



Neutral Citation Number: [2020] EWHC 344 (Ch)

Case No: CH-2019-000218

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

The Rolls Building
7 Rolls Buildings
Fetter Lane, London
EC4A 1NL

Date: Tuesday, 5 February 2020

Before:

MR JUSTICE FANCOURT

Between:

MR ROBERT HURST

Appellant

- and -

(1) MRS EVELYN GREEN
(2) MR DAVID GREEN
(3) MR IAN MABLIN

Respondents

THE APPELLANT appeared as a **litigant-in-person**

MR RICHARD BOWLES appeared for the **Respondents**

Hearing dates: 4 and 5 February 2020

Approved Judgment

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MR JUSTICE FANCOURT:

1. On 8 July 2003, Mrs Hannah Hurst (“Mrs Hurst”), the mother of the Appellant and the First Respondent, established trusts and sold property, including her residence, 29 Norrice Lea, in Finchley, to the trusts. She retained a life interest in the property and left the purchase price outstanding. The debt was then settled on further trusts in favour of her children. This was done in an attempt to avoid a future inheritance tax liability on her death, trying to take advantage of a then apparent loophole and a scheme that had some currency at the time.
2. The firm of lawyers, Berwin Leighton Paisner (“BLP”) acted for the settlor, Mrs Hurst, and/or the family in relation to the transaction, and Mrs Hurst was also advised throughout by the Third Respondent, Mr Mablin, her accountant.
3. The transaction was proceeded with in a hurry because it was expected that the loophole would shortly be closed by the Revenue. It appears that BLP advised the family on 7 July 2003 and that the necessary documents were executed the next day. It is not wholly clear who was the client of BLP at various times, though at some stage Mrs Hurst did become a client.
4. The effect of the trusts was that on Mrs Hurst’s death the trust property would be realised and distributed. Mrs Hurst died on 1 August 2014, and the Appellant was her Executor.
5. The Respondents, who were the trustees of the trusts, alleged that the Appellant had failed to pay them substantial sums of money. The Appellant contended that the trusts were voidable on the grounds of undue influence exercised by the Respondents over Mrs Hurst, causing her to enter into the relevant transactions.
6. On 23 March 2016, the Respondents brought a claim against the Appellant for substantial sums of money that were said to be unpaid by him. On 21 April 2016, the Appellant cross-claimed, seeking to set aside the settlements and denied that any sums claimed by the Respondents were due for that reason. The Appellant also raised other allegations of undue influence and breaches of fiduciary duty.
7. The matter came before Master Price on 3 August 2016. He heard, in effect, the Respondents’ claim for final judgment. The Master held that all the cross-claims raised by the Appellant were unarguable and on that basis he entered judgment for the Respondents for substantial sums.
8. The relevant parts of his judgment for present purposes are the following. In paragraph 9, he indicated first that none of the allegations of undue influence or breach of fiduciary duty held any water or gave rise to triable issues that had any realistic prospect of success. He then set out the evidence on which the Appellant relied for his assertion of undue influence. He said:

“In contrast to that evidence is the evidence of the Claimants that all this was done on the advice of Berwin Leighton Paisner and with the involvement of the deceased’s accountant, Mr Mablin, who is also one of the trustees.”

He continued:

“In my judgment, it is impossible to spell out of the allegations which I have adumbrated anything which could enable a claim in respect of undue influence to be put on its feet.”

In paragraph 12, he said as follows:

“12. There is, of course, no presumption of undue influence that arises in connection with any of this. The deceased was disposing of her estate in what she understood to be a tax efficient manner, acting on the basis of legal and accounting advice, and the matters I referred do not go anywhere near showing actual undue influence on the part of anyone”.

