Neutral Citation Number: [2022] EWCA Civ 195

Case No. CA-2021-00058 (formerly Case No: 2021/0838)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS
MR JUSTICE ADAM JOHNSON
[2021] EWHC 893 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday 21 February 2022

Before :

LORD JUSTICE LEWISON
LORD JUSTICE NEWEY
and
LORD JUSTICE SNOWDEN

- -

Between :

(1) RENO REA **(2) NINO REA** **(3) DAVID MARK REA**	**Defendants/ Appellants**
- and -	
RITA REA	**Claimant/ Respondent**

- -

Robin Howard (direct access) for the **Appellants**
John Ward-Prowse (direct access) for the **Respondent**

Hearing date : 13 January 2022

- -

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII. The date and time for hand-down is deemed to be 10 a.m. on Monday 21 February 2022.

Lord Justice Snowden :

1. This is a second appeal against a decision of Deputy Master Arkush (the "Deputy Master") given on 13 September 2019 after a two-and-a-half day trial. The Deputy Master admitted to probate the will of Anna Rea ("Mrs. Rea") made on 7 December 2015 (the "2015 Will"). The parties to the case are Mrs. Rea's four children.

2. A first appeal was dismissed by Adam Johnson J (the "Judge"): see [2021] EWHC 893 (Ch). Permission for a second appeal was given by Birss LJ on 19 August 2021.

3. The appeal arises as a result of a genuine mistake by the Deputy Master in restricting the Appellants, who appeared at the trial as litigants in person, from cross-examining the Respondent on certain key matters. On appeal to this court, Mr. Howard, for the Appellants, accepted the Judge's finding that although the Deputy Master had made a mistake, he had not been biased and had not exhibited any hostility or ill-will (*animus*) towards the Appellants. Indeed, it is clear that the Deputy Master took various steps during the hearing to assist the Appellants to present their case. The issue on the appeal is essentially whether those steps remedied the prejudice caused by the Deputy Master's earlier mistake, so that, taken as a whole, the trial was fair.

The case in outline

4. The 2015 Will revoked a previous will dating from 1986 that had divided Mrs. Rea's estate equally between her four children. The 2015 Will in effect left the entirety of Mrs. Rea's estate – primarily her house in Tooting - to her daughter, Rita (the Respondent to this appeal), and excluded her sons, Reno, Nino and David (the Appellants). For convenience, and adopting the same terminology as the Deputy Master and the Judge, I shall refer to the parties to the appeal by their first names.

5. The 2015 Will was drafted by a solicitor, who witnessed it, together with a medical general practitioner who, on the solicitor's advice, had carried out a mental capacity assessment of Mrs. Rea in November 2015. Mrs. Rea's reasons for changing her will were set out in a Declaration in Clause 11 of the 2015 Will as follows,

> "I DECLARE that my sons do not help me with my care and there has been numerous calls from me that they are not engaging with any help or assistance. My sons have not taken care of me and my daughter Rita Rea has been my sole carer for many years. Hence should any of my sons challenge my estate I wish my executors to defend any such claim as they are not dependent on me and I do not wish for them to share in my estate save what I have stated in this Will."

6. As pleaded in their Defence and Counterclaim, the Appellants' case was that the 2015 Will was invalid on four grounds. The first was that Mrs. Rea lacked testamentary capacity. This was dropped at the end of the trial. The second was that she spoke limited English and therefore did not properly know and approve of the contents of the 2015 Will when she executed it. The third was that Rita had exploited her mother's age, infirmity and reliance upon her to pressurise and exert undue influence on Mrs. Rea to make the 2015 Will disinheriting her sons. Fourth, the Appellants contended that Rita knowingly misrepresented her own financial position and ability to house herself to her

mother, together with the nature of the Appellants' relationship with their mother and their willingness to assist with her care. They contended that Rita had done so dishonestly and in a way calculated to poison Mrs. Rea's mind against them. In law this is known as a claim of "fraudulent calumny".

7. At trial, the Appellants were unrepresented and appeared in person, having terminated the retainer of solicitors who had acted for them. Rita was represented by counsel, Mr. Ward-Prowse, who also appeared before us.

8. Rita gave evidence on her own account, together with the solicitor who had drawn up the 2015 Will and the doctor who had carried out the mental capacity assessment of Mrs. Rea. Each of the Appellants also gave evidence, and they caused witness summonses to be issued for Mrs. Rea's niece and for a carer who had previously been in a relationship with Rita and who had attended Mrs. Rea for some time prior to her death.

9. In his judgment, the Deputy Master found the Respondent's evidence on the key points more persuasive than that of the Appellants. He was also strongly influenced by the evidence of the solicitor and doctor who both indicated that they considered Mrs. Rea was well able to understand what she was doing and that the 2015 Will represented her true intention.

10. The Deputy Master also thought that the intention underlying the 2015 Will, namely to benefit Rita, was consistent with what David accepted in his evidence, namely that Rita had been principal carer for her mother for a long period. He also thought it consistent with the carer's evidence that Mrs. Rea would have wanted to help Rita and was protective of her, and with David's evidence that Mrs. Rea "always had a soft spot for Rita".

11. The sole ground of appeal against the Deputy Master's decision which was permitted by Nugee J (as he then was) was that the trial had been unfair by reason of the manner in which it was conducted. In his judgment on the first appeal, the Judge considered a number of respects in which it was alleged that the trial had been unfair to the Appellants, and rejected them all.

12. On the second appeal to this court, Mr. Howard focussed on the decision by the Deputy Master to prevent David, who acted as the main advocate for the Appellants, from cross-examining Rita towards the end of the first day of the trial on the key issues of undue influence and fraudulent calumny. As I shall explain, the Deputy Master did so under the mistaken belief that the Appellants had already asked questions of Rita on those matters and that they should not be permitted to go over the same ground again. In fact, the questions to which the Deputy Master referred had been asked of Rita by her own counsel in an extended examination-in-chief.

13. Mr. Howard contended that the Deputy Master's decision deprived the Appellants of the only real way to obtain evidence and advance their case on undue influence and fraudulent calumny. He submitted that this was contrary to clear authority emphasising the importance in the adversarial system of the judge allowing the parties to put their case fully to opposing witnesses during the evidential phase of a trial, and that the prejudice that this caused was not rectified by the subsequent efforts of the Deputy Master to assist the Appellants.

