

561. Indeed, the "plan" ensured that Alan had no opportunity to consider the grounds of his children's opposition or to directly engage with them in finding a consensual resolution. Perhaps

unintentionally, the "plan" resulted in the children first learning of Alan's terminal cancer diagnosis from the Trustee rather than from Deborah. I also infer that the "plan" resulted in Alan not being told of all the efforts his children were making to contact him. I make no finding as to whether or not Alan refused to talk to Michele when she called at Christmas time, as Deborah contended in her evidence. At the very least, it seems clear she did not encourage him to speak to his daughter. It is impossible to believe that Alan was aware that Nick had considered travelling to Florida but had expressed legitimate concerns in a late October 2015 email (which were not allayed) about travelling to Florida and being locked out of the house when he arrived.

562. For these reasons I ultimately have little difficulty in finding that the decision to instruct Kobre & Kim in early 2016 on behalf of Alan on a very 'tight leash' to ensure the termination of the Trust and distribution of the Trust assets to Alan and Deborah was not reflective of Alan's free and independent will. It is not a matter of whether Alan approved the retainer letter. On January 14, 2016 on a follow up consultation at the Mayo Clinic he reported being "*much better in the past 2-3 weeks*". The critical factor is that any decision he actually made to pursue the termination route was obviously heavily influenced by a view of his financial and family position which was shaped by partisan briefings undiluted by independent advice about the implications of pursuing the transaction at that stage of his life.

563. What Alan required and deserved was truly independent legal advice from an advisor capable of appreciating his dual affections for and obligations towards his wife and his children and affording him an opportunity to reflect on who he wanted to take these affections into account. Because of his health, he had limited direct contact in late 2015 with his Cayman-based and London-based lawyers and most of their instructions were filtered through Deborah and/or Joe Knecht. When he was more equipped to give direct instructions, he instructed Kevin Packman that he wished to terminate the Trust, gain control of the shares in his sole name, and then create grantor trusts for his wife and children. Although he was somewhat ill in July 2015, there was no reason to doubt that he would have time post-termination to resolve the contingent IRS claim and establish the US trusts. By January 2016, the most significant concern Alan ought to have had (if he had known his children were seeking to see him and reasonably seeking alternatives to terminating the Trust) was whether (in light of his terminal diagnosis) (a) it still made sense to terminate the Trust, and (b) if so, how could he provide for his children before he died. The mediation proposed by Forsters and Ogier could have addressed these concerns.

564. The appropriate advice was never received because in the prelude to the execution of the Declaration of Exclusion on March 2, 2016, Alan was represented by fresh lawyers retained on the implicit assumption that he had already made a free and informed decision that (a) he wished to terminate the Trust without making immediate provision for his children and (b) assume the obvious risk, arising from his terminal illness, that his children would be 'disinherited' as a result.

The role of Mr Knecht

565. In my judgment it is not necessary or appropriate to draw adverse inferences from the failure of D2-D4 to call Joe Knecht as a witness. However his role was so pivotal in the lead-up to the termination of the Trust, based in large part on the documentary evidence placed before the Court that I have been obliged to make findings in relation to his involvement in matters which he was unable to respond to. In this regard, I have sought to adopt a careful approach in light of the obvious fact that documents he created have not received the benefit of oral explanation by him. Broadly speaking, I have drawn inferences from the fact that he wrote various things rather than reached any conclusions about the truth of the relevant statements. My view of his involvement largely explains why I reject the Plaintiffs' thesis that Deborah was the prime mover in, as their case implied, launching a deliberate 'smash and grab' raid on their birth-right which was protected by the Trust.

566. In Appendix 7 to D2-D4's Closing Submissions ("*Joe Knecht*"), Mr McPherson QC commended to the Court three takeaway points:

> "*(a) First, that the idea of a conspiracy between Deborah and Mr Knecht, layered on an intimate relationship between them, is simply fantasy*
>
> *(b) Secondly, that in truth Mr Knecht is something of a red herring. While plainly a colourful character, he is in fact of no practical significance in this case whatsoever*
>
> (c) *Thirdly, the fact that Ps are so willing to pin their colours to Mr Knecht being a key part of Deborah's scheme to secure the Cutty Sark shares for herself reflects the weaknesses in their case. They seek to weave someone who they wish to paint as a 'rogue' and a fraudster into the narrative solely for the purpose of trying to taint Deborah by association.*"

567. For reasons I have already set out briefly above, I accept the first proposition. There is no evidential basis for even tentatively finding that an intimate relationship existed between Deborah and Joe Knecht. He may have been a secret (or not-so-secret admirer) of Deborah's, hoping to win her favour. Wilson, Deborah's son and clearly loyal to Alan, was not a fan. Deborah when pressed about their relationship calmly suggested that counsel was making "too much" of it. The only material inference which I draw from the documentary evidence in particular is that Mr Knecht was a partisan supporter of Deborah's longstanding desire to gain control of all the Trust assets in the event of Alan's demise.