9. It appears from that part of his judgment that legal advice was a factor in the Master’s conclusion. The Master was satisfied that the onus of proving actual undue influence lay on the Appellant, and that nothing in the evidence remotely established a case of actual undue influence.
10. The Appellant submitted before me that he raised before the Master a presumption of undue influence, but that that possibility was effectively closed down by the Master in argument, as his judgment reflects. The Appellant did not appeal the decision of the Master, or seek to set aside his order.
11. Following a statutory demand served in 2017, which the Appellant sought but failed to set aside, a bankruptcy petition was presented on 23 October 2017. A Bankruptcy Order was made on 15 February 2018 by Chief Registrar Briggs. The Appellant’s bankruptcy was automatically discharged a year later. Notwithstanding that, on 21 May 2019, the Appellant issued an application, pursuant to section 282(1)(a) of the Insolvency Act 1986 for an annulment of his bankruptcy. The Appellant’s trustee in bankruptcy is Paul Allen of FRP Advisory. The trustee is not a Respondent to this appeal but he has been notified of it and has indicated that he is content to be bound by the court’s decision.
12. The stated ground of the Appellant’s application to annul was that there had been a fraud perpetrated, which gave rise to the bankruptcy debt. The fraud, though not particularised in the application, is alleged to have been committed by the First Respondent, Mrs Green, who is the Appellant’s sister, the Second Respondent, Mr Green, her husband, and a solicitor at BLP, who wrote a letter to the Appellant in August 2014.
13. The allegation of fraud is based on what Mrs Green is alleged to have told the Appellant at a meeting that Mrs Green asserts was a without prejudice meeting to attempt to settle differences, held on 15 August 2018. The evidence of the Appellant is that at that meeting Mrs Green confirmed that Mrs Hurst did not attend a meeting at BLP’s offices at any time.
14. The relevant evidence is the following – paragraph numbers refer to the paragraph numbers of the underlying witness statement of the Appellant:

“21. In the course of our discussions, I referred in passing to the meeting, which had apparently been attended by my mother at BLP’s offices. Evelyn expressed her surprise at my reference and asked me who had informed me of that meeting.

22. Evelyn informed me that my mother had never travelled to BLP’s offices. The only meeting that my mother had with a representative of BLP was when a solicitor visited her at her home and requested her to sign the relevant documents. Evelyn specifically recalled having given that solicitor a lift to the local underground station after the meeting.

23. Evelyn also expressed the view that it would have been a waste of time requesting my mother to attend a meeting at BLP’s offices. My mother would not have understood what was being said to her. It would also have been difficult to persuade my mother to travel to the City for a meeting.

24. Evelyn emphasised that my mother trusted David. If David considered that it was prudent to sign the relevant documents, she would do so. My mother had apparently been reassured by the fact that David’s mother had recently signed a similar set of documents on the advice of BLP.

25. Since what Evelyn had just said to me was directly contrary to her witness statement, I asked her whether she was absolutely sure that my mother did not attend a meeting at BLP’s offices. She responded in the affirmative.”

15. What the Appellant there says that he was told by Mrs Green on 15 August 2018 is inconsistent with part of the Respondents’ evidence that was before the Master, on 3 August 2016. That evidence was as follows. Mr Green explained in his witness statement the origins of the proposed scheme and said that it was agreed that the family would go to see BLP about the idea. He continues:

“I do not now recall when I spoke to Robert about the proposal. I do not recall the evening he refers to in his witness statement at paragraph 21, but certainly I recall trying to speak to him about the suggested tax planning, asking if he wanted to attend a meeting with BLP and receiving no positive interest from him. I also spoke to Ian about the proposal and asked him if he would come along with Hannah and me to the proposed meeting with BLP. I knew that Hannah trusted and respected Ian’s views in relation to her financial affairs, as my father-in-law had done before her, and I knew that she would want Ian to attend.

On 7 July 2003, Hannah, Ian and I attended a meeting with Joanna Tolhurst, an associate solicitor at BLP. Ms Tolhurst explained the proposal in detail and set out what the implications would be for Hannah. I remember that Hannah wanted to know if she would be able potentially to move house during her

lifetime and was relieved to know that this would remain a possibility. Otherwise, she seemed content with the essence of the proposal and I imagine was comforted that both Ian and I were in favour of the plan. At some point prior to implementing the planning, there was a discussion as to who would act as the trustees. I recall that Evelyn and I suggested that because Robert could not be a trustee himself, because of his bankrupt status, it might be appropriate for Robert's wife, Stephanie, to be a trustee. Again, I recall that Robert wanted her to have no part in it, and Hannah asked me if I would be a trustee instead. Hannah explained this in her letter of 28 September 2003.