14. Mr. Ward-Prowse did not dispute the principles to be drawn from the authorities upon which Mr. Howard relied. He accepted that the approach we should adopt was simply to ask ourselves whether the trial before the Deputy Master was fair. He contended, however, that the Deputy Master had taken sufficient steps to ensure that the Appellants' case was put to Rita and that the outcome was fair notwithstanding his error.

15. Mr. Ward-Prowse accepted that the question of whether the trial had been fair was not a matter for the exercise of discretion, and so if we came to the conclusion that the trial had not been fair, the fact that the Judge had taken the opposite view would not prevent us allowing the second appeal.

The Trial in detail

16. The trial before the Deputy Master was scheduled to take five days. It in fact concluded in two-and-a-half days.

17. As I have indicated, the Appellants were unrepresented at the trial because they claimed to have lost confidence in their solicitors and had dismissed them in the run up to the hearing. They had also failed in a number of applications to vacate the trial date to obtain alternative representation. The first such application was rejected on paper in mid-August 2019, the second was rejected by the Deputy Master at a hearing a few days before the trial was due to commence, and the third was rejected at the start of the trial on Monday 9 September 2019. On that third occasion, the Deputy Master stated that although he appreciated that the Appellants would be without legal representation, he believed that with assistance from him and from counsel for Rita, their case could be given a fair hearing.

18. After some further preliminaries, the trial commenced with Rita's evidence. She had previously served two witness statements in 2016 and 2018, and in conventional fashion she confirmed the truth of those statements at the start of her evidence. However, instead of then being cross-examined by the Appellants, Rita was asked a very lengthy series of questions in chief by her own counsel, supplemented by questions from the Deputy Master. In all, those questions and answers cover some 26 pages of transcript.

19. In the course of these exchanges, Rita was asked questions by Mr. Ward-Prowse that were plainly designed to give her the opportunity to answer the various allegations against her that had been raised by the Appellants in their pleadings and witness statements.

20. So, for example, Rita was first asked to comment on her mother's understanding of English by reference to documents that had not previously been disclosed; and she was asked about allegations that she had prevented contact between her mother and her brothers and had prevented other people from visiting Mrs. Rea.

21. Rita's counsel then turned to her evidence about the origins of the 2015 Will and elicited an account from Rita of a conversation in the kitchen of her mother's house over a newspaper article which Mrs. Rea read about wills. Rita gave evidence in response to a question from the Deputy Master that the idea of making a new will was her mother's idea. The questioning then moved on to how the solicitor had been instructed to prepare the 2015 Will and ultimately to the signing of the will in the solicitor's office.

22. In the course of the lengthy series of questions, Mr. Ward-Prowse also asked his client to comment on various passages from the evidence of her brothers and the allegations which they had made, eliciting her denial of those allegations. By way of illustration, Nino's witness statement had referred to a series of text messages he had exchanged with Rita in which she had, in addition to being abusive, described David as having "abandoned" his mother and his responsibility for her care. Nino's contention was that the word "abandon" had also been used by Mrs. Rea when the 2015 Will was being prepared by the solicitors, and that her use of the word was evidence that she had been influenced by Rita. That resulted in the following examination-in-chief,

> "Q: Your brother refers the Court to what he says is your repeated use during text messages of the word abandon, do you see that?
>
> A: Yes.
>
> Q: It is suggested that your mother would not have used the word abandon and it is suggested that you have put the idea, the idea of being – that your brothers abandoned her, that you suggested that to your mother. What do you say to that suggestion?
>
> A: I did not ever, no. I say no that I didn't put that in her vocabulary or make her say things like that. It was her language and … mummy always used that word. She used it about her father.
>
> Q: That word being?
>
> A: Abandoned.
>
> Q: Okay.
>
> A: She used it and used to say that to me about my papa that – my father that he abandoned us. It was just her.
>
> Q: She would tell you that, would she?
>
> A: Yes."

23. Similarly, Mr. Ward-Prowse also put the allegations in the Defence and Counterclaim to his client, and the Deputy Master added to the questions,

> "Q: It's suggested by your brothers that you influenced your mother in what she provided in her will, in particular leaving her home, her property, to you. What do you say to that accusation? … I'll ask you it directly. Did you influence your mother in what she provided in her will, in particular did you influence her in leaving her property to you?
>
> A: No.

> Q: It's suggested that you pressurised your mother, you put pressure on her, into making the will that she did. Did you pressurise her?
>
> A: No.
>
> Q: It is suggested that you misrepresented, in other words, you didn't tell your mother the truth about your financial position and your ability to rehouse yourself. Did you do that?
>
> A: No.
>
> Q: It's suggested that you misrepresented how near your brothers were living to your mother and you misrepresented their willingness to care for your mother. Did you do that?
>
> A: No.
>
> Q: And it's suggested that you said things about your brothers to your mother so as to poison her mind against your brothers and that's why your mother made the will that she did, leaving her property to you. Did you do that?
>
> A: No.
>
> …
>
> DEPUTY MASTER ARKUSH: Miss Rea, whose idea was it for your mother to leave the house to you?
>
> A: Whose idea was it? I don't – well it was my mum's. She wrote the will out. She went to the solicitor. It was her idea.
>
> DEPUTY MASTER ARKUSH: Did you ask her to do it?
>
> A: No.
>
> DEPUTY MASTER ARKUSH: Did you encourage her to do it?
>
> A: No."

24. It should be said at the outset that this lengthy examination-in-chief did not comply with the Civil Procedure Rules. CPR 32.5(3) and (4) provide,

> "(3) A witness giving oral evidence at trial may with the permission of the court –
>
> (a) amplify his witness statement; and
>
> (b) give evidence in relation to new matters which have arisen since the witness statement was served on the other parties.

> (4) The court will give permission under paragraph (3) only if it considers that there is good reason not to confine the evidence of the witness to the contents of his witness statement."

25. Before us, Mr. Ward-Prowse very candidly told us that he had taken the course that he had in the interests of his client because the witness statements prepared for Rita by her solicitors had been inadequate and had not satisfactorily addressed the pleaded allegations against her. Nor had the solicitors acting for Rita sought permission to file supplemental witness statements responding to the evidence of the Appellants.