568. As early as September 7, 2012, he introduced Deborah to John Ball as a client with a "*somewhat complicated international estate planning situation with complex issues…this will be a*[n] *involved and delicate situation*". He attended an initial meeting with Deborah and Mr Ball in which Alan's "*real estate in London*" was mentioned as being "*income producing maybe owned by a Cayman Trust*". As a result of this initial meeting, which did not reflect any involvement on Alan's part at this initial stage (he would have been well aware of the Trust), Mr Ball decided after doing conflict checks to represent both Deborah and Alan and on September 18, 2012 advised her he would have to meet with them both[116]. The first involvement of Joe Knecht in the Poulton family's financial and legal affairs, therefore, appears to have been as a supporter of Deborah who seemingly viewed the Trust as merely holding assets which really belonged to Alan. The previous month, she had become Alan's sole beneficiary under the 2012 Will and purportedly given an entitlement to 40% of the Trust income after Alan's death.

569. A significant plank of the Plaintiffs' case, advanced through cross-examination of Deborah, was the absence of any evidence of his terms of remuneration, it being agreed that he was paid for the extensive work that he did on Alan's behalf over a period of roughly six months. This merely suggested that the work that he did was not on a formal commercial basis. An accountant, he made an unsuccessful pitch for working on Alan's tax returns in the summer of 2015 when someone else had already been retained. One possibility is that Alan or Deborah had an oral agreement with him and he was being paid on a cash basis. Another possibility is that Mr Knecht was working (perhaps in part) on a contingency basis, having been promised by Alan and/or Deborah that he would be taken care of once Alan got control of the Trust assets. This might explain his uncompromising

[116] G2/623- G630.

approach to achieving the Trust termination goal. I make no finding one way or the other on an ultimately inconsequential issue.

570. I am unable to accept the submission that "*Mr Knecht is something of a red herring…of no practical significance whatsoever*". He was between September 2015 and January 2016 Alan's significant mouthpiece (alongside Deborah) in relation to his financial and legal affairs, during a period when Alan's ability to instruct lawyers in a fully engaged and sustained manner was seriously impaired by his medical condition. With Deborah herself occasionally "*overwhelmed*" by the challenges of caring for Alan, Joe Knecht played a pivotal role in directing the course of Alan's affairs, and on more than one occasion brazenly demonizing Alan's children in correspondence. In the context of an analysis of whether or not Alan's decision to trigger the termination of the Trust by executing the Declaration of Exclusion on March 2, 2016 is vitiated by undue influence, his role cannot be ignored. Based on my view of the evidence, the most significant portions of the pleaded case as regards Joseph Knecht may be summarised as follows:

(a) the ASOC addresses the "*Involvement of Joseph Knecht in September/October 2015*" (paragraphs 34-57) by broadly pointing to his unexplained role in representing Alan as casting doubt in the Plaintiffs' minds as to whether Alan was in control of his affairs (I accept that notwithstanding attempts to explain his role, Mr Knecht's involvement demonstrates that Alan was not in full control of his affairs);

(b) the ASOC alleges that Mr Knecht advised Deborah to instruct Kobre & Kim and that they were both involved in "*coordinating the whole process…to…advance her interests….not interested in seeing that Alan was being properly and independently advised*" (paragraphs 75.2O) and that Joseph Knecht was primarily committed to Deborah's interests *(*paragraph 75.2P) (this allegation has been proven to my satisfaction);

(c) the ASOC casts doubt on the probity of Mr Knecht by referring to unsubstantiated allegations of past wrongdoing on his part (paragraph 57) (no credible evidence of any lack of probity in the past was in fact adduced).

571. Bearing in mind these pleaded allegations and the undeniable fact that Joe Knecht with Deborah's consent purported to act for Alan over a period of several months and was involved in shaping the

scope of Kobre & Kim's retainer in a pivotal manner, it is somewhat surprising for her counsel to submit (Closing Submissions, Appendix 7, paragraph 4) that:

> "*…given his willingness, even propensity, to be economical with the truth, little weight can be placed on anything that he might have said in emails, save where it can be corroborated from other sources (documents or witnesses).*
> *The Court will therefore no doubt wish to treat with care anything that Mr Knecht might have said in emails.*"

572. It is true that on or about January 18, 2016 Mr Knecht's authority to act on behalf of Alan by instructing Kobre & Kim was terminated. The position was confirmed to the law firm by email on January 21, 2021 and explained by reference to a desire to limit the persons involved to avoid confusion and expense. In mid-January 2016, when the Kobre & Kim retainer was almost finalized, Deborah had complained to Mr Knecht about his continuing to cause Ogier to incur further costs. Her explanation for his termination was the following[117]:

> "*My husband got upset because he was running the bill up and it was shortly after, I believe, we got the new firm, Kobre &Kim*."

573. This evidence supports rather than undermines the general picture of Joe Knecht being a somewhat uncontrollable 'force of nature' rather than, as Deborah's evidence overall sought to imply, a humble servant in the palm of Alan's hand dutifully carrying out his instructions. Although he purported to be solely or primarily representing Alan's interests, he assumed the covert (and probably self-appointed) role of being Deborah's 'attack dog'. Moreover, Joe Knecht being 'fired' does not magically erase the evidential significance of the role he played and the influence he had over Alan up to the pivotal point of Kobre & Kim's retainer. The scope of that retainer critically (a) expressly required the new lawyers to ensure that the Trust was terminated and the CSLC shares be transferred to Alan and Deborah, a brief which they successfully achieved, and (b) implicitly expunged from the retainer any duty to give advice on whether that course of action was consistent with Alan's true wishes overall. There is no suggestion that after Mr Knecht exited the stage, Kobre & Kim were invited to revisit the terms upon which they had been retained and to carefully explore with Alan (in the round and in the absence of Deborah) what his true wishes were. More importantly still, what is most significant about the emails sent by Mr Knecht during the autumn of 2015, in particular, is not the truth of any factual assertions made, but the fact that they suggest that:

[117] Transcript Day18, page 156 line 25-page 157 line 2.