On the following day, Ms Tolhurst returned to Hannah's house to have a further meeting with her and to witness Hannah, Evelyn and me execute the documents. The original documents were kept at BLP for safekeeping, but Ms Tolhurst sent copies to Hannah for her records."

16. The Third Respondent, Mr Mablin, said as follows in his witness statement:

"In mid-2003, the Second Defendant, David, contacted me about an inheritance tax mitigation scheme that his mother had implemented on advice from BLP. He suggested that this might also be something that we should consider for his mother-in-law, Mrs Hurst. I did not have any experience of the proposed scheme, but confirmed that it sounded worth exploring and that I would attend a meeting with BLP to discuss it further.

On 7 July 2003, I accompanied Mrs Hurst, with David, to BLP's offices, where we met with an associate solicitor, called Joanne Tolhurst. Ms Tolhurst explained in detail how the scheme would work and what tax benefit it might provide. After a thorough explanation, I was satisfied that the advice was sensible, and I indicated to Mrs Hurst that I was in favour of it. Mrs Hurst confirmed that she would like to proceed with the proposal, and it was agreed that Ms Tolhurst would take matters forward to implement the planning."

17. The witness statement of the First Respondent, Mrs Green, simply confirmed that, to the best of her knowledge, what the Second and Third Respondents had said in their witness statements was correct.
18. The Appellant's application to annul his bankruptcy came before ICC Judge Barber, and she directed that a preliminary issue be heard as follows:

"Whether on consideration of the written judgment of Master Price, which gave rise to his order of 3 August 2016, the factual discrepancy alleged by Mr Hurst in his witness statement, dated 21 May 2019, is of such materiality as to give rise to arguable grounds for setting aside the order of 3 August 2016, or, on an application of the principles espoused in *Dawodu v American*

Express Bank [2001] BPIR 983, an arguable defence to the bankruptcy petition upon which the bankruptcy order, dated 15 February 2018, was based.”

19. The reason the Judge so ordered was that the Respondents submitted that even if the facts were as alleged by the Appellant, the difference was inconsequential and of no materiality, because it could not have altered the Master’s conclusion that there was no evidence of actual undue influence. It was, therefore, proportionate, the Respondents submitted and the judge agreed, to hear argument first on a preliminary issue.
20. Logically, the question of whether the conversation between Mrs Green and the Appellant was a without prejudice conversation should have been resolved first. If the meeting was a without prejudice occasion, and what the First Respondent is alleged to have said was not abusing the privileged occasion, the Appellant is not entitled to rely on the evidence that he relies in support of his application, which, therefore, inevitably would fail. It is not stated in Judge Barber’s order that the right to argue later that the matter was without prejudice was preserved, but the parties appear to have understood that that is so.
21. Instead, what the judge ordered was an argument about whether it was realistically arguable, assuming what the Appellant says that Mrs Green said is true, that the different factual account would have resulted in the undue influence claim succeeding before the Master, and so no debt being due to the Respondents.
22. The preliminary issue was heard by ICC Judge Prentis on 22 July 2019. At paragraph 5 of his ex tempore judgment, he said:

“What is before me, therefore, is the following issue: whether, on consideration of the written judgment of Master Price, which gave rise to his order of 3 August 2016, the factual discrepancy alleged by Mr Hurst in his witness statement, dated 21 May 2019, is of such materiality as to give rise to arguable grounds for setting aside the order of 3 August 2016 on an application of the principles espoused in *Dawodu*.”

So it is clear that the Judge was addressing the question of whether it was arguable, not whether a different outcome would have resulted, as a result of the new evidence.