26. Mr. Ward-Prowse also told us that he had overlooked the requirement to seek permission from the Deputy Master under CPR 32.5(3) and (4). That was regrettable. If the requirements of CPR 32.5(3) and (4) had been observed, the potential prejudice to the Appellants of allowing Rita to make good the deficiencies in her evidence and thereby pre-empting cross-examination would have been highlighted. In such circumstances, I cannot see that it would have been appropriate for the Deputy Master to give permission, but if for some reason he had, at very least he ought to have made it a condition that the gist of any further evidence to be given in chief should be communicated in writing to the Appellants in advance, and that they should have been given sufficient time to prepare their cross-examination properly.

27. As it was, however, the examination-in-chief ranged far and wide and served to introduce a significant amount of new evidence from Rita. This included, for example, a handwritten letter from Mrs. Rea which was said to be relevant to Mrs. Rea's command of the English language, and which David protested the Appellants had not previously seen. Rita gave evidence that she had found the letter among her mother's possessions.

28. When the examination-in-chief ended, the Appellants asked the Deputy Master for a 30 minute adjournment to discuss what Rita had said and to prepare some questions. The Deputy Master summarily refused that request, saying that he did not think it was necessary and that David's brothers could pass him notes. He did, however, grant a five-minute break, commenting, "but by now you know everything about the case". Although not relied upon by the Appellants as a free-standing ground of appeal before us, Mr. Howard (in my view justifiably) criticised this decision. In any event, for reasons that I shall explain below, I consider that it had certain consequences which are relevant for assessing whether the trial as a whole was unfair.

29. After the five minute break, David started to cross-examine Rita on behalf of the Appellants. That cross-examination continued for about an hour and a quarter until about 1.10 p.m. At that point, the Deputy Master indicated that he thought that the Appellants should be able to complete the cross-examination in the two hours between 2.15 and 4.15 p.m., which David confirmed should be sufficient. However, Mr. Ward-Prowse then told the Deputy Master that he wished to interpose the evidence of the doctor and the solicitor when the court resumed at 2.10 p.m..

30. After the lunch adjournment, the evidence of the solicitor and the doctor took up a very significant part of the afternoon, probably until about 3.30 p.m. or so. Notwithstanding that before lunch the Deputy Master had expressed the view that two hours should be sufficient to complete Rita's cross-examination, he then indicated that he would like to conclude the evidence of Rita by the end of the afternoon if that were possible.

31. David resisted that suggestion, indicating that although the Appellants had prepared some questions, they would like to have more time to do so overnight. The Deputy Master responded by asking why David had not prepared the questions before trial and indicating that he should "move on with it, quickly". He added that "on past form" many of the questions that David had asked had not been helpful, and that if the Appellants wanted to ask more questions, "I am going to make sure, by intervening if necessary, that they are to the point and necessary".

32. David then resumed the cross-examination, asking questions about Rita's knowledge of the earlier 1986 will and when Rita had first found out that Mrs. Rea planned to make a new will leaving the house to her. However, after 10 short questions, the Deputy Master intervened as follows,

> "DEPUTY MASTER ARKUSH: And all this was gone over and questions were asked about it earlier today, I think by her counsel? No, it was in answer to you.
>
> She said, 'The issue of making a new Will was first discussed around 2015. We were at home, Mummy was in the kitchen reading the newspaper. She read an article about Wills, she read it to me. She said things like, wanting to be cremated. It was her idea to make a new Will, not mine, I'm sure about that. Mummy asked me to make an appointment to see a solicitor. I did as she asked, but not straightaway, it may be about two weeks later'.
>
> And then you asked her about paragraph [36(b)] in Nino's statement and how the word 'abandon' had got there, do you remember that? And then you asked lots of questions, 'Did you influence Mother in relation to the Will, in particular, leaving her property to you'? And the answer given was, 'No, I did not pressurise her I did not misrepresent anything to her about my situation. I did not misrepresent anything to her about my brothers' willingness to care for her. I did not poison her mind against them'. And I asked, 'Whose idea was it to leave the house to you'? And the witness said, 'It was her idea to leave the house to me, she wrote the Will, I did not ask for or encourage her to do it'.
>
> Now, I do not want to go over old ground and I do not think it will necessarily help you to go round and round and round. But I am not going to permit questions that go over the old ground."

33. It is readily apparent that the Deputy Master's intervention was based on the mistaken belief that it had been the Appellants who had asked the series of questions to which he referred. As I have indicated above, it is in fact clear that these questions had been asked by Mr. Ward-Prowse during his extended examination-in-chief.

34. In passing I would observe that it is both surprising and unfortunate that when the Deputy Master made his ruling on the erroneous basis that the relevant questions had been asked by David, he was not corrected in that misapprehension, either by the

Appellants themselves, or by Mr. Ward-Prowse. If that had occurred, a very different course of events would inevitably have followed.

35. As it was, the Deputy Master's ruling prompted David to ask for a 30 minute break, indicating that he did not feel well. The Deputy Master responded, however, that there would be no break and that they were going to sit and hear the matter until the end of the day. He then asked what topics the Appellants wished to cover. David responded that he wished to cover something that is recorded on the transcript as "want of knowledge" together with "coercion". The Deputy Master then replied, "You have asked questions about all those matters, There is a risk of going over old ground". David then asked for a 10 minute adjournment "to get our thoughts together", which resulted in the Deputy Master ruling,

> "You will have until 4.10pm to finalise what questions you are going to put to this witness and I will not have the court go round and round in circles on old ground. Any matters we have covered before we will not be covering again."

36. David resumed the cross-examination at 4.10 pm, but after a few questions the Deputy Master intervened again and continued to intervene on the basis that his line of questioning was more suited to submission and/or irrelevant. David then asked a series of questions concerning an allegation that Rita had changed the locks at her mother's house. Rita's evidence was that she had done so after her mother's death. The following exchange then took place,

> "DEPUTY MASTER ARKUSH: Yes and after you changed the locks at that time did you change the locks at any previous time?
>
> A. No.
>
> DEPUTY MASTER ARKUSH: Right, that is the answer to your question.
>
> MR REA: Okay, well it seems that you're lying.
>
> A. No.
>
> DEPUTY MASTER ARKUSH: Right, that is put.
>
> Q. Okay.
>
> A. Can I just say something, no?
>
> DEPUTY MASTER ARKUSH: No need.
>
> MR REA: I don't know if I'm allowed to do this, but I put it to you that you coerced Mother – can I do that, Your Honour?
>
> DEPUTY MASTER ARKUSH: Yes … But I have not heard the end of the question. But if you are putting to her your case that your mother's Will was overborne by your sister making her do

what she did not really want to do, then you can put that, that is your case.