(a) he had seemingly boundless enthusiasm for advancing Deborah's interests through demonizing her husband's children; and

(b) he paid no evident attention to the natural love and affection that Alan must have had for his children and the possibility that he might actually have wanted to make peace with them and/or to make provision for them in any event.

574. Further and in any event, although Joe Knecht was clearly stopped from representing Alan formally in the context of instructing Kobre & Kim on or about January 18, 2016, he continued to play a role behind the scenes. For instance, on January 21, 2016 he sent an email to Mike French. On March 3, 2016, Deborah sent a '*Narrative of Wrongdoing*' to the Trustee in relation to Michele and Nick. Deborah admitted the broad aim of this two page document was to encourage the Trustee to ignore Alan's children's objections to the termination of the Trust. She could not recall who had helped her prepare this document after the March 2, 2016 meeting, but her daughter-in-law Christine recalled that Mr Knecht was involved with the document. This evidence is credible because Joe Knecht had several months earlier initiated investigations into the way in which Michele and Nick had managed their father's affairs. On or about January 6, 2016, there had been email correspondence between Deborah and Joe Knecht with the header "Narrative of Wrongdoing".

575. In summary, I find that the role of Mr Knecht provides broad support for the Plaintiffs' case on undue influence. To be clear, I make no positive findings about precisely how he brought his influence to bear. It is entirely plausible that the worst that he did was to reinforce, in pot-stirring fashion, feelings of anger Alan already had and/or voiced. However, the evidence as to Alan's personality overall suggests that he was quick to anger but also willing to forgive. Bearing in mind Alan's medical condition and extreme dependency after his mid-October 2015 surgery, he was particularly vulnerable to becoming stuck on a somewhat immature path of angry stubbornness, oblivious of the option of taking a wider and more conciliatory view of his financial and legal options. On a balance of probabilities, I find that Joe Knecht helped to create circumstances in which the division between Alan and his children was widened rather than narrowed and Alan's natural desire to provide for his children was swept aside or suppressed by the mistaken belief that they were unreasonably thwarting his reasonable wishes and failing to financially support him in his hour of greatest need. In my judgment, based on the material before the Court, Mr Knecht was

a more aggressive advocate for an outcome which would privilege Deborah's financial interests over the Plaintiffs than Deborah herself (overtly at least) would have been, left to her own mostly more gentle devices.

576. Joe Knecht appears from the record to have been an ideal comrade-in-arms for a bitter commercial conflict, somewhat like the aggressive leader of an otherwise more restrained litigation team. He seems to have relished a 'good fight' and to have had no compunction about playing 'hardball'. If Deborah had proposed peace, he would probably accuse her of being "*too full of the milk of human kindness*". Although the idea of settlement was ridiculed and rejected when he was at the helm, Deborah herself had been willing to contemplate reaching an accommodation with Alan's children at an earlier stage. In a very frank July 21, 2015 email where she expressed why she wanted to terminate the Trust, she raised the idea of London property being transferred to her[118]:

> "*…I would really like to own it outright so I can walk away without having to deal with them every month….Do you think we could reach an arrangement with the kids that I would release any claim in the trust and/or income and the assets could be transferred to them upon Alan's death…*"

Findings: the Narrative of Wrongdoing and the Voicemails

577. An important part of D2-D4's defence to the undue influence claim was the central factual thesis that Alan was angry with his children because of (a) their past misconduct, (b) their obstruction of his attempts to terminate the Trust and (c) their failure to financially support him. Because of this, it was he that did not want to speak to them, not Deborah who was sequestering him. Accordingly, there was no deliberate attempt on Deborah's part to unduly influence Alan. The 'Narrative of Wrongdoing' sent to the Trustee on March 3, 2016 and the audio recordings apparently made on March 23, 2016 and also sent to the Trustee were both used at the time to encourage the Trustee to proceed with termination of the Trust over the Plaintiffs' objections. For present purposes, the question is whether these materials support a finding that Alan would have freely wished to terminate the Trust without making provision for his children despite the fact that he received, as I have now found, insufficient legal advice about the implications of the Declaration of Exclusion. The short answer is that they do not.

[118] G11A/4007. She also expressed what I regard as irrational fears about Alan's children, which I view as demonstrating the depths of her anxieties about being a minority beneficiary of the Trust after Alan's death.

578. The Narrative of Wrongdoing alleges that a "*cursory review of the HSBC statements from 2006-2014 showed a number of unauthorized charges and transfers*". There is no reliable evidence that Alan himself, either in Hospital or shortly after returning home from major surgery, determined that his credit card had been misused by Nick over an 8 year period. It seems inherently improbable that Alan would have failed to look at one or more bank statements during a period when his vision was not materially impaired. If he did look at the bank statements, it makes no sense that he would not detect unauthorised charges which a "cursory review" would have revealed. Nick's somewhat convoluted explanation as to how he used the credit card did not entirely withstand cross-examination. But it is difficult to believe that at a time when Alan was not short of money (2006-2014) he would have been angered by his son using the card on the HSBC account to some extent as if it was his own, on the assumption that he did not have explicit or tacit permission to do so[119].