23. The relevant test was set out by the Judge in paragraph 6 by reference to the judgment of Etherton J in the *Dawodu* case as follows:

“My only qualification to the summary by Warner J is that the case law has established that what is required before the court is prepared to investigate a judgment debt in the absence of an outstanding appeal, or an application to set it aside, is some fraud, collusion or miscarriage. The latter phrase is, of course, capable of wide application, according to the particular circumstances of the case. What, in my judgment, is required is that the court be shown something from which it can conclude that had there been a properly conducted judicial process, it would have been found, or very likely would have been found,

that nothing was, in fact, due to the Claimant. It is clear that in those circumstances, the court can enquire into the judgment and the judgment debt, even though the debtor himself has previously applied to have the judgment set aside, and even though that application has been refused and that refusal has been affirmed by the Court of Appeal – see in *Re Fraser, ex-parte Central Bank of London*) [1892] 2 Q.B. 633.”

24. The judge also referred to the case of *Royal Bank of Scotland v Highland Financial Partners LP* [2013] EWCA Civ 328, which sets out the high test that applies to similar effect, where a judgment is sought to be set aside on the basis that it was secured by fraud. The relevant part of the judgment of the Court of Appeal is as follows:

“First, there has to be a "conscious and deliberate dishonesty" in relation to the relevant evidence given, or action taken, statement made, or matter concealed, which is relevant to the judgment now sought to be impugned. Secondly, the relevant evidence, action, statement or concealment performed with conscious and deliberate dishonesty must be "material". "Material" means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court’s decision to give judgment in the way that it did. Put another way, it has to be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus, the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms that it was. Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence.”

25. The question for the Judge was, therefore, whether it was realistically arguable that the different factual account relied on would have caused, or would very likely have caused, the master to reach the opposite conclusion, namely that undue influence was proved and no debt was due.
26. In his judgment, the Judge referred to a number of aspects of the evidence that he considered were inconsistent with any actual undue influence. In particular, the facts: that the Appellant knew and was involved in open discussion about the proposed scheme; that he was invited to be a trustee and attend a meeting at BLP’s offices; that Mr Mablin, Mrs Hurst’s accountant, was involved in assisting her and her children to set up the scheme; and that the Appellant gave his mother advice not to enter into the scheme.
27. The Judge then turned to evidence about the involvement of BLP, and what was not in dispute in that regard and what could properly be inferred. In paragraph 31 of his judgment, he gave a number of reasons why he considered that the Appellant’s inferences about what happened were unsustainable. He said:

“31. Mr Hurst has, in the course of the afternoon, a few times described to me his interpretation of what happened, which is that Ms Tolhurst, a solicitor, simply appeared at the door of his mother’s house, brandishing documents to be signed and they were signed. That is not what his sister told him on 15 August and it is not what Mr Green says here either. Mr Green describes a further meeting and the witnessing and execution of the documents. It anyway seems inherently implausible, and is inconsistent with the evidence that I have already identified, to think that a solicitor would simply turn up and request execution without more of these documents. It is also inconsistent with the attendance note of 7 July, and it is inconsistent as well with the letter, dated 7 July.”

28. In paragraph 38 of his judgment, the Judge referred to the Master’s conclusion, at paragraph 11, and he said:

“Now I read that perfectly simply, and in the light of the passages which I myself have taken from the evidence, as being a conclusion by the Master that there was simply no evidence to support a relationship by which Mr Green was unduly influencing his mother-in-law.”

29. In paragraph 39, he referred to the conclusion in paragraph 12 of the Master’s judgment, and said that:

“As I read his judgment is a secondary reason to reject the contention for undue influence, being that Mrs Hurst was acting on the basis of legal and accounting advice. I have already set that out, together with my conclusion, which is that I agree with Master Price.”

30. Paragraph 41 of the judgment reads:

“41. One of the matters to which Mr Hurst has drawn my attention is the skeleton argument used before Master Price on behalf of the Claimants. He observes that incorporated within that skeleton argument was this, at paragraph 4:

"(3) The double trust scheme and its documentation were fully explained to Mrs Hurst by her solicitors, as explained in paras 9 to 14 and 19 to 21 of Mr Green’s second witness statement. Mr Mablin was also involved in that process. There is no credible basis for the assertion that she participated in the scheme, other than of her own free will, after a proper explanation from professional advisors."