Q. Okay, I think you just took the words right out of my mouth, Your Honour?

DEPUTY MASTER ARKUSH: [to the witness] Did you understand the question?

A. There was no question.

DEPUTY MASTER ARKUSH: Well, let me put you the question I think is being asked? Did you make your mother, write her Will in a way that she did not want?

A. No, no.

DEPUTY MASTER ARKUSH: Did your mother really want, in her heart of hearts, to leave everything to her four children equally, but you made her change her mind?

A. No.

DEPUTY MASTER ARKUSH: Did your mother really and truly, intend to leave virtually all of her estate, namely the house, to you?

A. Yes.

DEPUTY MASTER ARKUSH: Did your mother, understand when she was making the Will, that in doing so, you would get pretty much everything in her estate and your brothers would get nothing?

A. Yes.

DEPUTY MASTER ARKUSH: I think those are the questions you wanted asked?

Q. Yes, can I just say that I put it to you, that you are lying?

DEPUTY MASTER ARKUSH: You have challenged and you are suggesting to this witness, that she is not telling the truth and that question is put and your answer to that is?

A. I'm telling the truth.

MR REA: That's it well, thank you for your help. We do not have any more questions for Rita at this stage."

37. After the statement from David that he had no more questions, the Deputy Master then indicated that he was going to ask some further questions, explaining as follows,

> "DEPUTY MASTER ARKUSH: You see, you are absolutely entitled to put your case and indeed, not entitled, but bound, to put your case to this witness, all right?
>
> MR REA: Yeah.
>
> DEPUTY MASTER ARKUSH: So, I am going to ask a few questions, which will help you do that … On things that you might not have fully covered yet, all right? … And arising out of my questions, you can come back if you want?
>
> MR REA: Okay, thank you."

38. The Deputy Master then proceeded to ask Rita a series of questions. Initially they concerned the issue of how often the Appellants saw their mother and who was most responsible for Mrs. Rea's case.

39. The Deputy Master then referred Rita to the emails she had sent to Nino. He described the texts as "rather rude" and asked, "Can you just tell me why you wrote those texts?". Rita gave a long answer explaining that she was angry. The Deputy Master did not, however, pursue the point and in particular did not ask Rita about her use of the word "abandon" in the texts, which had been the allegation made by Nino in his witness statement.

40. The Deputy Master then also went through the other allegations made by the Appellants and put them to Rita in brief and unchallenging terms. As an example, the following exchanges took place,

> "DEPUTY MASTER ARKUSH: The case being said by your brothers is that because your mother was dependent on you, you took advantage of her. What do you say about that?
>
> A. I say it's absolutely not true, I didn't take advantage of her. I didn't take advantage of my mum. … Can I just say, you can't take advantage of my mum, because she was the kind of woman, only, yeah, she was a very strong-made woman. And Mummy would always be assertive with me and you know, she wasn't someone that you could just take – I mean, there are certain things that you would tell her to do and she wouldn't do it because she didn't want it.
>
> Q. Was she a person who knew her own mind?
>
> A. Yes, absolutely.
>
> Q. The solicitor's note described her as, 'strong-willed', do you think that is accurate?
>
> A. Yes.
>
> Q. Do you think of her as someone who was vulnerable, who could be taken advantage of?

> A. No, I mean, no I don't think so.
>
> Q. Did you ever pressurise her to make a new Will?
>
> A. No.
>
> Q. Did you ever pressurise her to give you property in her Will or in her lifetime?
>
> A. No."

41. The Deputy Master then identified the Appellants' contention that Rita had given her mother a false picture of her finances and asked a series of neutral questions about Rita's financial position and how she had used the proceeds of sale of a flat. He concluded,

> "DEPUTY MASTER ARKUSH: Your brothers say as part of their case, that you gave your mother a false picture of your finances and told her that you were, effectively, hard up when you were not. Is there any truth in that?
>
> A. It's not true, we never talked about money and that kind of thing to each other. I never talked to my mum about how much money I was getting, it was something I didn't do with my mum."

42. The Deputy Master then asked a few questions about Mrs. Rea's own finances, before concluding as follows,

> "DEPUTY MASTER ARKUSH: And your brothers also say that you were dishonest to your mother about how much care they were prepared to give. Is there any truth in that?
>
> A. There's no truth in that, I mean they –
>
> Q. Well they say that you told your mother they did not want to be involved in her care and that was untrue?
>
> A. That's not true.
>
> Q. When your mother said to the solicitor that she had been abandoned by her sons, do you think that is how she genuinely felt?
>
> A. Yes, she did feel that because there was a time when I used to send David photographs of me and Mummy when he was abroad. And I used to keep regular updates with him, that was like up to – I used to always send photographs and messages to them. My mum wanted them, you know, to be involved.
>
> Q. Did she feel let down by her sons?

> A. I think so.
>
> Q. Did you put the idea into her head?
>
> A. No, I didn't put any ideas into my mother's head.
>
> Q. Was she a person who you could easily put ideas into her head?
>
> A. No, she wasn't."

43. At the end of these questions, the Deputy Master then turned to the Appellants and the following further exchange took place,

> "DEPUTY MASTER ARKUSH: Now, anyone who wants can ask questions arising from what I said. I hope that the defendants appreciate that I felt that in some regards, questions which they could have put, I mean think they have put an awful lot of questions, which were not necessary. But actually, the questions I have put I think, were rather important to put because they were the core part of your case.
>
> MR REA: Yes, Your Honour, I can see you're professional at your job.
>
> DEPUTY MASTER ARKUSH: Well I obviously have a little bit more practice at it than you - But I wanted, it is my job, to make sure that the trial is conducted fairly and that means that the questions, which ought to be put, are put.
>
> MR REA: Yes.
>
> DEPUTY MASTER ARKUSH: So I have put them, of course, you know, the answers you get are the answers the witness gives. In the end, it will be for you to make submissions to me. And it will be for me to weigh up the evidence that I have heard from all the witnesses and to draw my conclusions."

44. The Appellants then indicated that they wished to ask a few further questions arising from the questions asked by Deputy Master, and proceeded to do so. However, after only four questions, the Deputy Master intervened again to take over the questioning and to stop some questions which he considered irrelevant. At the conclusion of the questions, the following exchange took place,

> "DEPUTY MASTER ARKUSH: I think I did ask the questions that can properly be put.
>
> MR REA: Yeah, I don't think – have you got any questions? I think we're done with the questions, thank you very much for your help."