579. In late October 2015, however, Alan might well have been angered by the idea that his son who was failing to assist with his IRS liability at a time when he had just been told he was terminally ill had been the recipient of undue generosity in the past. And by this juncture there was in fact a genuine shortage of funds, attributable primarily to rising legal fees, creating good grounds for him to instruct Mr Knecht to limit Nick's further use of the card. Having regard to the fact that (a) on March 2, 2016 Alan was still contemplating making provision for his children (b) it is possible that if Nick had an opportunity to freely communicate with his father he might have (through charm or fact-based persuasion) been able to allay any concerns, I find that this "indictment" laid against Nick has no material significance for the undue influence analysis. The same applies to the audio recording, which merely confirms that Alan was angry because he felt convinced that his son had exploited him. It is in any event unclear when and in what circumstances this recording was made. It is not easy to accept that Alan after his mid-October surgery had a crystal clear recollection of the agreement he reached a decade ago about the use of his HSBC account, not by a stranger but by the son who was most directly involved in preserving Alan's business legacy.

580. Two charges are laid against Michele. The main charge is that JA Poulton Building Contractors made an investment with Barclays (referred to as a hedge) in 2008 with Michele forging her father's

[119] It appears from comments on the draft of this Judgment from D2-D4's counsel that in fact Alan did not examine his bank statements at all on a contemporaneous basis over a number of years. This would support, rather than undermine, my central finding that before legal expenses were incurred to respond to the FATCA crisis and terminate the Trust, there was no shortage of funds and Alan had no desire to strictly monitor how his son was using his credit card.

name. Alan only learned about it in 2010 and suffered a loss of £3 million. Deborah's evidence that Alan spoke of this incident and was angry about it was supported in general terms by Father Pfab. Michele's evidence that she often signed Alan's name on his behalf was supported by Mr French. Michele adamantly denied signing the Barclays form without Alan's prior authority. I accept Mr French's evidence that Michele did from time to time sign documents on Alan's behalf when he was in the US. I infer from this that Michele must on occasion have signed documents with Alan's name assuming that he would approve her doing so, and exercised judgment as to when his prior consent was required.

581. In these circumstances, the "forgery" allegation would appear to be somewhat hyperbolic with the real point being that Michele made a significant investment which went 'belly-up,' without his prior approval. Alan was, seemingly, not a stranger to hyperbolic ranting and raving. Had the investment been a roaring success, it is impossible to believe that Alan would have been keen to deny that he approved it. I accept that Alan was for a time angry about the investment loss and blamed Michele for it. However, I also accept Michele's evidence that compensation (in an amount uncertain) was ultimately received, probably before the beginning of 2015. Detached from a scenario in which Alan believed in (2015-2016) that Michele (a) had no interest in his wellbeing, (b) was unreasonably blocking his attempts to terminate the Trust and (c) was starving him of cash, it is impossible to believe that Alan would have still harboured searing anger about an imprudent investment (which many others had also been ensnared by) made in 2008. So this charge provides no answer to the undue influence case of the Plaintiffs.

582. The second count laid against Michele was that she attempted to deceive her father by deliberately drafting a CSLC Board minute as approving the transfer to her of all the CSLC shares rather than CSLC's shares in JA Poulton Building Contractors as had been agreed. Alan corrected the error before signing the minute. As there would have been no commercial rationale for transferring all of the CSLC shares to Michele, it is not seriously arguable that this was a deliberate attempt to deceive Alan. It makes no sense that in January 2015 he would have proceeded give Michele the other 50% of JA Poulton Building Contractors' shares after a major attempted deception and/or if he was still furious about the so-called "forgery" in 2008. This transaction supports a finding that any anger Alan felt towards Michele in 2015-2016 was not to any material extent based on any pre-Trust termination concerns. Against this background, the audio recording in which Alan expresses

anger towards Michele and accuses her of stealing from him makes no sense detached from his understanding of how Michele was treating him at the time.

583. Finally, I should record that this Narrative does not come close to explaining what anger Alan could possibly have harboured towards the children he had somewhat less contact with (James and Daisy) and his grandchildren. While he was seemingly mildly disappointed in James' wealth-building achievements, Alan may well have underestimated how difficult economic conditions were in post-2008 London (as elsewhere). While Alan seemed insensitive to Daisy's needs, he likely was the type of father who idealised his youngest daughter and found her challenges too painful to confront. Moreover, the idea that he sustained a burning anger about Michele's distant misdeeds is belied by the fact that on March 2, 2016, he confused Michele's occupation (running a jewellery store) with that of a former, fond French girlfriend, which reflected a transference of the memory of endearment.

The relevance of Alan's children's opposition to Alan's wishes and their failure to provide financial support

584. An implicit (if not explicit) part of D2-D4's case was that it was entirely rational for Alan to seek to recover the Trust assets without making any or any immediate provision for them because he was justifiably angry at their failing to comply with his wishes, their failure to provide tangible financial support to meet the IRS claim and their apparent lack of interest in his wellbeing after his terminal diagnosis. My above findings implicitly reject this view of the facts, but I now briefly deal with it more explicitly.