Mr Hurst relied strongly on the assertion in paragraph 4(3) of the skeleton argument, contending that it must significantly have influenced, or been the basis for, the master’s conclusion.

31. The final conclusion of the Judge is expressed in the following paragraphs of the judgment:

“42. What Mr Hurst draws from this is that among the identified paragraphs of Mr Green’s statement is that referring to the 16 September 2014 Berwin Leighton and Paisner letter, which I have already mentioned, talking about a number of meetings. He says, therefore, that as on his case, it is now evident that there was no meeting with Mrs Hurst on the 7th, and there is no evidence of other meetings, the Master proceeded in a way in which he would not otherwise have done.

43. I think that that gloss on matters can be rejected for the reasons that I have already discussed when going through the evidence. The totality of the evidence, including Mr Hurst’s own evidence, is that there were discussions about this scheme and there was advice from the lawyers who were being paid. There was a meeting, at the very least, on 8 July. What is more, Mrs Hurst was being advised by her accountant. The evidence is also that in Mrs Hurst’s mind was the fact that Mr Green’s mother had entered into a similar scheme.

44. I have already given my view that on reading Master Price’s judgment, his primary point was that there was no undue influential relationship. That contention is one put forward by the same paragraph in the skeleton argument. The primary point made by counsel for the then Claimants was that Mr Green did not have any such control over Mrs Hurst’s affairs.

45. For those reasons, I cannot conclude that had there been a properly conducted judicial process, meaning one including Evelyn’s new account given to Mr Hurst on 15 August, it would have found, or very likely would have found, that nothing was due to the Claimants, and it must follow that this application is dismissed.”

32. When first reading the Judge’s judgment, I was concerned by the possibility that the Judge, instead of limiting his decision to whether Mr Hurst had established an arguable case, might have proceeded to decide whether Mr Hurst had established that the new evidence would have, or would very likely have, resulted in a finding of undue influence. Had he done so, he would have departed from the terms of the preliminary issue and deprived the Appellant of his right to have the matter tried, if he could demonstrate an arguable case.
33. I am, however, persuaded that the Judge did not fall into error in that regard. The Respondents presented their argument to the Judge on the basis that what was in issue was whether there was an arguable case of materiality, and the Judge himself stated this at the outset of his judgment; paragraph 18 of the judgment is also consistent with that approach.

34. Although the final conclusion in paragraph 45 is not expressed in terms of “no arguable case that”, there is no real reason to suppose the Judge forgot the terms of the preliminary issue or the opening part of his judgment. The judgment was an ex tempore judgment and allowance must be made for that. Mr Hurst did not seek to make any argument in this regard, or suggest that the case was argued before the Judge on a different basis.
35. The Appellant argued that the Judge’s conclusion that the new evidence did not establish an arguable case of undue influence was wrong for a number of reasons, which I shall now address. First, it was argued that the Judge applied the wrong test and should only have asked himself whether there was a genuine dispute as to the existence of the debt. Mr Hurst relied on *Guinan III v Caldwell Associates* [2004] EWHC 3348, a decision of Neuberger J, where there was an issue about whether a debt had been owed to the creditor. That was not a case in which a money judgment had been entered that the debtor was seeking to go behind.
36. Like Birss J, who refused permission to appeal on paper on this issue, I am satisfied that where there is an existing judgment in place and the debtor seeks to go behind it, the test is that set out by Etherton J in the *Dawodu* case.
37. The next points that Mr Hurst argued relate to paragraph 31 of the judgment, which I have set out in full. It was on the basis of one apparently incorrect statement in this paragraph that Birss J gave permission to appeal on a renewed application by Mr Hurst. The point was that the Judge was wrong to say that Mr Hurst’s characterisation of what must have happened on 8 July 2003 was inconsistent with the contents of a solicitor’s note of the meeting on 7 July.
38. Mr Bowles, appearing for the Respondents on this appeal, accepts that there is no inconsistency between Mr Hurst’s inferred account and that note, because the note says nothing about who was present on that occasion. It is, therefore, as Mr Hurst agreed, neutral in that respect.
39. What significance, if any, did the judge’s error in this regard have? Paragraph 31 is part of the judgment in which the Judge explained why he could not accept the inferences that Mr Hurst was seeking to draw about what must have happened on 8 July 2003, namely that a wholly unsuspecting Mrs Hurst was confronted by a solicitor on her doorstep, brandishing documents and requiring her without more to sign them.
40. The Judge gave six reasons why those inferences could not be drawn. If the reason relating to the allegedly inconsistent attendance note had been omitted, it would in my judgment have made no difference to the Judge’s rejection of Mr Hurst’s inferential case. Accordingly, although the Judge was wrong to draw support from the note for his rejection of Mr Hurst’s case, that made no substantial difference to his conclusion. I reject the suggestion that the mistake shows that the Judge did not really understand the case. This was a highly-compressed hearing and an ex tempore judgment.
41. As for the other reasons given in paragraph 31, Mr Hurst also criticises the Judge for concluding, on a summary basis, that it seemed inherently implausible that a solicitor would simply turn up and request execution of prepared documents without more.