45. There was then a further exchange between the Deputy Master and the Appellants in which the Deputy Master indicated in fairly strong terms that he had been impressed by the independent evidence of the doctor and the solicitor that they had not seen any sign of coercion, or of undue influence, or of lack of capacity. David responded that the solicitor and the doctor were not aware of what had gone on before Mrs. Rea went to the solicitor's office. The Deputy Master urged the Appellants to consider whether to reach a negotiated settlement rather than "push the case to its bitter conclusion".

46. The trial then concluded for the day and resumed the next day when the remaining witnesses (including the Appellants) were cross-examined. The Deputy Master heard closing arguments on the third morning, and, as indicated above, the trial concluded after two-and-a-half days.

The First Appeal

47. The Appellants raised a number of grounds of appeal before the Judge. These included that the Deputy Master had been impatient and had unfairly hurried them along in spite of the fact that five days had been set aside for the trial; that he had intervened excessively in David's cross-examination of Rita and her witnesses; that he had given heavy-handed indications of his provisional views of the evidence at the end of the first day; and that he had been hostile to the Appellants, including suggesting that their arguments were hopeless.

48. The Judge considered each point raised by the Appellants by reference to the transcript of the hearing. The Judge rejected all of the grounds of appeal, concluding that none of the exchanges relied upon showed that the Deputy Master had any *animus* towards the Appellants, that the Deputy Judge had in fact taken care to assist the Appellants to present their case properly, and that, overall, the trial had been fair.

49. In particular, the Judge took the view that the Deputy Master's refusal to adjourn for 30 minutes prior to Rita's cross-examination had been "somewhat stern" but had been within the wide latitude of acceptable case management decisions; and that although the Deputy Master had occasionally shown signs of impatience and irritation during David's cross-examination of various witnesses, this was understandable because David had a tendency to return to issues that had no legal relevance, and to "veer away" from the points actually at issue in the case.

The Second Appeal

50. On appeal before this court, Mr. Howard's contention that the trial had been unfair was focussed on the decision by the Deputy Master to prevent Rita from being cross-examined by the Appellants in the mistaken belief that they had already asked her the same questions earlier.

51. That point had also been raised on the first appeal and was dismissed by the Judge in paragraphs 103 to 110 of his judgment as follows (emphasis in the original),

> "103. I agree with Mr Howard that the Deputy Master's mistake over who had put certain questions to Rita during the course of the early part of her evidence was unfortunate, but I do not think it rendered the process overall unfair. That is for at

least two reasons. The first is that, looking at the course of Rita's examination-in-chief, the mistake was an understandable one, because what Rita's counsel was doing at least for part of the time was *putting the Defendants case* to her.

[The Judge then quoted extracts from the passages from the transcript including those set out in paragraph 22 above].

…

105. It seems to me that in putting these questions, Mr Ward-Prowse was seeking to assist the Defendants, by making sure that the key elements of their case had been put to Rita, as they needed to be. In any event, whatever Mr Ward-Prowse's motivation, the Deputy Master was right to note that the questions had been asked and answered by the witness, and that there was very likely little to be gained, and from the Defendants' point of view possibly something to be lost, in going over the same ground again.

106. The second reason I consider that no unfairness arises from the Deputy Master's error is because of what happened next. What happened next, and indeed took up most of the remainder of the afternoon session, is that the Deputy Master himself undertook a careful examination of Rita, designed precisely to ensure the Defendants' case was properly put to her. Moreover, he took time to explain what he was doing at the beginning.

[The Judge set out the passage from the transcript referred to in paragraph 37 above].

107. Once more, this was not a matter of the Deputy Master descending into the arena, but instead of him seeking to assist by being flexible and adopting an inquisitorial role.

108. The Transcript shows the Deputy Master questioning Rita on a number of topics raised by the Defendants as part of their case, including: (1) the degree of contact Reno, Nino and David had with Anna in the periods before her death, (2) Rita's finances and whether she had portrayed a false picture of them to her mother, including the circumstances which led to sale of her flat, and (3) whether Rita had misled Anna about the degree to which the three brothers were prepared to be involved in her care.

109. Having concluded his questioning, the Deputy Master made it clear that the Defendants could ask any follow-up questions if they wished, which David duly did, but only having first thanked the Deputy Master, saying: "Yes, Your Honour, I can see you're professional at your job." David's further

> questions were punctuated by some more interventions by the Deputy Master, but in order to try and assist him, including by way of direct challenge to Rita …
>
> 110. The examination then concluded [in the manner set out in paragraph 44 above]."

52. The Judge's reference in paragraph 107 to the Deputy Master not descending into the arena, but instead seeking to assist by being flexible and adopting an inquisitorial role, was a reference to what the Judge had earlier described as "encouragement" to that effect in the Equal Treatment Bench Book (the "ETBB"). The ETBB is published by the Judicial College which has responsibility for training judges in England and Wales. In paragraph 58 of his judgment, the Judge drew specific attention to some words that he extracted from paragraph 65 of the ETBB dealing with hearings involving a litigant in person ("LIP"),

> "Adopting to the extent necessary an inquisitorial role to enable the LIP fully to present their case, (though not in such a way as to appear to give the litigant in person an undue advantage).

53. Before us, Mr. Howard contended that the Judge failed to appreciate the importance of the cross-examination which the Deputy Master's mistake had prevented, and that both of the reasons given by the Judge for thinking that the prejudice caused to the Appellants had been effectively remedied by the questioning of Rita by Mr. Ward-Prowse and by the Deputy Master himself, were wrong.

Analysis

54. I accept Mr. Howard's submission that the result of the Deputy Master's error was that he prevented the Appellants from having the opportunity to cross-examine Rita to any meaningful extent on at least two of the central issues in the case – namely undue influence and fraudulent calumny. As Mr. Howard contended, cross-examination of Rita on the second of those issues was particularly important to the Appellants. By its nature, the alleged poisoning by Rita of Mrs. Rea's mind against the Appellants prior to her decision to cut them out of her will was not something to which the doctor or solicitor could testify or upon which they could be cross-examined. Nor was there any written evidence supporting such a case. The Appellants' only chance of proving that this had happened was therefore to undermine Rita's evidence and credibility by a searching cross-examination. They were, however, denied that important opportunity. Mr. Ward-Prowse's submission that the trial was nonetheless fair must be measured against that background.