585. Firstly, I accept that Alan was probably genuinely angry at his children not going along with his wishes in part because he was ultimately persuaded that it was the best financial option and partly because he could not bear the stress of the ongoing conflict between the wife whom he loved and the children that he loved. Even before his terminal diagnosis and major surgery in mid-October 2015, Deborah implied that he lacked the physical strength to cope with this gargantuan financial dilemma. In a July 11, 2015 email to Kevin Packman, she observed: "*his mind is still sharp but his body is giving up*". Bearing in mind that Alan had the power to exclude the children as beneficiaries, they arguably should have accepted the position (as Nixon Peabody warned them)

and trusted that he would make alternative provision for them. However it is far from clear that this was a prudent course for them to take for the following reasons:

(a) the Plaintiffs were initially entitled to be suspicious that Alan had been persuaded to 'disinherit' them, because they were initially mistakenly told that the Trust had already been terminated without any or any significant prior consultation in July 2015;

(b) the Plaintiffs were given a rational basis for exploring alternatives to the termination option when Nixon Peabody advised them on July 28, 2015 that the IRS could not access the assets as long as they were held by the Trust;

(c) their suspicions that their father was being influenced by Deborah were reinforced when Jamie, attempting to engage with his father in exploring alternative options to terminating the Trust, was locked out of his father's home in early August;

(d) even if terminating the Trust was the most prudent option because of the threat of criminal liability for Alan in the summer of 2015, Alan's terminal diagnosis in mid-October 2015 objectively called for a reappraisal of the strategy for dealing with the IRS. With Alan's life expectancy being materially reduced, it was (or ought to have been) obvious that the risk of criminal prosecution was significantly reduced and that the main priorities should be protecting Deborah from the ravages of the IRS claim and (if the Trust had to be terminated) making alternative provision for Alan's children before he died;

(e) because Alan, under the influence of Deborah and Joe Knecht, rejected the advice of two lawyers to explore mediation, and the Plaintiffs were denied access to their father, they were denied a reasonable opportunity to reach a compromise and were given further reasons to suspect that their father's capacity to make independent decisions had been compromised; and

(f) with hindsight there is no basis for finding that if they had 'obediently' consented to the Trust being terminated in or about October 2015, the terminally Alan, relying on Deborah assisted by Joe Knecht to manage his affairs, would have made alternative provision for his children before he died.

586. In light of these considerations, it is perhaps unsurprising that the Plaintiffs appear to have made somewhat half-hearted efforts to raise alternative sources of financing to meet the contingent IRS claim. While they were being cross-examined, I was somewhat bemused as to why more vigorous steps had not been taken to try and see their father and to come up with alternative financial options to terminating the Trust. On reflection their seeming inaction, preoccupation with their own financial interests and their apparent lack of deep concern for their father's medical plight is probably explicable by a variety of factors, including the following:

(a) the dilemma presented by FATCA with cross-border legal implications was far above their 'pay grade' and beyond their comparatively narrow working experience;

(b) because they were denied access to their father, the Plaintiffs could not verify what his true wishes were. They probably feared termination of the Trust and being deprived of their 'birth-right' as much as much as Deborah feared being dependent on Alan's children after his death. This (and perhaps a lingering fear that their father might really have decided to disinherit them) would have undermined any serious motivation to provide financial assistance to meet the IRS claim. Thirdly, because of their geographical separation from their father, relative youth[120] and limited contact in recent years, the parent/child relationship had not undergone the gradual process which often occurs when, typically, late middle-aged children assume responsibility for making important decisions for their parents and managing their care. This potentially explains why Alan expected his adult children to simply follow his wishes and they did not simply nominate one of their number to fly to Florida and more assertively seek to involve themselves in the management of his affairs and medical care, despite anxieties about being locked out.

587. In summary, I find that the Plaintiffs' conduct in declining to consent to the Trust being terminated (and raising questions about Alan's capacity and Deborah's undue influence) in circumstances where (a) the Plaintiffs were being denied access to their father to directly explain their position and (b) Alan's own lawyers had recommended a mediated solution, did not provide objectively reasonable grounds for making the impugned decision in any event (i.e. even with the benefit of

[120] This is a somewhat subjective maturity judgment based on my personal and general experience that adult children in recent times have frequently only begun assuming responsibility for their parents at an older age than the eldest of the Plaintiffs had reached in 2015-2016.

independent legal advice). Nor does any historic 'misconduct' on their part adequately explain or justify the impugned decision, it being admitted that Alan had not already decided on March 2, 2016 to 'disinherit' his children.

Summary of factual findings on undue influence claim

588. In summary, I find that D2-D4 have not displaced the presumption of undue influence which arises from the circumstances under which Alan executed the Declaration of Exclusion on March 2, 2016. Further and in any event I find on the balance of probabilities, Alan's decision to execute the Declaration of Exclusion in order to terminate the Trust was not made "*after full, free and informed thought about it*"*: Zamet v Hyman* [1961] 1 WLR 1442, 1446, per Evershed MR.