42. The Judge was, as he recognised, required for the purpose of the application before him to treat the evidence of what Mrs Green said to the Appellant on 15 August 2018 as correct and to disregard any inconsistent evidence contained in the witness statements relied on by the Respondents before the Master. However, the inferences that Mr Hurst sought to draw about what happened on 8 July went beyond that evidence. He sought to infer that Mrs Hurst received no legal advice at any time and had her will overborne in circumstances in which lawyers, advising the beneficiaries of the transaction, turned up and required her to sign on the spot. The Judge was saying only that the Appellant's inferential case was not realistically arguable for various reasons, including improbability that a solicitor from a well-respected City firm would act in that way.
43. I consider the Judge was entitled to conclude that it was not realistically arguable that events happened in the rather extreme way that the Appellant characterised them. The Judge was not rejecting the argument of undue influence outright for that reason, simply rejecting the factual inferences that the Appellant was seeking to draw.
44. Before turning to address the other grounds on which the Appellant says that the Judge's decision was wrong, it is helpful to consider in what ways the new evidence that on this appeal is assumed to be true differs from the evidence that was before Master Price. That is because application of the *Dawodu* test requires me to consider not what I, or even Judge Prentis, would have concluded on the basis of the new evidence, but whether Master Price would have concluded that there was actual undue influence.
45. There are, in fact, only two significant differences that emerge from the new evidence. The first is that Mrs Hurst did not attend the meeting at BLP on 7 July 2003 at which Mr Green and Mr Mablin, and possibly Mrs Green, were present, but only saw the solicitor from BLP on the following day, when the documents were signed by her. The second difference is that Mr Mablin was not also present at the time when the solicitor met Mrs Hurst. Mr Mablin had, however, been present at the meeting the afternoon before, and was there as Mrs Hurst's accountant. Importantly, it was not, therefore, the case that before the Master the evidence established that Mrs Hurst had been independently advised by her own solicitor. On the evidence that Master Price considered, Mrs Hurst had no meeting or contact with BLP, other than in the company of the potential beneficiaries of the transaction, who had set up the meeting.
46. The high point of the evidence of legal advice on which the Appellant relies is the letter written to the Appellant by a solicitor at BLP in September 2014, which was rehearsed by Mr Green in his witness statement, which I have already referred to. That evidence, to the extent that it is inconsistent with the Appellant's new evidence, falls to be disregarded. However, the new evidence establishes that Mrs Hurst was advised by her accountant throughout, had discussions with her son and son-in-law about the benefits and appropriateness of the scheme before legal advice was taken, and had a meeting with the solicitor from BLP on the occasion on which the scheme documents were executed, albeit in the presence of her daughter and son-in-law. What she did not have was a meeting with the solicitor the day before execution, or have her accountant present at the time of the meeting. The ultimate question for the Judge, therefore, was whether Master Price would arguably have allowed the Appellant's claim of undue influence as a result of those differences in the evidence.
47. The next ground on which the Appellant said that the decision of the Judge was wrong was that he had not concluded that this was a case of presumed undue influence. In my

judgment, the Appellant cannot rely on this argument. No such argument appears to have been advanced before the Judge. The Appellant's skeleton argument before the Judge only asserts actual undue influence. The Master had dealt with the case as one that could not be one of presumed undue influence, and his decision was not appealed. The judgment of the Judge did not address presumed undue influence. Further, there is no ground of appeal that the Judge was wrong not to have done so.

48. The Appellant's skeleton argument on this appeal does raise an alternative case, that the Greens and the solicitor from BLP were "in a position of ascendancy over Mrs Hurst", such as to give rise to a presumption of undue influence, but this is advanced in the form of rearguing the merits of the case and does not allege that the Judge was wrong not to deal with such an argument in his judgment.
49. The Appellant explained that as a litigant-in-person, he was disadvantaged in not having a transcript of the ex tempore judgment before settling his grounds of appeal. But as a qualified and experienced solicitor, the Appellant would have known without a transcript if the Judge had failed to deal with an important argument that had been advanced.
50. In any event, the Appellant could have amended his grounds of appeal later, if it had been properly arguable that the Judge had wrongly failed to deal with a case based on presumed undue influence. Although the Appellant would wish to argue a case based on presumed undue influence, neither the judgment of the Master nor the judgment of the Judge addressed it, and it is too late for the Appellant to seek to do so on the hearing of an appeal.
51. A further criticism of the Judge made by the Appellant that is not raised in the grounds of appeal was that there was no evidence from the solicitor at BLP, Ms Tolhurst, who advised the family and visited Mrs Hurst on 8 July 2003. I queried whether what was being suggested was that the Judge should have drawn an inference adverse to the Respondents about what happened on 8 July, but Mr Hurst did not suggest that I should. In any event, before the hearing before the Judge, the Appellant had himself contacted that solicitor, who was no longer at BLP, and had ascertained that she no longer had any recollection of the events of 2003.
52. What the Appellant did say was that the potential importance of that witness, once she had refreshed her memory from the files, meant that the issue should go to trial. However, that is to put the cart before the horse. The question for the Judge was whether the Appellant had an arguable case of actual undue influence and the potential availability of that witness made no difference to it.
53. In the grounds of appeal, the Appellant also contends that the Judge failed to apply the doctrine of clean hands, because of the falsity of the Respondents' evidence in their 2016 witness statements. However, even assuming the falsity was culpable, about which I can make no finding at this stage, the Respondents were not claiming any equitable relief. The issue was rather whether the Appellant had an arguable claim that equitable relief should be granted to him as Executor of his late mother's estate. If that claim failed, there was no answer to the Respondents' claim to require the Appellant to pay over sums to them as trustees of the trust.