55. The first of the Judge's two reasons, in paragraphs 103-105 of his judgment, was that in conducting his lengthy examination-in-chief of Rita, Mr. Ward-Prowse had been "seeking to assist the Defendants, by making sure that the key elements of their case had been put to Rita". In reaching that view, the Judge manifestly did not have the advantage of Mr. Ward-Prowse's candid admission to this court that this was not so. As Mr. Ward-Prowse told us, his real reason for seeking to conduct a lengthy examination-in-chief was not to assist the Appellants at all, but to remedy the deficiencies in his own client's evidence. That explanation was, unfortunately, not

given to the Judge, because Mr. Ward-Prowse did not appear on the first appeal, when Rita was represented by alternative counsel.

56. I also do not consider that the Judge was right, in paragraph 105 of his judgment, to agree in any event with the Deputy Master's view that "the questions" had already been asked and answered by Rita, and that there was very likely little to be gained, and from the Appellants' point of view possibly something to be lost, in going over the same ground again. That view cannot be supported, for at least three reasons.

57. The first is because it assumes that "the questions" that could have been asked in cross-examination would have been the same as those which had already been asked in examination-in-chief by Mr. Ward-Prowse. But this simply perpetuates the Deputy Master's mistake in thinking that it was the Appellants who had already asked those questions and that they would simply be repeated.

58. Second, there is a world of difference between the type of questions that can be asked in examination-in-chief and those that can be asked in cross-examination. An advocate cannot ask leading questions of his own witness in examination-in-chief, whereas a good cross-examiner will seek to ask a series of closed-end questions aimed at forcing the witness into making admissions, casting doubt upon the accuracy and reliability of the evidence and/or undermining the credibility of the witness: see e.g. Jones v National Coal Board [1957] 2 QB 55 ("Jones") at 65 per Denning LJ.

59. That distinction is evident in this case. The friendly and open-ended questions that Mr. Ward-Prowse asked of Rita in examination-in-chief (see e.g. paragraphs 22 and 23 above) were not remotely searching and certainly not the equivalent of the questions that might have been asked in cross-examination. That is hardly surprising: as Mr. Ward-Prowse told us, his questions were designed to assist Rita to make her case. They were certainly not designed to undermine or cast any doubt upon it.

60. Third, the Deputy Master's view of what might have been achieved by further cross-examination was undoubtedly coloured, at least in part, by his negative view of David's earlier cross-examination of Rita. In that regard, I have very real doubts that the prejudice of denying a litigant the fundamental opportunity to cross-examine his opponent's witness can be minimised or disregarded simply because the judge (or an appellate court) forms the view that such opportunity would not have been well-used because the litigant was not represented by, or had not shown himself to be, a good cross-examiner.

61. But in this case, and picking up the point I made earlier, it should in any event be recalled that David had started his cross-examination of Rita under a substantial handicap. Rita's case had not been properly set out in her witness statements, and David had only heard much of Rita's evidence for the first time during her lengthy examination-in-chief. The Deputy Master had then only allowed him a five minute adjournment to consider that evidence and to formulate his questions. That situation would have been challenging even for an experienced trial advocate. It is not surprising that, as a LIP who had not appeared in court before, David struggled to conduct a properly structured or effective cross-examination of Rita before the lunch adjournment.

62. I consider that there are also fundamental problems with the Judge's second reason, expressed in paragraphs 106 and 107 of his judgment, that any unfairness to the Appellants had been remedied because the Deputy Master adopted what the Judge described as "an inquisitorial role" and "undertook a careful examination of Rita, designed precisely to ensure the [Appellants'] case was properly put to her".

63. The starting point for the analysis in this respect is that civil litigation in England is generally conducted on an adversarial basis by the opposing parties calling and cross-examining witnesses and making submissions to the judge, who sits to decide the case on the basis of the issues that the litigants have raised. It is not conducted by the judge on an inquisitorial basis. The fundamental importance of the right of a litigant to cross-examine an opponent's witnesses in our adversarial system has been emphasised in many cases, and is the foundation for what has been termed the "core principle" that the judge should remain above the fray and neutral during the elicitation of the evidence by the parties: see Jones at 63 per Denning LJ, and Michel v The Queen [2009] UKPC 41 at paragraph 31 per Lord Brown. The cases have accordingly identified significant risks of unfairness when a judge departs from this general rule and intervenes in cross-examination or conducts an examination of the witness himself.

64. There is, of course, a requirement for a party to "put" his factual case in cross-examination to the relevant witnesses for comment if he then wishes to invite the court to prefer his version of events rather than theirs: see Deepak Fertilizers & Petrochemical Ltd v Davy McKee (UK) London Limited [2002] EWCA Civ 1396 at paragraph 49,

> "49. The general rule in adversarial proceedings, as between the parties, is that one party should not be entitled to impugn the evidence of another party's witness if he has not asked appropriate questions enabling the witness to deal with the criticisms that are being made. This general rule is stated in *Phipson on Evidence* (15th Edition) at paragraph 11–26 in the following terms:
>
> > "As a rule a party should put to each of his opponent's witnesses in turn so much of his own case as concerns that particular witness … If he asks no questions he will generally be taken to accept the witness's account and will not be permitted to attack it in his final speech. …""

65. That requirement rests upon the litigant, and paragraph 72 of the ETBB specifically deals with how the judge might ensure that a LIP complies with such obligation,

> "72. LIPs may not understand the importance of "putting" their key points to the other side's witnesses. It is often appropriate to help them do this, rather than hold it against them later that they have failed to do so."

66. This is, to my mind, what the Deputy Master was (quite properly) seeking to do when asking Rita questions after David had indicated that he had no more questions to ask. As the Deputy Master explained,

> "DEPUTY MASTER ARKUSH: You see, you are absolutely entitled to put your case and indeed, not entitled, but bound, to put your case to this witness, all right?
>
> MR REA: Yeah.
>
> DEPUTY MASTER ARKUSH: So, I am going to ask a few questions, which will help you do that … On things that you might not have fully covered yet, all right?"

67. Again, however, there is a world of difference between a judge taking steps to assist a LIP to comply, as a minimum, with the requirement to "put" his case to a witness for comment if he wishes to maintain his case to the contrary (on the one hand); and an effective cross-examination which is designed to extract admissions and cast doubt upon the accuracy, reliability and credibility of the witness's evidence (on the other).