589. He was misinformed about his children's true position and was denied free contact with them. His wife who his primary caregiver was convinced that his children had no interest in their father's welfare and had a vested interest in Alan making no provision for them. Although he admittedly wished to provide for both his wife and his children, Alan received no independent advice about the implications of consummating the transaction (when he was terminally ill) on terms which would benefit the wife he was wholly dependent upon and 'disinherit' the children he also wished to provide for, if he died after the Trust was terminated and before making alternative financial provision for his children. The lawyers he did receive advice from were retained for him by an agent who was committed to advancing his wife's interest over his children, and the terms of their retainer absolved them from any obligation to advise Alan on the merits of the Trust termination decision. The Declaration of Exclusion executed on March 2, 2016 is accordingly liable to be set aside on the grounds of undue influence.

FINDINGS: WRONGFUL EXERCISE OF POWER/ESTOPPEL CLAIMS

Wrongful exercise of power

590. In paragraph 78.1 of the ASOC, the Plaintiffs allege that the power of exclusion was a fiduciary power which Alan improperly exercised (a) by failing to have regard for the interests of the Plaintiffs and (b) in breach of duty and/or for an improper purpose. This claim as specifically

pleaded was not addressed in the Plaintiffs' Closing Submissions. Instead it was argued (in summary):

> "*645. When a power is exercised not bona fide, but for a purpose beyond the scope of the instrument creating the power, or not justified by it, any appointment or exclusion is said to be a "fraud on the power" and equity holds it bad.*"

591. Mr McPherson QC critically submitted as follows:

> "*106) The Declaration of Exclusion was made by Alan as Settlor although he also consented to the declaration as Protector. As the substantive power of exclusion is conferred on the "Settlor or the Protector", without requiring the Protector's consent, the only question which arises is whether the Settlor's power is a personal or fiduciary one. There is nothing in the Trust Deed from which the Court should infer that when reserving powers to himself – whether generally, or the power of exclusion specifically – Alan intended to burden himself with fiduciary obligations. Absent a clear objective indication that that was his intention, the Court will be slow to conclude that the Trust Deed did indeed impose any fiduciary obligations on him qua Settlor in respect of the powers that he reserved to himself…*
>
> *119)… (e)… (ii)* Ps' unpleaded claim that Alan's exclusion of all beneficiaries except him and Deborah '*subverts the very purpose of the power*' and is thus a fraud on the power is
>
> *(1) Is simply not understood:*
>
> *(a) The purpose of the power was to enable Alan to exclude as beneficiaries individuals who might otherwise be entitled to benefit under the Trust*
>
> *(b) What Alan did was entirely consistent with that*
>
> *(2) Has no prospect of succeeding in light of Grand View v Wong*[121]."

592. In light of the Court of Appeal for Bermuda's decision in *Grand View-v- Wong et al* [2020] CA 6 Civ (20 April 2020), I agree that the Plaintiffs cannot rely on my decision that one cannot exercise a similar power in a way which is inconsistent with the substratum of a trust: *Wong v Grand View Private Trust* [2019] SC (Bda) 37 Comm. However, even if the substratum doctrine was potentially

[121] [2020] CA (Bda) 6 Civ (20 April 2020).

applicable to a power of amendment or exclusion, I would still find that a settlor may validly exercise such a power with a view to benefitting some beneficiaries at the expense of others as occurred with the Declaration of Exclusion in the present case.

593. If I was required to consider the wrongful exercise of power/fraud on power claim, I would have dismissed it.

Estoppel

594. In their Closing Submissions, the Plaintiffs' alternative estoppel claim was summarised by Mr McLarnon as follows:

> "*659. There are two estoppels which arise on the facts of this case.*
>
> *660. First, an estoppel which prevented Alan from exercising the power of exclusion to exclude the Plaintiffs from benefitting from the terms of the Family Trust in circumstances where he represented to them that the assets in the Trust formed part of a family business and relying on that representation they devoted their working lives to the Family business on the basis of a common understanding between them and Alan that it was a family business. It was unconscionable for Alan to exercise the legal power of exclusion at the expense of the Children's expense and for his betterment.*
>
> *Second, an estoppel when Alan took possession of the Trust Property. When the Trust Property was transferred Alan (and Mrs. McMullan-Poulton as registered legal owners) took it subject to an equity in the Plaintiffs' favour. It would be inequitable and unconscionable for Alan (or anyone claiming through or under him) to be allowed to resile from his earlier representations that the Trust property formed part of a family enterprise in order to pay his own debts, debts which were incurred after the Trust was established and which it would appear were knowingly not paid by Alan.*"

595. Mr Lowe QC did not address this alternative claim in oral closing argument, making it clear that he was now abandoning it. In D2-D4's Closing Submissions, Mr McPherson QC advanced cogent reasons why the facts of the present case did not support a finding in favour of the proprietary

estoppel claim. I accept those submissions. Apart from the submission that there was no sufficient evidence of representations and detrimental reliance in the requisite legal sense, the claim seemed ill-suited to the trust context. The following important further submissions were made which I also accept:

> "86. *In addition*
>
> *a)* *The representor must be the owner of the property which is said to be the subject of the estoppel; an estoppel cannot arise if the representation relates to property that is owned by, or under the control of, a third party: Thorner v Major (supra, @ para 61). That is likely to be important in this case*
>
> *b)* *The property which is the subject of the assurance/representation must be sufficiently 'certain'; to put it another way, if the property which is the subject of the assurance/representation is uncertain, a proprietary estoppel cannot arise: Thorner v Major[122] (supra, @ para 90 et seq). In that regard it is important to distinguish between*
>
> *i)* *The physical identity of the property – the fact that the extent of the property might change from time to time does not prevent an estoppel from arising*
>
> *ii)* *The nature or terms of any benefit that might be accorded to the representee – where there is uncertainty as to 'the nature or terms of any benefit (property interest, contractual right or money) and, if a property interest, as to the nature of that interest (freehold, leasehold or a charge)' that might be accorded to the representee, that will prevent an estoppel from arising.*
>
> *That distinction is likely to be of considerable relevance here (1) where 'the physical identity of the property' – the Trust assets, and in particular Cutty Sark's shareholding in APL – might well be said to have been sufficiently certain, even though the size of that shareholding and/or the underlying assets might change from time to time, but (2) where the 'nature or terms of any benefit' that any P might, on Alan's death, have otherwise had in the same, would be wholly uncertain and outside the scope of Alan's control, given the terms of the Trust – in particular, the ability to add and exclude beneficiaries and the discretion of the Trustees to*

[122] [2009] 1 WLR 776.

determine what income, if any, to appoint to any particular beneficiary at any point in time

c) If the representations did not relate to identified property, but instead were akin to unspecific promises of 'financial security', a proprietary estoppel will not arise: Thorner v Major (supra, at para 63)."

596. Accordingly, if I was required to consider the Plaintiffs' alternative estoppel claim, I would have dismissed it.

FINDINGS: CONSPIRACY CLAIM

597. The essence of the pleaded conspiracy case is captured by the following passages in the ASOC:

"*79. Further and alternatively, Deborah, Wilson and Christine are liable in damages to the Plaintiffs, in an amount to be assessed, for the torts of unlawful means conspiracy and/or conspiracy to injure.*

80. It should be inferred that Deborah combined together with Wilson and Christine so that they should together take steps to remove the Plaintiffs as beneficiaries of the Trust, to the financial detriment of the Plaintiffs, leaving the assets of the Trust for Deborah (and indirectly for the benefit of Wilson and Christine) upon Alan's death which they knew would occur in the near future."

598. In the Plaintiffs' Closing Submissions, their alternative conspiracy claim was summarised as follows:

"*571. It is the Plaintiffs' case that Mrs. McMullan-Poulton, Christine and Wilson conspired and worked together to achieve the termination of the Family Trust, to take and maintain control of its assets in breach of the provisions of the Trust Deed.*

572. Their conspiracy came to fruition when they procured the signing of the Letter of Exclusion and the other documents in front of Mr. Griffin and when they had themselves appointed to the board of Cutty Sark Land Company and dismissed Nick and Michele from its board in circumstances where it should have been obvious to them that Alan was elderly, frail, infirm, vulnerable, under the influence of Mrs. McMullan-Poulton and lacked capacity or they were recklessly indifferent."

599. Mr Lowe QC, without abandoning the claim, did not address it in oral closing argument. It is unclear from the Plaintiffs' pleading and submissions why the steps D2-D4 are said to have taken in relation to the termination of the Trust amount to unlawful means and support findings that they intended harm or injure the Plaintiffs. However, D2-D4's counsel construed the unlawful means conspiracy as a conspiracy to unduly influence Alan. As to the requirements for establishing the claim, Mr McPherson QC submitted:

> "*69. The tort of unlawful means conspiracy requires a plaintiff to prove, to the requisite (high) standard*
>
> *a) That 2 or more persons had a common agreement or understanding to act unlawfully*
>
> *b) That the conspirators intended to cause damage to the plaintiff by such unlawful act*
>
> *c) That the plaintiff suffered the intended damage.*
>
> *Whether there is also a fourth requirement – that the conspirators must have known that the action that agreed to take was unlawful – is contentious on the existing authorities.*"

600. If I were required to consider this alternative claim, I would have dismissed it. Although I have found the undue influence claim to be proved, this is on the specific basis that Deborah did not deliberately seek to unduly influence Alan albeit that she helped to create circumstances which had an operating undue influence effect.

601. I would also summarily find that Wilson and Christine did no more than assist their mother/mother-in-law to a minimal extent and were not party to an agreement to act unlawfully on any basis. Wilson was extensively cross-examined about numerous emails being forwarded to him prior to Joe Knecht's involvement in the summer of 2015. He explained that his mother sent him various emails which he simply ignored, implying that she unrealistically expected him to be able to assist with the dispute. I accept this evidence. His description of his mother's actions in this regard as "annoying" seemed to me to be the typical response of a young man of his then-age to a mother perceived as overbearing. It is regrettable that Wilson and Christine were asked to assist Deborah to the extent that occurred and that they became embroiled in this litigation.

602. Finally, I would summarily find that even Deborah had no intention (in the requisite legal sense) of harming the Plaintiffs. Her primary motivation in advancing the cause of terminating the Trust was a combination of protecting Alan's interests and protecting herself from harm she feared the Plaintiffs would inflict on her.