54. The Appellant includes, as a ground of appeal, that the Judge failed to take proper account of the factual events described in paragraphs 2 to 12 of his witness statement of 10 July 2019. These paragraphs, however, set out arguments why the new evidence derived from the meeting on 15 April 2018 undermines the evidence that was before the Master; why the right conclusion was that no substantive advice was given to Mrs Hurst, and why she could not have understood what she signed. As such, the complaint in this ground of appeal is covered by the other arguments raised.
55. I come then, finally, to what is, in reality, the main ground of appeal, which to an extent is prefigured in paragraphs 8 and 9 of the Appellant's grounds of appeal, namely that the Judge erred in reaching a judgment that a case of actual undue influence was not even arguable in the light of the new evidence of the extent to which Mrs Hurst had received legal advice.
56. The Appellant's grounds of appeal contend that the Master's view was dominated by the evidence of the assurance from the solicitor at BLP that Mrs Hurst had been fully advised, and that if he had been told that Mrs Hurst received no advice, the Master would not have reached that decision. That formulation does not accurately state the applicable test, which is whether it is properly arguable that the Master would have reached the contrary conclusion, namely that there was actual undue influence on the basis of the new evidence before him.
57. As an appeal judge, it is not my task to carry out that assessment and reach my own conclusion. My task is to decide whether the Judge was wrong in any respect in the reasons that he gave and the decision that he reached. There is no sustainable argument that the judge applied the wrong test. The grounds of appeal do not establish any basis on which it is said that the judge exercised his judgment wrongly, save in that it is suggested that the new evidence would have resulted in a different decision, and save for the paragraph 31 point that I have already dealt with.
58. The Appellant's case is that the Master was seriously misled by the Respondents and by the solicitor at BLP, who wrote to him in September 2018 (this was not the same solicitor who had attended on Mrs Hurst in 2003). However, the relevant question is whether it is properly arguable that the Master would have reached a conclusion of actual undue influence, if he had had the different evidence before him. The evidence establishes that family discussions had taken place about the appropriateness of entering into the tax avoidance scheme; that these had taken place between Mrs Hurst and Mr Green, and between Mrs Hurst and the Appellant, and that Mr Green advocated the scheme and the Appellant counselled against it. This was characterised by the Appellant as a tug-of-war, although there is no suggestion of any threats or force being used.
59. There is no dispute that the basis of the scheme and the involvement of BLP was being talked about openly and that the Appellant was invited to attend a meeting and become a trustee, but declined to do so. The purpose of the scheme was to benefit family members generally by avoiding a tax liability on the death of Mrs Hurst. Mrs Hurst would be protected by having a life interest in the property. That is the kind of tax planning that routinely takes place between family members. There is no dispute that a meeting with a lawyer at BLP took place on 7 July 2003, at which Mrs Hurst's accountant, Mr Mablin, was present. A letter of advice to Mrs Hurst was prepared by BLP that day, but there is no evidence one way or the other whether Mrs Hurst received

it the next day, or at all. The solicitor from BLP attended a meeting with Mrs Hurst the next day, at which the Greens were present. The scheme documents were signed later that day by Mr Mablin.

60. This was not a case of presumed undue influence, where independent legal advice was required to rebut the presumption. The onus of proof was on the Appellant to prove that undue influence in some form was actually used, or must have been used, to cause Mrs Hurst to execute the scheme documents. Availability of legal advice may be a relevant factor among others, but there is no requirement for independent legal advice, or any legal advice.
61. The Judge's conclusion was that the Appellant's gloss on the evidence, as he called it, was incorrect. He held that the totality of the evidence established that: there were discussions about the scheme; there was legal advice; there was a meeting with the lawyer and accountancy advice for Mrs Hurst specifically; and there was evidence of a particular motive for Mrs Hurst to enter into the scheme. Although the final conclusion in the judgment is perhaps not as clearly expressed as it might be, the Judge reaches the conclusion that there is no evidence or inference of any actual undue influence and, therefore, no arguable case.
62. I cannot find any fault in the Judge's evaluation of the evidence. The Appellant contends that the circumstances of a solicitor attending on an elderly lady at her home without a prior meeting, with documents to be signed, in the presence of beneficiaries of the transaction, is itself undue influence. It may well be in a particular case, but not on the facts of this case, as they were summarised by the Judge. This was a family tax-planning transaction, of the kind that many families enter into in order to try to mitigate tax liability, even if the particular scheme in this case was more complex and at greater risk of being struck down. Its advantage for Mrs Hurst, compared with a potentially exempt transfer, was that Mrs Hurst retained a life interest in her property. To echo the words of Lord Nicholls in the *Etridge (No 2)* case, the transaction could readily be accounted for by the ordinary motives of ordinary persons in the relationship of parent and child and so was not such as to excite the protective interests of equity.
63. There is no evidence that Mrs Hurst was unfairly coerced, or misled, or taken advantage of by the Respondents, or that any other kind of undue influence was used on her, and the Judge's conclusion is sound. I must, therefore, dismiss the appeal for the reasons that I have given.

(This Judgment has been approved by the Judge.)