68. That distinction is evident in the questions which the Deputy Master asked Rita to which I have referred above. They were phrased simply to allow her to comment and were, in reality, no more searching than those which Rita had been asked by her own counsel. So, for example, as set out in paragraphs 39-42 above, the Deputy Master did not pursue the Appellants' real point about the use of the word abandon in the text messages that Rita had sent to Nino, and his questions putting the various allegations to Rita were open-ended, or leading, or simply allowed her to provide short denials. They were, in short, not a remotely adequate substitute for the opportunity to cross-examine Rita of which the Appellants had been deprived by the Deputy Master's earlier error.

69. There is, I should say, nothing very surprising about that conclusion. Indeed, it would have been far more surprising if the Deputy Master had actually taken it upon himself to conduct a substitute cross-examination of Rita on behalf of the Appellants.

70. I say that, first, because the Deputy Master was, of course, not aware that he had wrongly prevented the Appellants from cross-examining Rita: he mistakenly thought that the Appellants already had done so. There was, therefore, no reason for him to think that he had to go out of his way to make up for that.

71. Second, such a course would have carried a very real risk that the Deputy Master's neutrality and objectivity would have been compromised if he had actively descended into the fray on behalf of the Appellants. The problems of taking such a course are clearly set out in the authorities. For example, in Yuill v Yuill [1945] P 15 at 20, Lord Greene MR stated (in a passage subsequently endorsed by Denning LJ in Jones at page 64),

> "A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation…"

72. Lord Wilson also summed up succinctly the additional problems that arise where one party is unrepresented in Serafin v Malkiewicz [2020] 1 WLR 2455 at paragraph 46,

> "Every judge will have experienced difficulty at trial in divining the line between helping the litigant in person to the extent necessary for the adequate articulation of his case, on the one hand, and becoming his advocate, on the other."

73. The risks for a judge in going beyond the basic requirement to assist a LIP to put his case to the witnesses are well-known, and it is significant that the Deputy Master gave no indication that he thought he was embarking upon such a risky course.

74. In paragraph 107 of his judgment, the Judge thought that the Deputy Master was following paragraph 65 of the ETBB, and was "seeking to assist [the Appellants] by being flexible and adopting an inquisitorial role". As I have just indicated, I do not think that is what the Deputy Master was in fact doing. Moreover, I am very far from convinced that it would have been appropriate for the Deputy Master to have adopted an inquisitorial role, or that this is what paragraph 65 of the ETBB encourages judges to do in any event in cases involving a LIP.

75. The starting point when one party is unrepresented is CPR 3.1A. This provides, in CPR 3.1A(4), that the court must adopt such procedure at any hearing as it considers appropriate to further the overriding objective. CPR 3.1A (5) then provides,

> "(5) At any hearing where the court is taking evidence this may include-
>
> (a) ascertaining from an unrepresented party the matters about which the witness may be able to give evidence or on which the witness ought to be cross-examined; and
>
> (b) putting, or causing to be put, to the witness such questions as may appear to the court to be proper."

76. This rule clearly authorises a judge to put questions to a witness, but this is plainly not the only option, and there is no suggestion that a judge should do so on a free-range basis, acting as a quasi-advocate for the LIP. The structure of CPR 3.1A(5) envisages that the judge might ask questions of a witness, but after having ascertained from the LIP what evidence the LIP is endeavouring to elicit from the witness or what point he is seeking to make. It is also open to the judge to cause appropriate questions to be put to the witness, for example by asking the advocate for the represented party to do so, rather than the judge descending into the fray and doing so himself.

77. The caution inherent in CPR 3.1A(5) is also reflected in the authorities. In Drysdale v Department of Transport [2014] EWCA Civ 1083 at paragraph 49, Barling J observed that the appropriate level of assistance that a court or tribunal can give to a LIP must be constrained by the overriding requirement that the court must be, and be seen to be, impartial as between the parties, and that injustice to either side must be avoided. The particular difficulties for a judge of maintaining such neutrality and distance whilst asking questions were also commented upon by Asplin LJ in Global Corporate Limited v Hale [2018] EWCA Civ 2618 at paragraph 27,

> "27. A trial judge is perfectly entitled to ask a party or other witness to clarify the answers he or she has given in evidence and it is often important to do so. Where a party is unrepresented, as a matter of fairness both to the unrepresented party and the other party or parties to the litigation, it may also be both appropriate and necessary to ask questions in order fully to understand the unrepresented party's case as pleaded, their submissions and their evidence. In doing so, the judge should take care not to ask leading questions of the unrepresented party in his capacity as a witness. It may even be necessary to ask questions of other witnesses about matters central to the issues in the case which have not been posed by the unrepresented party in cross-examination. Such questioning should be approached with caution and limited to essential matters…. It is very important that whilst seeking to clarify the issues and the evidence and to be fair to all parties the trial judge does not stray from the case as pleaded and the evidence before the court."

78. Against that background, it seems to me that the directly relevant paragraphs of the ETBB in relation to the assistance that a judge can give to a LIP in relation to cross-examination are paragraphs 68-72 which appear under the heading "Advocacy",

> "68. If a LIP does not know where to start in cross-examining an opposing witness, it may be helpful to suggest they prepare by reading through the latter's witness statement and marking the parts of evidence he or she does not agree with.
>
> 69. When trying to cross-examine opposition witnesses, litigants in person often phrase questions wrongly or ask several questions in one sentence, and some find it hard not to make a statement or launch into their own evidence.
>
> 70. Explain that once you understand the point they are getting at, you can assist them to put it in question form.
>
> 71. LIPs frequently have difficulty in understanding that merely because there is a version of events being presented that is different from their own, this does not necessarily mean that the other side is lying. Similarly, they may construe any suggestion from the other side that their own version is not accurate as an accusation of lying. Be ready to explain that this is not automatically so.
>
> 72. LIPs may not understand the importance of "putting" their key points to the other side's witnesses. It is often appropriate to help them do this, rather than hold it against them later that they have failed to do so. The significance of a LIP failing to put a point is likely to be less than a lawyer failing to put a point…."

79. Those paragraphs envisage that a judge might assist a LIP by, for example, reformulating the LIP's questions once the judge has understood the point they are trying to make. But they do not remotely suggest that a judge in a civil case should adopt an inquisitorial role or conduct a cross-examination of a witness in place of the LIP doing so.

80. Nor do I consider that this is what paragraph 65 of the ETBB envisages. That paragraph appears in an earlier section of the ETBB headed "Introductory explanations by the judge". It is preceded by a number of other paragraphs dealing with how the judge should approach the start of a hearing, identifying the basic roles of the various participants and the procedure to be followed. Although the Judge extracted and relied on some of the words in paragraph 65, it is important to have regard to the whole to put those words into context. Paragraph 65 states,

> "65. It can be hard to strike the due balance when assisting a LIP in an adversarial system. LIPs may easily get the impression that the judge does not pay sufficient attention to them or their case, especially if the other side is represented and the judge asks the advocate on the other side to summarise the issues between the parties. Consider:
>
> - Explaining the judge's role during the hearing.
>
> - If doing something which might be perceived to be unfair or controversial in the mind of the LIP, explain precisely what you are doing and why.
>
> - Adopting to the extent necessary an inquisitorial role to enable the LIP fully to present their case, (though not in such a way as to appear to give the litigant in person an undue advantage)."

81. As I read paragraph 65, the suggestion in the last sub-paragraph to which the Judge referred is actually offered as one of the ways in which a judge might avoid a perception on the part of the LIP that the judge is not paying sufficient attention to the LIP's case, "especially if the other side is represented and the judge asks the advocate on the other side to summarise the issues between the parties." In that context, the suggestion that the judge might adopt an inquisitorial role can be understood as a suggestion that the judge might actively question the LIP during the openings at the start of the trial, as a means of teasing out what the LIP's case really is. But this has nothing to do with the judge acting as an inquisitor of witnesses during the subsequent evidential phase of a trial.

82. That point is reinforced by considering other areas of the law in which it might be necessary for a judge to adopt an inquisitorial role at the evidential stage of proceedings. Such areas include, for example, cases in the family courts where parties are often unrepresented, and where there are serious and sensitive issues to be addressed at fact-finding hearings, sometimes requiring the examination of vulnerable witnesses. The difficulties inherent in the judge taking an active role in such cases were discussed by Dyson MR in Re K and another (Children) [2015] 1 WLR 3801 and by Hayden J in S v P (unrepresented party: cross-examination) [2018] EWHC 1987 (Fam) [2018] 4 WLR

119. The cases show that it is possible for a judge to adopt the role of questioner during an evidential hearing, but where that is necessary there are detailed procedures to be followed. These may, for example, require the LIP to submit in advance and in writing the questions that he wishes to see asked, and the holding of a separate "ground rules hearing" (GRH) at which the judge considers the suitability of those questions, if necessary conferring with the LIP to establish the key points that they wish to see explored with the witness.

83. The contrast between the brief wording of paragraph 65 of the ETBB and the complexities of such procedures for the protection of all concerned simply underlines that paragraph 65 is most unlikely to be encouraging judges to adopt an inquisitorial role at the evidential phase of ordinary civil trials.

84. Finally, and very much in passing, I note that the Judge also placed reliance in paragraphs 109 and 110 of his judgment on the fact that the Deputy Master gave the Appellants the opportunity to ask further questions arising out of his questions, and that the Appellants thanked the Deputy Master for his assistance. I do not think, however, that such limited opportunity could fairly be understood as an invitation to the Appellants to go back and restart the cross-examination that they had earlier been prevented in clear terms from carrying out. The Appellants were also being commendably polite in thanking the Deputy Master who had, as I have indicated, been trying to assist them in certain respects. But that politeness cannot sensibly be taken as a clear acknowledgment by the Appellants that the adverse consequences of the Deputy Master's earlier decision had been remedied.

Conclusion

85. For these reasons I conclude that the error by the Deputy Master in preventing cross-examination caused serious prejudice to the Appellants, which was not remedied by anything else which occurred at the trial. In my judgment, the trial was therefore unfair to the Appellants and the appeal must be allowed.

86. The result is that the matter will have to be remitted to the High Court for a retrial. Without making any observations whatever on the merits, that is a most unfortunate result. Quite apart from the emotional stress for the parties of a retrial, when added to the irrecoverable costs incurred to date, the further irrecoverable legal costs which will inevitably be incurred will only serve to reduce the limited benefits available from Mrs. Rea's estate for the successful party or parties. The consequences for the loser(s) will inevitably be much worse.

87. I would, therefore, strongly urge the parties to these proceedings to do everything possible to reach a consensual settlement of their differences rather than fight out a retrial. In particular, serious consideration ought to be given to mediation. In that regard, if the parties request it, I see no reason why this court cannot, as part of the exercise of its power to order a new trial pursuant to CPR 52.20(2)(c), direct that such trial should not take place for a specified period, and stay the proceedings in the interim to enable such mediation to occur.

Lord Justice Newey:

88. I agree.

Lord Justice Lewison:

89. I also agree. I have no doubt that the Deputy Master was doing his best in what was a difficult case; and was conscientiously trying to be fair to all parties. The point of principle which Birss LJ identified in granting permission for this second appeal was whether it was necessary to show that the trial judge was hostile to or biased against one of the parties before it could be said that a trial was unfair.

90. That question is, in my judgment, answered by the leading case of *Jones v National Coal Board* [1957] 2 QB 55, a case of excessive interference in evidence by the trial judge. In that case Denning LJ said:

> "No one can doubt that the judge, in intervening as he did, was actuated by the best motives. He was anxious to understand the details of this complicated case, and asked questions to get them clear in his mind. He was anxious that the witnesses should not be harassed unduly in cross-examination, and intervened to protect them when he thought necessary. He was anxious to investigate all the various criticisms that had been made against the board, and to see whether they were well founded or not. Hence, he took them up himself with the witnesses from time to time. He was anxious that the case should not be dragged on too long, and intimated clearly when he thought that a point had been sufficiently explored. All those are worthy motives on which judges daily intervene in the conduct of cases, and have done for centuries."

91. Nevertheless, despite the judge's best of motives, the trial in that case was unfair. Here too the Deputy Master was actuated by the best of motives. But the brothers were hampered by the extensive and irregular examination in chief of Rita and by the Deputy Master's mistaken (and uncorrected) belief that their case had been adequately put to her. I am reluctantly driven to the conclusion that, for the reasons given by Snowden LJ the trial in our case was also unfair.

92. The outcome is a tragedy for the whole family. The tangible benefits deriving from the relatively modest estate will have been seriously depleted by the costs of the original trial and the appeal. A further trial may well exhaust them completely. Like Snowden LJ, I urge the family to do everything possible to arrive at a consensual solution.