UN-PLEADED CLAIMS IDENTIFIED IN THE PLAINTIFFS' OPENING SUBMISSIONS

603. Mr Said for the Trustees, in his oral closing submissions, drew the following potential claims which the Plaintiffs appeared to be seeking the right to pursue in the future to the Court's attention, as set out in his Written Closing Submissions:

> "*32. These new claims involved allegations that:*
>
> *a. The September 2013 Deed did not effectively appoint Alan as protector – this is diametrically opposed to the Ps' own pleaded case at, for example, [20]; [20.2]; [22]; [22.1] and [22.2] of the ASOC: 'As at 24 October 2013, Alan was the Protector of the Trust…'*
>
> *b. The October 2013 Deed did not effectively appoint Deborah as a beneficiary – this is diametrically opposed to the Ps' own pleaded case at [22.3] 'the original terms had been varied so that Deborah was a beneficiary of the Trust.'*
>
> *c. The April 2016 Deed of Amendment did not effectively amend the Trust so as to allow appointments of capital, because it was outside the powers of the trustee as contravening its basic purpose, and because Alan was not validly appointed as protector, so could not consent even if he did have capacity – this is not pleaded anywhere, see in particular [38] and [38A] of the ASOC (lengthy pleading relating to the 2016 Deed of Amendment which nowhere mentions these matters).*
>
> *33. In oral opening, Mr Lowe said this about these new claims:*
>
> *'…those aren't arguments that you need to decide – it's just important to know that our case that we say that from a fairly early start, a legal analysis of the trust was lacking…But it's not a criticism that your Lordship needs to make any findings on. It was also there to flag up to the trustees that we do have an issue about what happened in 2013, which*

only becomes material…if we succeed in maintaining any interest in the trust."

604. He invited the Court to consider the following legal principles and to adopt the following approach:

"*a. Despite Mr Lowe's submissions, it is obvious that these new claims raise the prospect of a further claim that the actions of the Trustee in 2016 were invalid, even if none of the Ps' claims succeed in these proceedings i.e. these arguments are not only relevant if the Ps succeed;*

b. These arguments bear all the hallmarks of having been belatedly identified and developed in Mr Lowe's preparation for trial, when they could and should have been brought forward, if at all, far earlier in these proceedings, and at least following the Ps receipt of the Trustees' disclosure in 2017;

c. There can be no reasonable basis for saying that these arguments could not have been brought forward so as to have been determined at this trial.

d. In those circumstances, the principle in Henderson applies to any attempt to raise these arguments after Judgment in these proceedings:

'where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires that the parties to that litigation to bring forward their whole case, and will not (save in special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but were not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time…" Wigram V-C, in Henderson, cited in the leading authority Virgin Atlantic v. Zodiac Seats [2014] AC 160 at 181B et seq. Lord Sumption JSC.

e. In order fairly to assist the parties in bringing finality to their dispute, and to protect this warring family from themselves (by an ongoing disproportionate cost spend relative to the sums at stake), the Court ought to make a finding to the effect that the Ps new arguments, as foreshadowed in their opening, could and should have been pursued in these proceedings.

f. That finding would likely dissuade any further litigation, and (failing that) would at the very least assist any second Court dealing with another claim

> *on these bases, to swiftly dismiss those subsequent proceedings as an abuse of process on Henderson grounds. All of the Former Trustee Defendants' rights are fully reserved in respect of these newly discovered arguments, first mentioned at the eleventh hour, on the eve of this trial.*" [Emphasis added]

605. However in oral argument, Mr Said also indicated that an agreement had been reached with Mr Lowe QC that (as I understood it) a future application based on statutory mistake (section 64 A of the Trusts Act (2021 Revision)) to set aside the Trustee's reliance on the Declaration of Exclusion could still be made if the Plaintiffs succeeded in setting aside the Declaration of Exclusion. Mr Lowe QC envisaged that the Trustee itself would make any such application. I will hear counsel after the delivery of this Judgment as to how any such consequential relief should be dealt with.

606. Mr Lowe QC did not, so far as I can discern, advance any coherent response to the straightforward proposition that points not formally advanced which could have been dealt with in the present proceedings would be barred by the rule in *Henderson-v-Henderson* (1843) 3 Hare 100. The validity of the Deed of Amendment in 2013 and the Deeds of Removal and Appointment (of Protectors) in 2013 and 2015 were challenged in the Plaintiffs Opening Submissions (at paragraphs 18, 31-33) but not pleaded. It is obvious that if it was desired to challenge the validity of any Trust instrument executed during the time-frame covered by the pleaded issues in this action this could only properly be done within the ambit of the present proceedings.

CONCLUSION

607. For the above reasons, the Plaintiffs' undue influence claim succeeds and all other claims are dismissed. I will hear counsel if required as to costs, the terms of the final Order, and any other matters arising from this Judgment.

POSTSCRIPT

608. The law in human terms is often a blunt implement. A moral judge might well in this case have found that blame was equally shared and imposed a 'win-win' solution. Ultimately the parties will probably always regret that they could not collectively find a way to rally together at Alan's bedside in his last days. Had they done so they might have heard or felt what must have been his strong

desire: that they honour his memory acknowledging the love that he had for them all. While that moment may have passed, the idea endures and the seemingly impossible wishes can still be met.

THE HON. JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT