Neutral Citation Number: [2020] EWHC 1215 (Ch)

CLAIM No.BL-2019-001417

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (Ch D)

Royal Courts of Justice,
Rolls Building,
Fetter Lane,
London, EC4A 1NL.

Date: 18th May 2020

Before: DEPUTY MASTER HENDERSON

BETWEEN:-

Claimant: NICOLA SUZANNE MACKAY

AND

Defendant: DAVID STUART WESLEY

Thomas Chacko (instructed by Charles Russell Speechlys) for the Claimant; no representation for the Defendant

Hearing Date: **22nd January 2020**

JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

COVID-19: This judgment was handed down remotely by circulation to the Claimant's solicitors by email for onwards transmission to the Defendant. It will also be released for publication on BAILII. The date and time for hand down is deemed to be 10.00 a.m. on 18th May 2020.

DEPUTY MASTER HENDERSON

Introduction

1. This is my judgment on a Part 7 Claim seeking an order that the appointment of the Claimant as a trustee of the Ellen Morris 1990 Settlement ("the Settlement") pursuant to a Deed of Appointment dated 19th March 2003 be rescinded. In the alternative, the Claimant seeks a declaration that she never became a trustee of the Settlement.

2. By an order dated 19th December 2019 Master Kaye ordered that the Claimant's application for summary judgment dated 30th September 2019 be adjourned to be listed with the disposal hearing which she also ordered. Master Kaye ordered that the Claim, which had been started as a Part 7 Claim, be treated as if it was issued under CPR Part 8 and be listed for a disposal hearing.

3. That disposal hearing took place on 22nd January 2020. This is my judgment on that disposal hearing and on the Claimant's application for summary judgment.

4. I was assisted by a detailed skeleton argument from Mr Chacko for the Claimant and by his oral submissions.

5. The Defendant has not acknowledged service. He was not represented before me. In an email to the Claimant's solicitors dated 2nd December 2019 he confirmed that he had no objection to the Claimant's application for summary judgment. He also stated in that email that he believed the Claimant's witness statement to be a true and accurate account of events as he recalled them to the best of his knowledge.

6. The reason why the relief sought by the Claimant is important to her is that HMRC claim that, by reason of her trusteeship she is personally liable to pay some £1.6 million Capital Gains Tax. If the Claimant's claim is successful, she will avoid that liability.

7. There was a hearing before the First-tier Tribunal (Tax Chamber) ("the FTT") in the week before the hearing before me. It is possible that as a result of that hearing there will be no Capital Gains Tax liability on the Claimant. I was informed that as at 22nd January 2020 the FTT had not given its decision.

8. HMRC is clearly interested in the outcome of the Claim. HMRC was informed of the proceedings by a letter from the Claimant's solicitors dated 30th July 2020. By a letter dated 7th October 2019 HMRC, amongst other things, informed the Claimant's solicitors that it was reviewing its position with respect to the Claim.

9. By a letter dated 18th October 2019 to HMRC, the Claimant's solicitors, amongst other things, updated HMRC on the progress of the proceedings and supplied them with copies of the application for summary judgment, the 1st witness statement of the Claimant and related documents. The Claimant's solicitors asked HMRC to let them know as soon as possible if HMRC intended to make any submissions for the Claimant's solicitors to bring to the attention of the Court, or whether it intended to intervene or participate in the proceedings in any capacity.

10. By a letter dated 28th November 2019 to HMRC, the Claimant's solicitors, amongst other things, stated that they presumed that HMRC did not intend to attend the hearing of the summary judgment application, then listed for 11th December 2019 and did not require the Claimant's solicitors to put any submissions before the Court on its behalf.

11. By a 10 ½ page letter dated 3rd December 2019 addressed to the Court, HMRC set out its case in relation to the Claim. HMRC did not apply to be joined. The concluding paragraph of the letter stated that HMRC advanced "all the above observations in the hope that they will assist the Court." So far as I am concerned, that hope is partly fulfilled and partly not. Insofar as the letter raises legal arguments, I have found it helpful, even where I do not agree with the arguments. I have found the letter less helpful where it has made factual allegations or has attempted to question or add to the Claimant's evidence. If HMRC wished to do that, they should have applied to be joined as a party so that they could put in their own evidence (if any) and cross-examine the Claimant and her witnesses. In the absence of any challenge by way of cross-examination, I cannot disregard the Claimants' evidence. Nor can I treat it as untrue unless it conflicts with some other clear evidence – which it does not.

12. In the absence of any opposition, I still need to be satisfied that relief ought to be granted as sought or otherwise (*Wright v National Westminster Bank plc* [2014] EWHC 3158 (Ch) at [10]).

13. The Claimant's claim for relief is based on four overlapping grounds:

    13.1. Undue influence.
    13.2. Mistake.
    13.3. Lack of capacity.
    13.4. *Non est factum.*

The evidence

14. The Claim and the application were supported by two witness statements made by the Claimant; one made by the Claimant's husband ("Mr Mackay") and one made by the Claimant's sister. There are copies of exhibits and other documents in the hearing bundle, including two statements made by the Defendant in the Tribunal proceedings.

The facts

15. The Settlement was created by a deed dated 6th September 1990 made between a nominee settlor and two Isle of Man companies.

16. The Settlement created a discretionary trust for the benefit of, or principally of, the descendants of Ellen Morris then living or born thereafter and their spouses.

17. Ellen Morris was the maternal grandmother of the Claimant. By 2003 the class of potential beneficiaries of the Settlement comprised, or included, the Defendant, his wife ("Mrs Leslie Wesley"), the Claimant, her husband and the Claimant's sister, Kathryn.

18. The substantive funding of the Settlement initially came from an earlier settlement which had been founded by Ellen Morris. By 2003 the Settlement was heavy with retained gains or potential gains for UK Capital Gains Tax ("CGT") purposes. The gross value of the trust fund was some £3.6 million. The potential CGT liability if the gains were realised or the Settlement's assets were applied in such a way as to give rise to a liability for UK CGT was some £1 million.

19. By 2002 the sole trustee of the Settlement was Abacus Trust Company (Isle of Man) ("Abacus"). It took advice from the accountancy firm PWC in London. In the light of that advice Abacus decided to embark on what was called a "Round the World" CGT tax avoidance scheme. The arguments which were advanced before the FTT were not put to me. What follows in respect of how the scheme was intended to work from a tax perspective is my understanding based on the documents before me and the explanation of Round the World schemes in the Court of Appeal's judgment in *Smallwood v. HMRC* [2010] EWCA Civ 778.

20. After Mr Chacko had seen a draft of this judgment he suggested that the tax planning was not part of the dispute before me. I disagree. Of the grounds relied upon for setting aside the appointment of the Claimant as a trustee, the tax planning appears to me to be central to the ground of mistake and relevant to the other grounds. I need to make such findings and examine such possibilities and arguments as are directly or indirectly relevant to the claim before me. Further, the Claimant has chosen to make the claim on the grounds relied upon and the existence and nature of the scheme, or "planning" is pleaded in the Particulars of Claim. That said, I have had insufficient information or argument to determine whether or not in this particular case the Round the World Scheme worked or should have worked as planned. I do not complain about that. As between the parties and HMRC that is a matter for the FTT.

21. The essence of the scheme was that Mauritian trustees would be appointed. The Settlement would become Mauritian resident for tax purposes. The gains would be realised by the Mauritian trustees disposing of the relevant assets and distributing the proceeds to or for the benefit of the UK resident beneficiaries. UK resident trustees would then be appointed in place of the Mauritian trustees in the same UK tax year of assessment. In *Smallwood v. HMRC* [2010] EWCA Civ 778 this last step was a necessary step because the appointment of UK resident trustees within the same year of assessment would exclude the operation of s.86 Taxation of Chargeable Gains Tax Act 1992 ("TCGA") which required the trustees to remain non-resident throughout the relevant year in order for it to apply (s.86(2)). If s.86 TCGA applied the gains would have been attributed to the Defendant as the UK settlor of the Settlement (or of the bulk of its assets) and the scheme would have failed to avoid the payment of CGT. There was no material before me to indicate that the appointment of UK resident trustees was not a necessary step in the Round the World scheme in this case and for the same reasons as in *Smallwood*.

22. I derive from *Smallwood* that the "magic" elements which were supposed to make Round the World schemes involving Mauritius effective were that:

    22.1. Mauritius did not tax capital gains.

    22.2. Mauritius had entered into a double taxation agreement with the UK, the provisions of which were scheduled to the Double Taxation Relief (Taxes on Income) (Mauritius) Order 1981 which provided that chargeable gains would be taxable only in the contracting state in which the alienator was resident. By reason of the Order it would have been contemplated that no tax could be charged in the UK.

23. The Defendant says that he did not instigate or play any part in the discussions between Abacus and PWC. He says that when the trustees decided on the steps they wanted to take he was asked if he had any objections. He says that he trusted that they had obtained the best advice possible and so confirmed that he did not object. He says that by then he was the main point of contact with the Settlement on behalf of the beneficiaries owing to his wife's (the Claimant's mother's) terminal illness.

24. On 26th July 2002 Abacus retired as trustee in favour of a Mauritian company called Standard Bank Trustee Company Mauritius Ltd ("Standard") and two Mauritian resident individuals.

25. The Mauritian trustees realised the gains and distributed almost all of the trust fund until, by 19th March 2003, there was only some £61,000 remaining.

26. The distributions which were made from the Settlement were as follows:

    26.1. About £2.6 million on 18th November 2002 by way of a transfer to a new Isle of Man trust. This new Isle of Man trust was known as the Ellen Morris 2002 Trust. I refer to it as "the First 2002 Trust". Its trustees were the Defendant, Mrs Irene Wesley and Browne Jacobson Trustees Limited.

    26.2. Just under £1 million on 26th November 2002 by way of a transfer to another new Isle of Man trust. This new Isle of Man trust was known as the Ellen Morris 2002/2 Trust. I refer to it as "the Second 2002 Trust". Its trustees were the Defendant, Mrs Irene Wesley and Browne Jacobson Trustees Limited.

27. On 26th February 2003 the following payments were made out of the First 2002 Trust:
    27.1. £25,000 to the Defendant.
    27.2. £25,000 to the Claimant.
    27.3. £28,000 Mrs Leslie Wesley.
    27.4. £28,000 to Kathryn.
    27.5. £28,000 to or for the benefit of the Claimant's daughter.

28. By a deed dated 19th March 2003 ("the DORA") the appointment of new trustees was made which the Claimant seeks to have set aside or declared void. The DORA was made (or purportedly made) made between Standard and the two individual Mauritian trustees ("the Mauritian Trustees") of the one part and the Defendant and the Claimant ("the New Trustees") of the other part.

29. The recitals to the DORA included the following (with the word "Mauritian" inserted by me in square brackets for clarification):

    29.1. (2) The [Mauritian] Trustees are entitled to appoint new trustees of the Settlement.

    29.2. (4) The [Mauritian] Trustees wish to appoint the New Trustees as trustees of the trusts of the Settlement in their place.

    29.3. (5) The New Trustees accordingly wish to indemnify the [Mauritian] Trustees "in the manner set out in this Deed".

    29.4. (6) "It is intended immediately after the execution hereof that the assets at present comprising the Trust Fund of the Settlement and any undistributed income thereof be put under the control of the New Trustees."

30. The following were the particularly relevant clauses of the operative part of the DORA:

    30.1. Clause 1 provided:

    > "PURSUANT TO THE POWER CONFERRED ON THEM BY CLAUSE 44 OF THE Settlement and every other power them enabling the [Mauritian] Trustees appoint the New Trustees to be trustees of the Settlement to act in place of the Trustees who hereby retire and are discharged from the trusts of the Settlement"

    30.2. Clause 2 provided:

    > "THE parties to this deed consent to the discharge of the [Mauritian] Trustees and to the vesting in the names of the New Trustees of the assets now comprising the Trust Fund of the Settlement and any undistributed income thereof"

    30.3. Clause 3 contained a covenant by the New Trustees to indemnify the [Mauritian] Trustees, subject to a proviso that the New Trustees' liability should be limited to the amount or value of the trust fund of the Settlement for the time being in their hands as trustees of it.

    30.4. Clause 4 contained a covenant by the New Trustees to obtain equivalent covenants to that in clause 3 from any further new or substituted trustees.

    30.5. Clause 5 contained a covenant by the New Trustees to obtain indemnity covenants for the benefit of the Mauritian Trustees from any beneficiaries to whom distributions should be made.

    30.6. Clause 7 provided that the DORA might be executed in any number of counterparts all of which taken together should constitute one and the same deed and any party might enter into the Deed by executing a counterpart.

31. There are three copies of the DORA in the hearing bundle. One executed by the Mauritian Trustees; one by Browne Jacobson Trustees Limited and the third by the Defendant and the Claimant.

32. The signatures of the Defendant and the Claimant on the counterpart of the DORA signed by them are witnessed by the Claimant's husband.

33. Browne Jacobson were an English firm of solicitors. They were undoubtedly involved in the arrangements for the execution of the DORA. However, they deny that they acted for the Defendant or the Claimant in relation to that.

34. On 12th May 2013 the Claimant's then solicitors (Fisher & Co) made an attendance note in respect of a meeting they had on that date with the Defendant. That note records, and I have no reason to doubt its accuracy, amongst other things, that:

    34.1. The funding of the Settlement was "essentially done by him". There was approximately £100,000 left in it by Ellen Morris. When the Defendant sold his shares in Body Care Toiletries in 1991 the Settlement benefited to the tune of £2.3 million.
    34.2. Browne Jacobson first became involved on the advice of PWC.
    34.3. The Defendant had never been a trustee before and he wasn't advised as to the nature of trusteeship or his responsibilities. In his mind everything was really being controlled by the advisors. He understood the principles of the Round the World scheme and was advised that it should work.
    34.4. The Settlement was, in his eyes, for his benefit and whoever he chose to make payments to. It was (the Defendant is recorded as saying) his money funding the Trust and the sole purpose was to maximise the return to him.

35. In a letter dated 19th March 2013 from Browne Jacobson to the Claimant's then solicitors, Browne Jacobson say, amongst other things:
    35.1. That they are providing a chronological list of correspondence including bills and retainer documents sent to the Claimant and also correspondence with the Defendant "where it is correspondence between us as Trustees". There is no Browne Jacobson correspondence in the hearing bundle dating from the period before the execution of the DORA.
    35.2. That there was no correspondence or other communication with the Claimant relating to her appointment as a Trustee.
    35.3. They did not consider that they were acting for the Claimant until after her appointment as trustee when they took the view that they were acting for the Trustees as a whole.
    35.4. As trustee they liased with PWC and the former trustees so that appropriate tax returns could be prepared. They dealt with and agreed Inheritance Tax liability and carried out administration of the Settlement, including preparation of cash statements. They say that "with" their co-trustees (i.e. the Defendant and the Claimant) they resolved to keep the money they received in AbicoCash in the Isle of Man and paid various invoices.

35.5. The remaining balance of funds which was less than £10,000 was distributed by deed to the Defendant.

35.6. They did not advise the Claimant as trustee and/or beneficiary in connection with the Round the World scheme although they did liase with HMRC in relation to their ongoing enquiry.

36. The somewhat surprising effect of the appointment of the Claimant as a trustee of the Settlement is that, if, as HMRC contend, the Round the World scheme was not effective in relation to the Settlement, then, despite having been appointed a trustee of a fund with only some £61,000 in cash in it at the time of her appointment, the Claimant is liable to HMRC for some £1.6 million CGT.

37. That result is said to be a consequence of the terms of s.65 Taxation of Chargeable Gains Tax Act 1992. At the material times and so far as relevant, that provided:

37.1. By s.65(1) that CGT chargeable in respect of chargeable gains accruing to the trustees of a settlement may be assessed and charged on and in the name of any one or more of "the relevant trustees".

37.2. By s.65(4)(b) "the relevant trustees", in relation to any chargeable gains, means "the trustees in the year of assessment in which the Chargeable gains accrue and any subsequent trustees of the settlement".

38. On the footing that the Round the World scheme failed to avoid CGT, chargeable gains accrued to the trustees of the Settlement (albeit that at the time of the disposals they accrued to the Mauritian Trustees) in the year of assessment ending 5th April 2003. The Claimant was a trustee of the Settlement during that year of assessment and was a subsequent trustee of the Settlement. Accordingly, so HMRC contend, the Claimant was a "relevant trustee" of the Settlement and is chargeable with the full amount of the CGT attributable to the gains made by the Mauritian Trustees, being some £1.6 million.

39. In the course of the hearing I expressed some incredulity that that should be the result. I remain somewhat incredulous. By the time the Claimant became a trustee of the Settlement it only contained some £61,000 and there were various liabilities payable out of that £61,000. The settled property at that stage only comprised £61,000 at most. Hence it appeared to me that it might be arguable that the Settlement of which the Claimant was a trustee was only the settlement of £61,000 less liabilities (some £10,000), not the settlement of the larger amount in respect of which the CGT liability arose. However: (i) this argument was not addressed before me save by a reference to s.65 TCGA 1992 and (ii) I was informed that it was not an argument which had been raised with the FTT. In these circumstances, I proceed on the assumption, but do not hold that, if the Round the World scheme fails in respect of the Settlement, then the Claimant and her co-trustees, the Defendant and Browne Jacobson Trustees Limited, are jointly and severally liable to HMRC for some £1.6 million.

40. Browne Jacobson Trustees Limited changed its name and is in liquidation. No meaningful contribution to the £1.6 million is likely to be forthcoming from it. The

Defendant is now virtually penniless and no meaningful contribution to the £1.6 million is likely to be forthcoming from him. Accordingly, virtually the whole burden of the liability will fall to be borne by the Claimant.

41. In her first statement the Claimant says that "currently" she does not work and has no savings. Any savings she had have been spent on solicitors over the last 8 years. The Claimant explains that initially there was a standstill agreement in respect of a potential claim against Browne Jacobson, but that in September 2016 they refused to renew it; the Claimant could not afford to issue a High Court claim against them and any claim she might have had against them is now time-barred.

42. In her first statement the Claimant explains that she is only in a position to bring this claim as a result of assistance from family and friends. If the Claimant had no significant assets, then from a hard-nosed financial perspective it would have to be asked, both rhetorically and practically, why she did not simply become bankrupt and rid herself of the £1.6 million liability in that way. I accept that there remains a stigma attached to bankruptcy and that it could adversely affect the Claimant's future employment prospects. Nevertheless, if the issue of the unconscionability of not setting aside the appointment of the Claimant as a trustee arises, in my judgment the fact that financially it would make no significant difference to the Claimant's position would in my judgment be a relevant consideration. However, the Claimant does not say that she has no assets. In particular, she makes no mention of any interest she may have in the house or any assets representing it, the purchase of which was partly funded by £285,000 from the 2004 Trust as mentioned below.

43. I now examine more closely the circumstances surrounding the execution of the DORA on 19th March 2003.

44. It is clear that the decision to appoint the Claimant as one of the New Trustees was taken fairly late in the process. The evidence is that the decision was not taken by the Claimant. Nor was she a party to it. In the circumstances it can only have been taken by the Defendant or by the Defendant in discussion with Browne Jacobson or PWC.

45. There is an email dated 12th March 2003 from Lucy Worwood ("Ms Worwood") to Ms Beatrice Fok Chow and Mr Nicholas Harries. Ms Fok Chow was one of the Mauritius Trustees and an employee of Standard. Nicholas Harries (as appears from his email address in a later email) was an employee of PWC. Ms Worwood was a solicitor employed by Browne Jacobson, and was the person at that firm who was mainly involved in the process.

46. In the email dated 12th March 2003 Ms Worwood says she has "now" spoken to PWC and "we need as least two UK trustees to be appointed." Ms Worwood continued:

> "I will therefore need to amend the documents to include the proposed additional trustee or possibly trustees. I anticipate that this will be David Wesley. Subject to this change – are you happy with the documents?"

47. Someone has handwritten on the email "I'll amend docs after here from Nicholas". Someone has also written in a different hand on the copy of the email in the bundle: "Why Nicola at all". I take this second comment or question as one which was written after the event. Nevertheless it is a very good question which neither the evidence nor the submissions have answered. Especially as the email of 12th March 2003 anticipates that the second UK trustee will be the Defendant, the first being the Browne Jacobson trust company; so at that stage there was no mention of a need for a third UK trustee at all.

48. In the course of the hearing I speculated that the perceived need for a third UK trustees might have arisen from the terms of the power to appoint replacement trustees contained in clause 44(a) of the Settlement. That may have been the case, but clause 44(b) permitted retirement without replacement so on the material before me I can do no more than speculate as to the reason.

49. The next email in the bundle is one dated 14th March 2003 from a Ms Denne on behalf of Ms Worwood to Ms Fok Chow, copied to, amongst others, Mr Harries. In this email Ms Worwood explains that she has "now established" that the three new trustees will be Browne Jacobson Trustees Limited, the Defendant and the Claimant. She does not say how she has "established" that. She says she has amended all of the documents to reflect that. The draft documents sent with this email were a deed of appointment and retirement, a deed of indemnity and an agency agreement.

50. The detail of how the relevant documents were provided for signature and, indeed, how they were signed is not entirely clear. However, it appears, and I find, that so far as their execution by the Defendant and the Claimant were concerned, they were sent by Browne Jacobson to the Defendant and he procured the signature of the Claimant to them. Thus:

    50.1. The attendance note of 12th May 2013 by the Claimant's then solicitors (Fisher & Co) of their meeting of that date with the Defendant records that

        50.1.1. The Defendant believes that the decision to include the Claimant must have been his recommendation so as to keep things in the family.

        50.1.2. The Defendant doesn't recall any discussion regarding the Settlement with the Claimant.

        50.1.3. The Defendant acknowledged that if he asked the Claimant to sign a document she would have done so.

        50.1.4. In the Defendant's view, Browne Jacobson were acting as if the need for the Claimant's appointment as a trustee was for a limited period of about 6 months. The Defendant is recorded as having said:
        "The sense was that this wasn't really a formal Trust with requirements for meetings, minutes and advice. The purpose was to take advantage of the Round the World scheme".

        50.1.5. The Note continues:
        "We looked at the correspondence that had been produced by Browne Jacobson. I said that in general terms what seemed to have happened was that the letters and associated documents were sent to him [(the Defendant)] first and he would then arrange for Nicola to sign. He

acknowledges that this was what happened but can't say whether this was at his suggestion or at the request of Browne Jacobson."

50.2. The Claimant's own evidence in her 1st witness statement is that prior to her execution of the 19th March 2003 documents she never received any personal communication, written or verbal from Ms Worwood. Nor did she receive any personal communication from any other professional person related to the Settlement or as to the fact that she had been nominated and subsequently appointed as a trustee.

51. At the time she signed the DORA the Claimant was in an extremely distressed, shocked and vulnerable state. As recently as 18th January 2003 the Claimant had lost her second child in very traumatic circumstances. I need not go into all the details, but in summary:

51.1. In about July 2002 the Claimant fell pregnant with her second child.

51.2. In November 2002 a scan revealed an issue with the baby's brain.

51.3. On 27th November 2002 a paediatric surgeon at a specialist hospital suggested a 20% chance of severe brain damage ranging to an 80% chance of a healthy child, or somewhere in between, but did not give any explanation why or advice what to do next. The Claimant and her husband were told to go home and wait until approximately 36 weeks gestation when the baby's brain would be fully developed to see if it might survive.

51.4. The emotional trauma and uncertainty led the Claimant and her husband to arrange an appointment with a Professor Nicolaides in London on 30th December 2002.

51.5. Professor Nicolaides advised that the baby had "no hope" he advised that she had had a catastrophic brain haemorrhage. Unsurprisingly the Claimant was devastated. Only 3 days earlier a specialist hospital had indicated that there might be an 80% chance of a healthy child.

51.6. There then followed what, in her witness statement, the Claimant describes as "16 days of pure mental torture" while she was sent from pillar to post in terms of hospitals, and on one occasion was refused to be seen by the very consultant who had missed the brain haemorrhage on 27th December 2002 because the consultant was too busy after Christmas. This consultant later sent the Claimant a written apology.

51.7. Eventually on 16th January 2003 another consultant concluded that the Claimant's baby's brain had shrunk and had begun to develop cracks and crevices. The Claimant was sent home to be induced on 18th January 2003 because the hospital was too busy to accommodate the Claimant on the 17th. Another hospital which might have accommodated the Claimant on 16th January was administered under a different trust and there were ongoing issues as to responsibility between various NHS trusts.

51.8. The baby was stillborn on 18th January 2003 and a week later a funeral was held for the dead child.

51.9. In her statement the Claimant explains that she all she felt was numb and in so much emotional pain that she hurt physically. Life evolved around the Claimant but she didn't feel part of it. The Claimant explains that she had no concept of real life. She looked after her two year old daughter and appeared

to function to the outside world by taking her to playgroup and feeding her, but that was it. The Claimant had no one else to rely on. Her mother was terminally ill with cancer. Her husband was out working all day.

51.10. The Claimant's distress and shock continued for many months.

51.11. The Claimant says that at this time she was "consumed by grief and truthfully incapable of making any decisions."

52. Further, as already indicated, by March 2003 the Claimant's mother (Mrs Leslie Wesley) was nearing her death of cancer. Throughout January 2003 Mrs Leslie Wesley had become increasingly ill, and in February and April was admitted as an emergency to hospital with infections and for further in-house radiation treatment. The Defendant was reluctant to accept help and insisted on mainly keeping the provision of help within the family, leaving a lot of the care to the Claimant.

53. The Claimant explains that her father, the Defendant, is a forceful character and had been a successful businessman who had always made the important decisions in the family and had dealt with the family's finances. He did not respond well when his decisions were questioned or when his requests were not answered favourably. The Claimant had grown accustomed to listening to the Defendant always, as he simply dismissed any questions she might have had as annoying interferences. In 2003 the Claimant considered that the Defendant was someone she could rely on and she had no real reason to question him.

54. The Claimant expands on what might be termed the overbearing nature of her father in her second witness statement. She there says, amongst other things, that the Defendant controlled most aspects of her life as she grew up and into and throughout her early twenties, including her finances and what she was allowed to have money for. She gives examples. The Claimant wasn't encouraged to have a career. The Defendant said she wouldn't need one as once she got married he didn't expect her to work. Her role was to be a housewife like her mother and look after her husband.

55. When the Claimant did finally start working as a teacher at the age of 24, the Defendant still had a major influence over her finances and earnings. He told her to opt out of the teachers' pension scheme, despite a financial adviser advising in the Defendant's presence that she should keep her pension. The Claimant summarised the position in her second witness statement as follows:

> "There wasn't an option to say no, you just did what you were told, Dad knew best otherwise life was made very difficult."

56. The Claimant's evidence is that even when she had met her husband and they were buying their first house, the Defendant still had some control. The Defendant gave them a contribution towards buying their house so long as it was a house he approved of. The house they bought was 3 minutes' walk away from the Claimant's parents. The Defendant would tell them who had the best mortgage deal, who to insure the house with and he organised who they had their car insurance with.

57. In paragraph 9 of her second statement the Claimant says, amongst other things:

> "My dad was such an authoritative figure who had been very successful in business, he had built up his toiletries company from nothing and I had grown up always being told he knew best, I was told I didn't know as much so had to trust what he said. He was my father, I had no reason to think he would do anything that wasn't in my best interests. I didn't feel able to question my father's advice but also didn't have any reason to distrust him at that time, as I knew he was respected by many people as a business man."

58. The Claimant's evidence as to the overbearing nature of her father is corroborated, not only by the Defendant's statement in his email to the Claimant's solicitors dated 2nd December 2019 mentioned above, where he stated that he believed the Claimant's witness statement (her first) to be a true and accurate accounts of events as he recalled them to the best of his knowledge, but also by:

    58.1. The Defendant's statement recorded by Fishers and mentioned above to the effect that the Settlement was, in his eyes, for his benefit and whoever he chose to make payments to.

    58.2. The Defendant's acknowledgment recorded by Fishers as mentioned above to the effect that if he asked the Claimant to sign a document she would have done so.

    58.3. The fact that, as explained further below, it was only in the weeks following 22nd September 2011 that the Claimant became aware that she was a trustee of the Settlement.

    58.4. The statement of the Claimant's younger sister ("Kathryn"). Kathryn was only 17 in March 2003 and was living at home with her parents. Kathryn says that the Defendant was even more dominant, controlling and irritable than usual at the time when his wife, the Claimant's and Kathryn's mother, was dying. Kathryn's evidence is that she and the Claimant grew up knowing the Defendant didn't like to be questioned and that his word was final. In paragraphs 8 and 9 of her statement Kathryn says:

> > "8. I believe these childhood experiences explain to a certain extent why we both signed documents when asked to by our father. Refusing him was simply never an option we felt we had at that time. Questioning him would result in our being shouted at and told 'just do it'.
> >
> > 9. Furthermore we trusted our father with financial matters at that time as he had always provided for us, and we had no reason to suspect that there was anything he would ask us to sign that would carry such a heavy risk or potential liability….."

    58.5. At paragraph 13 of her statement Kathryn says that she now understands from documents she has been shown, that distributions were made to her from trusts related to the Settlement at around "this time (2003/2004), but that she was completely unaware of this. She continued:

> "I do have distant recollections of signing things when my father asked me to, and this took place on the dining table at home in the same circumstances as Nicola, with my father instructing me to "sign here" on the signature page without explaining any details regarding what it was actually for. I do not remember seeing the contents of any documents [….] I had no idea I had any large sums of money in my name until around 2009. I am certain I would remember this if I had known about it."

58.6. The Claimant's husband's statement. The Claimant's husband says that he saw the Defendant as the head of the family. He was kind and generous to family and friends but also he was a strong-willed character and was invariably direct and unswerving in his opinion and decisions. As regards the execution of the DORA the Claimant's husband says:

> "I believe there is a document where I have witnessed Nicola's signature on a deed of appointment as a trustee. I have no recollection of this as it is so many years ago. Like Nicola I was not aware until Autumn 2011 that she had ever been made a trustee. However, this all appears to have taken place at a very difficult period in our lives due to the recent loss of our daughter and Nicola's mother's deteriorating health. David was an authoritative figure and I have never felt it was my place to ask questions about what were private Wesley family affairs. Therefore, if David, as Nicola's father, asked me to witness her signature on something I would have felt obliged to do so."

58.7. The Claimant's lack of active involvement in the running of the Settlement and the way in which distributions, apparently to her and her sister were dealt with on the instructions of the Defendant. I set out the position in this regard below.

59. In Fishers' attendance note of 12th April 2013 the Defendant is recorded as saying in respect of the documents signed by the Claimant that some of them were signed at his house because the Claimant was round there a lot, but he cannot recall any discussions. He is recorded as saying that he simply asked the Claimant to sign them because that was what Browne Jacobson wanted and in his mind it was a matter of process rather than choice.

60. The attendance note of 12th April 2013 concludes as follows:

> "In summary Dave accepts that he did exert influence over the family and that financial matters were generally left to him. Trust documents were presented to Nicola without advice from him or Browne Jacobson. He simply asked her to sign them. In his mind, albeit that a Trust structure was in place, the money was his to do with as he wished."

61. There is little evidence as to the actual execution of the DORA by the Claimant. The nearest the evidence in the witness statements in these proceedings comes to doing that is the Claimant's evidence in paragraph 28 of her 1st statement where she says:

"I cannot recall now the specific events which took place on the exact day I signed the deed of appointment, as this was 16 years ago, and I was not aware of the significance of this day until my discovery of the situation in 2011. I do not recall signing any specific documents. I must have signed this document in my father's lounge on his dining table. He used the dining table as a makeshift desk and it was usually covered with lots of forms and documents. It was normal at that time for my father to ask me to sign documents as we were dealing with all sorts of paperwork regarding my mum and her terminal illness. I do not now recall exactly what these documents were but they may have included social care and private carer forms among others. I was highly preoccupied with the loss of my daughter and the illness of my mother, and I was in no state to think about or understand the complexities of anything else at the time, I was extremely vulnerable and in a deep state of depression. I never saw a full document, I only ever remember seeing the last sheet which required a signature and my father would have just asked me to sign it amongst other documents. My husband witnessed my signature on the deed itself. He did not raise any questions at the time as he was also in a precarious emotional position following the death of our daughter and trusted my father."

62. There is some explanation in the Defendant's statement dated 20th April 2018 made in the FTT proceedings. He says that in March 2003 he was informed that the Mauritian Trustees needed three UK Trustees to take over the management of the Settlement. The Defendant says:

"I agreed to be a co-trustee along with Browne Jacobson Trustees Ltd, but my wife was unfortunately dying of cancer, which meant she was unsuitable to be appointed as the third Trustee. I don't remember now who first suggested my eldest daughter Nicola as a suitable replacement, but I do know that decisions were made very quickly and with no time to explain to Nicola any of the information regarding the Trust or the risks/responsibilities we were asking her to take on. In any case I didn't want to worry her with the details of it all since she was going through a difficult time after the loss of her baby. I just asked her to sign the signature page of the documents without explaining the nature of them or that she was becoming a Trustee. I relied on the professional Trustees Browne Jacobson to take care of all the Trustee duties on our behalf and didn't involve Nicola in any of it. Similarly Browne Jacobson appeared to take a similar approach and did not deem it necessary to communicate or liase with Nicola at all, not even to advise her to take independent legal advice […]. In subsequent years I hoped that the HMRC enquiry would come to nothing and so I didn't involve her in any of the correspondence or inform her about the enquiry or her involvement in it, until she found out about it herself in September 2011."

63. A letter dated 21st November 2012 from the Claimant's then solicitors, Napthens, to HMRC gives the following explanation:

"On 19th March 2003, Mrs Mackay was at her parents' home, caring for her mother. Her father, Dave Wesley, presented her with the last page of a document which he informed her related to certain offshore trusts and required her to sign it. The only trust Mrs Mackay had ever heard talk about was the IOM Trust set up by her grandparents. It would appear that the document was, in fact, the deed. Mr Wesley

did not inform Mrs Mackay that signing the deed would appoint Mrs Mackay as a trustee of the Settlement, nor was it ever her understanding that this would be the case. Mrs Mackay's impression was that the deed was something to do with her mother being ill and could she sign on her behalf (there were numerous forms that the family were filling in at the time due to the state of health of her mother).

Mrs Mackay was not afforded any opportunity to read or consider the deed, nor was she able to take any legal advice in respect of its contents. Indeed she was not even provided with the entirety of it. She merely signed it as requested. She was subject to considerable pressure from her father to do so and did not feel able to refuse."

64. Those contents of the letter of 21st November 2012 are confirmed by the Claimant in her witness statement where she says that the letter "explained the Circumstances of my appointment".

65. In the Defendant's statement dated 8th February 2019 he says much the same thing, but adds "I gave Nicola the signature page of the documents to sign". He also adds that at the time he himself did not appreciate the significant risks that he and the Claimant would be exposed to by becoming trustees.

66. There is a second document concerning the Settlement which was signed by the Claimant on 19th March 2003. That is a deed of indemnity in favour of one of the old Isle of Man trustee of the Settlement. As with the DORA, the Defendant's and the Claimant's signatures to this deed are witnessed by the Claimant's husband.

67. There is an agency agreement dated 26th March 2003 ("the Agency Agreement") executed by, amongst others, the New Trustees. The Defendant's and the Claimant's signatures on this document are witnessed by Mrs Leslie Wesley. By the agency agreement the New Trustees appointed the Mauritian Trustees as their agents for, amongst other things, the effecting of the transfer into the name of or under the control of the New Trustees of any part of the Trust Fund which had not yet been so transferred.

68. There is a written resolution of the New Trustees dated 1st April 2003 and signed by all three of the New Trustees. By this resolution the New Trustees resolved to establish a trust bank account with Abicocash Plc in the Isle of Man and transfer the Trust Fund to it.

69. There is a signed resolution of the New Trustees dated 1st April 2003 ("the 1st April 2003 Resolution") by which the New Trustees resolved to establish a trust bank account with Abicocash Plc in the Isle of Man and to transfer the Trust Fund to it.

70. Mrs Leslie Wesley died on 19th July 2003.

71. There is a Deed of Indemnity dated 15th March 2004 ("the 15th March 2004 Indemnity"). This is made between (1) the Defendant, the Claimant and Kathryn, defined as "the Indemnifiers", in their capacities as recipients of distributions from the Second 2002 Trust; (2) the Defendant, the Claimant and Browne Jacobson Trustees Limited in their

capacities as the New Trustees of the Settlement; and (3) two Isle of Man companies in their capacities as trustees of the Second New Trust.

72. All of the Defendant's, the Claimant's and Kathryn's signatures to the 15th March 2004 Indemnity are witnessed by the Claimant's husband.

73. On 9th March 2004 a further Isle of Man discretionary trust was created ("the 2004 Trust"). Its original objects were the descendants of Ellen Morris then living or born during the defined Trust Period; the Defendant; the spouses of the descendants; the Christie Hospital Charitable Fund. The Defendant's second wife, Michelle was added as a beneficiary on 24th April 2006.

74. The notes to the accounts for the 2004 Trust for the year ended 5th April 2010 state that by a deed dated 9th March 2004 the following assets were assigned to it from the First 2002 Trust:

    74.1. The benefit of a loan of £860,000 made to Mrs Leslie Wesley on 21st November 2002 and owed by her.
    74.2. The benefit of a loan of £40,000 made to the Claimant on 21st November 2002.
    74.3. The benefit of a loan of £40,000 made to Kathryn on 21st November 2002.

75. The notes to the accounts for the 2004 Trust for the year ended 5th April 2010 also state that
    75.1. In August 2007 in consideration of the trustees of the 2004 Trust not demanding repayment of the loan of £860,000, the executors of Mrs Leslie Wesley granted the trustees an equitable charge over a flat in Poole. The property has now been transferred into the name of the Defendant.
    75.2. The benefit of the £860,000 loan owed by Mrs Leslie Wesley was assigned to the Defendant on 11th November 2009.
    75.3. A loan facility of £525,000 was made available to the Claimant on 19th September 2006 which was drawn down as to £50,000 on 20th September 2006 and £475,000 on 11th October 2006. A partial repayment of £240,000 was received on 24th January 2007.
    75.4. On 11th November 2009 it was resolved that an additional £40,000 loan be made to the Defendant.
    75.5. On 3rd February 2010 it was resolved to convert the loans outstanding into specialty debts. The debts are interest free and repayable upon one month's written demand.

76. The accounts for the 2004 Trust for the year ended 5th April 2010 themselves show in the balance sheet the assets of the 2004 Trust as comprising £1,265,000 of loans plus cash and cash equivalents of £124,284.

77. Note 8 to the accounts for the 2004 Trust for the year ended 5th April 2010 shows capital distributions to the Defendant for the period 6th April 2007 to 1st September 2009 totalling £600,000.

78. The 15th March 2004 Indemnity recites that the trustees of the Second 2002 Trust have, on that date, transferred cash of £265,000 to the Defendant, £205,000 to the Claimant and £205,000 to Kathryn.

79. In Fishers' attendance note of 12th April 2013 the Defendant is recorded as saying in respect of the indemnities that when he asked for distributions from the trustees he was told that indemnities would be requested. He understood this and "arranged for" the indemnities to be signed by the Claimant as trustee and by the Claimant and Kathryn as beneficiaries. Again (the Note records) in the Defendant's mind he was the deemed settlor and it was his money.

80. In Fishers' attendance note of 12th April 2013 the Defendant is recorded as saying that after the Round the World scheme had been introduced and seemed to have worked, then he decided to get about £1 million out. For "unexplained reasons" he decided to split this three ways, with one third to himself and the balance to his two daughters. He is recorded as saying that the payments to his daughters were for him to draw off. They were never intended as a gift and he always expected the money to be paid back to him. However, he is recorded as going on to explain that there two exceptions to this:

    80.1. When the Claimant moved house he agreed to request a loan for a net £285,000.
    80.2. There was a gift intended of £40,000 for the education of the Claimant's daughter.

81. That statement of the Defendant is confirmed by the Claimant and by Kathryn in their evidence. The Claimant says that she can remember receiving money in or around 2003-2004. When she received the money the Defendant told her it was not for her to keep, and that he would have it back. In or around 2004 the Defendant asked the Claimant to open three bank accounts with different building societies to deposit £50,000 in each of them. However, she never used the money for herself. On one occasion the Defendant told her to give him some of the money to buy a car for his second wife, Michelle. On a different occasion the Defendant asked the Claimant to pay for significant repairs on his boat. She also gave the Defendant large cheques to be paid from the money whenever he asked her to.

82. In 2006, due to the difficult relationship between Michelle and the rest of the Defendant's family, in particular the Claimant, the Defendant encouraged the Claimant to move away from the area and to find another house. The Defendant offered to help the Claimant out. He arranged for her to have the £285,000 referred to above. The Claimant says that at the time this was presented to her as a gift to enable her to move. However, several years later, in 2010, this money came to be dealt with as a loan.

83. On 3rd February 2010 a deed was entered into between the trustees of the 2004 Trust and the Claimant. This deed effected the transaction referred to in the notes to the 2010 accounts for the 2004 Trust whereby £285,000 was stated to be owed by the Claimant to the trustees by way of loan and was confirmed as an interest free loan repayable on one month's notice.

84. There is a second deed dated 3rd February 2010 made between the trustees of the 2004 Trust and the Claimant. This deed referred to the loan of £40,000 which was stated to have been made from the trustees of the First 2002 Trust to the Claimant, the benefit of which was assigned to the trustees of the 2004 Trust. The deed confirmed the loan arrangement as a specialty.

85. There is a handwritten note from the Defendant to the Claimant dated 5th May 2011 in which he acknowledges receipt from her of a loan of £20,000, repayable on demand.

86. There is a similar note dated 31st May 2011 in respect of a loan of £30,000 and one dated 20th January 2010 in respect of a loan of £10,000.

87. The Claimant explains in her 1st witness statement that she started to ask for these acknowledgments, described by her as "I owe you" notes, in or around 2010 when she became worried that the Defendant was giving all the money he had to his new wife, Michelle.

88. The Claimant says that apart from the loans referred to above and the sums she was told to pass on to the Defendant, she has only ever received small distributions for medical or school fees "and the like". She says she believes that the funds in the Isle of Man trusts have largely been distributed to the Defendant at one time or another. That is borne out to a substantial extent by the 2010 accounts for the 2004 Trust and the notes to those accounts.

89. On 22nd June 2005 HMRC sent the Claimant a short letter saying that they were sending her copies of two letters of the same date that they had sent to Browne Jacobson Trustees Ltd. One of those letters referred to an enquiry into the Settlement and was a notice for the production of documents pursuant to s.19A Taxes Management Act 1970. The other was in substance a covering letter in respect of the s.19A notice letter. Browne Jacobson (by Ms Worwood) responded to these letters by a letter to HMRC dated 26th July 2005. The letter dated 26th July 2005 is expressed to be "cc", that is to say copied to, the Defendant and the Claimant. The letter dated 26th July 2005 is expressed to be written on behalf of Browne Jacobson Trustees Ltd, the Defendant and the Claimant.

90. In her first witness statement the Claimant says she does not recall receiving the letter from HMRC to her dated 22nd June 2005 but, she says, if she did receive it, she does not believe she would have appreciated the contents of the enclosed letters. She says that she did not have any legal or financial training and always used to pass on documents relating to the family finances to the Defendant to deal with. To a trust lawyer it can be gleaned from these documents that the Claimant is or was a trustee of the Settlement, but even if

the Claimant had appreciated that, there is nothing in those documents to give any indication that such trusteeship might result in a personal liability in the Claimant of £1 to 1.6 million.

91. In Fishers' attendance note of 12th April 2013 the Defendant is recorded as saying that he first became aware of a problem with the Round the World Scheme in September 2011 when letters from the Revenue were forwarded to him.

92. Around 22nd September 2011 the Claimant opened a letter which named her as being jointly liable to pay approximately £1 million in tax. The £1,6 million figure mentioned by me above is that £1 million plus interest and, possibly, penalties.

93. On or soon after receipt of the 22nd September 2011 letter the Claimant spoke to Ms Worwood on the telephone. The Claimant was horrified to be told that she and the Defendant were being pursued for a £1 million tax bill and that she would likely be facing bankruptcy.

94. A "Round the World" scheme was challenged by HMRC up to Court of Appeal level in *Smallwood v. HMRC* [2010] EWCA Civ 778. The scheme failed in that case because it was held that the place of effective management of the trust had remained in the UK.

95. In or around 2012 the Claimant went to see the Isle of Man trustees to inquire into the trusts and her position in relation to them. She says that they did not share much relevant information.

96. On 23rd November 2012 there was a meeting at Browne Jacobson's office in Nottingham. This was attended by three individuals from Browne Jacobson, representing Browne Jacobson Trustees Ltd, including Ms Worwood, the Claimant, the Defendant, Brian Dunk of Sopher & Co, and a Mr McGillivray and a Ms Noble from HMRC. A note of this meeting was exhibited to the Claimant's first witness statement and a copy was in the bundle. I have no reason to doubt its accuracy.

97. The note of the meeting of 23rd November 2012 records, amongst other things, that:

    97.1. Mr McGillivray asked whether any money had been put aside to fund the settlement with HMRC. The answer was "no".

    97.2. The Claimant responded to that by questioning her appointment as trustee. She said she had taken legal advice about that. She handed to Mr McGillivray a letter dated 21st November 2012 from her then solicitors, Napthens, to HMRC. This is the letter of 21st November 2012 quoted from above. Mr McGillivray said he would consider it in detail once he returned to his office, but asked the Claimant to explain her understanding of the content to him. The Claimant is recorded as having said words to the following effect:

> It was her intention to fight any liability she had as a trustee on the basis that she was not validly appointed as a trustee. The main point being that due to her physical and emotional problems surrounding the

death of her mother and a very difficult pregnancy which ended with her baby being stillborn she did not understand that she had been appointed as a trustee and she was not capable of acting in such a capacity.

98. In the letter of 21st November 2012 Napthens put her case on the grounds of *non est factum*, undue influence and misrepresentation.

99. There were further meetings with Mr McGillivray and Ms Noble of HMRC on 18th December 2012, in January 2013 and on 2nd May 2013. The Claimant says that HMRC told her that she could apply to the High Court to be removed as a trustee and that if she did so HMRC would have no objection. When it became apparent that the Claimant would not have the funds to do that, she was encouraged by HMRC to explore other possibilities through solicitors, including taking legal action against Browne Jacobson.

100. Any possibility of action against Browne Jacobson came to an end in September 2016 when they refused to renew a standstill agreement, and the Claimant did not have the funding to risk instituting proceedings against them.

101. Browne Jacobson conducted an appeal against the tax assessment on the Claimant's and the other trustees' behalf.

102. A lack of communication between Browne Jacobson and the Claimant meant that by March 2017 the Claimant had lost an opportunity to ask HMRC to exercise a discretion regarding her liability. Indeed, it was not until April 2018 that the Claimant discovered that the appeal against tax liabilities had been struck out in 2016.

103. On about 10th February 2017 the Claimant received a letter from HMRC demanding payment of approximately £1.6 million.

104. With the assistance of a barrister acting *pro bono* the Claimant succeeded in having the tax appeal reinstated. As already mentioned, that came on for hearing in Manchester in the week before the hearing before me.

105. The Claimant's position was made worse by the fact that since 2012 she has suffered such serious ill health that she has been unable to work as a teacher.

106. Eventually the Claimant obtained funding from family and friends and commenced these proceedings on 30th July 2019.

107. In the light of that history, I have great sympathy for the Claimant in the predicament in which she finds herself. The question is whether any legal principle is capable of applying which would result in the appointment being void or which would give the Court a discretion to set it aside. If such a discretion arose, then further questions would arise as to whether there were any bars to the exercise of that discretion and whether, absent any such bar, the Court should exercise its discretion in the Claimant's favour.

108. In my judgment this is not a case of *non est factum*. The essential element of such a plea is missing. Even if the plea could be established, it would suffer from the same ultimate problem that I address in more detail below in relation to undue influence; that is that the appointment of the Claimant as a trustee was not effected by her, but by the Mauritian trustees.

109. The essential element that is missing is a belief in the Claimant that the document signed by her (the DORA) was fundamentally or radically different in character from the document she thought she was signing. The need for such a belief was made clear by the House of Lords in what is still the leading case on the subject, *Saunders v Anglia Building Society* [1971] A.C. 1004.

110. In my judgment the Claimant did not have such a belief. It is clear from the passage in the letter to HMRC dated 21st November 2012 quoted by me above that the Claimant knew that the document she was signing "related to certain offshore trusts". The DORA did relate to an offshore trust. The fact that the Claimant was under the "impression" that the deed was something to do with her mother being ill and she (the Claimant) was signing on her (her mother's) behalf does not amount to a belief that the document she was signing was fundamentally different to the document which the Claimant actually signed.

111. Mr Chacko submitted that the Claimant believed herself to be signing documents needed to deal with her mother's care or finances. In my judgment the evidence does not go that far.

112. Mr Chacko submitted that the Claimant did not realise that she was accepting liability for a large potential debt. That is clearly correct as a statement of fact, but it does not follow that the Claimant was sufficiently mistaken as to the fundamental nature or contents of the DORA for the doctrine of *non est factum* to be applicable. The DORA was, as the Claimant believed, a deed which related to an offshore trust. The fact that the effect of its appointing her as a trustee was to give rise to the consequence that she was potentially liable for some £1 – 1.6 million tax does not make the fundament nature of the DORA or its contents any different. They remained things which related to an offshore trust.

113. For that reason the effect / consequences distinction which in *Pitt v Holt* [2016] UKSC 26 the Supreme Court made clear did not apply to case to set aside a voluntary transaction in equity for mistake in substance must still apply in respect of the doctrine of *non est factum*. That is because the doctrine of *non est factum* is concerned with whether the document itself is the applicant's document. It is concerned solely with the operative effect of the document, not with the consequences of that operation. So, in the present case it is concerned with the effect of the DORA in appointing the Claimant as a trustee; not with the consequences of her appointment as trustee.

114. Even if I was satisfied that the distinction between effect and consequences was wrong as a matter of principle in relation to the doctrine of *non est factum*, which, for the reasons given in the immediately foregoing paragraph I am not, I am in any event bound by authority to hold that such a distinction exists in that context. Thus, in *Saunders v Anglia Building Society*[1971] A.C. 1004 the House of Lords made it clear that the distinction between effect and consequences existed in respect of the doctrine of *non est factum*. Thus, per Lord Reid at p.1016F:

> "Further, the plea cannot be available to a person whose mistake was really a mistake as to the legal effect of the document, whether that was his own mistake or that of his adviser. That has always been the law and in this branch of the law at least I see no reason for any change."

115. Similarly with Viscount Dilhorne at p.1022G where he said:

> "I agree with my noble and learned friend, Lord Pearson, that the difference between what a document is thought to be may be in substance or in kind. It will not suffice if the signer thought that in some respect it would have a different legal effect from what it has; nor will it suffice if in some respects it departs from what he thought it would contain. The difference, whether it be in kind or substance, must be such that the document signed is entirely—the word used by Byles J.—or fundamentally different from that which it was thought to be, so that it can be said that it was never the signer's intention to execute the document."

116. And Lord Wilberforce at 1026A – B:

> "How, then, ought the principle, on which a plea of non est factum is admissible, to be stated? In my opinion, a document should be held to be void (as opposed to voidable) only when the element of consent to it is totally lacking, that is, more concretely, when the transaction which the document purports to effect is essentially different in substance or in kind from the transaction intended. Many other expressions, or adjectives, could be used - "basically" or "radically" or "fundamentally.""

117. Even if, contrary to my findings, the Claimant had had a belief that the document she was signing was fundamentally different to the document which she actually signed, in order to establish *non est factum* she would need to get over a second hurdle. That is that the belief would have had to have been induced in her by some form of misleading explanation or misrepresentation as to the contents of the document and that she was not careless or negligent in accepting that explanation or misrepresentation. There was no such misleading explanation or misrepresentation. Again, the Claimant's evidence as contained in the 21st November 2012 letter to HMRC, the truth of which is confirmed by her in her first witness statement, is that her father informed her that the document related to certain offshore trusts. It did relate to one offshore trust.

118. If, contrary to my findings, the Claimant had had a belief that the document she was signing was fundamentally different to the document which the Claimant actually signed

and had been misled into having that belief, the question of whether she was then careless or negligent in signing the document would be a finely balanced one. Having regard to my findings on the first two elements, that is an academic question.

119. That a misleading of the Claimant as to the contents or effect of the DORA is a necessary condition for the doctrine of *non est factum* to be capable of applying in the event that, contrary to my finding, she had a belief that she was signing a document the contents of which were radically or fundamentally different to the document which she actually signed follows from the speeches in *Saunders v Anglia Building Society* [1971] A.C. 1004. Specifically:

119.1. Lord Reid at p.1015G. There Lord Reid explains how the doctrine extended beyond deeds which the party concerned did not sign at all, to documents signed by him in circumstances where he had to rely on a person he trusted to tell him what he was signing. Signing without such reliance would be insufficient.

119.2. Lord Hodson at 1019H – 1020B. There Lord Hodson approved a statement by Byles J in *Foster v Mackinnon* LR 4 CP 704 at 711 – 712 where Byles J explains that the doctrine extends to a case where the person concerned has a written contract falsely read over to him. That is to say that there is a misleading of the signatory as to the content of the document. The words used by Byles J were:

> "the misreader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs".

119.3. Viscount Dilhorne at p.1021B posed the question: "What are the matters which have to be established for the plea to succeed?" First, said Viscount Dilhorne, it had to be shown that the document signed was radically different from that which the signer thought it was. Viscount Dilhorne then referred to the same part of the judgment of Byles J in *Foster v Mackinnon* LR 4 CP 704 as Lord Hodson had done, but also cited and approved a later passage of the judgment of Byles J which again premised the possible applicability of the doctrine on the signer having been deceived or misled as to the contents of the document.

120. Mr Chacko referred me to that part of Lord Reid's speech in *Saunders v Anglia Building Society* at p.1016A where he said:

> "I think it [the doctrine of *non est factum*] must also apply in favour of those who are permanently or temporarily unable through no fault of their own to have without explanation any real understanding of the purport of a particular document, whether that be from defective education, illness or innate incapacity.

121. In my judgment the evidence does not establish that the Claimant was unable to have without explanation any real understanding of the purport of the DORA. It is clear on the face of the DORA that it appoints the Claimant as a trustee of the Settlement. The

Claimant was in an extremely distressed, shocked and vulnerable state when she signed the DORA; but in the absence of medical evidence to the effect that she was incapable of understanding that it appointed her as a trustee of the Settlement, I do not accept that she was so incapable. I hold that if it had been explained to the Claimant, she would also have been capable of understanding that (if it was the case), signing the DORA potentially made her personally liable to HMRC for some £1 – £1.6 million.

122. In my judgment, as expressed at the beginning of this section on *non est factum*, the evidence simply does not make out a case that the document executed by the Claimant (the DORA) was fundamentally different from that which she supposed it to be. The doctrine does not apply.

Capacity

123. I have already touched on the question of the Claimant's capacity.

124. If a transaction is a voluntary one entered into without capacity, the transaction will be void (*Re Beaney* [1978] 1 WLR 770).

125. If a contractual transaction entered into by a person who lacked the capacity to make it, the transaction will not be void, but will be voidable at the instance of the incapacitated party if and only if the other party to the contract knew or ought to have known that the first party lacked capacity (*Imperial Loan Co Ltd v Stone* [1892] 1 QB 599, as approved by the Supreme Court in *Dunhill v Burgin* [2014] UKSC 18, per Baroness Hale at para.25).

126. The DORA was not a unilateral voluntary transaction by the Claimant. It was a multiparty document which effected four things:

126.1. (1) The appointment by the Mauritian Trustees of the New Trustees, that is to say (i) Browne Jacobson Trustees Limited, (ii) the Defendant and (iii) the Claimant, as trustees of the Settlement.

126.2. (2) The implied consents of the New Trustees to their becoming trustees of the Settlement.

126.3. (3) The express consents of the Mauritian Trustees and of the New Trustees to the vesting in the names of (i) Browne Jacobson Trustees Limited, (ii) the Defendant and (iii) the Claimant of the assets of the Settlement.

126.4. (4) The giving by the New Trustees to the Mauritian Trustees of covenants of indemnity.

127. In my judgment the DORA was not a unilateral voluntary transaction by the Claimant. In substance it was a contract, whereby in consideration of the New Trustees being appointed, they covenanted to indemnify the Mauritian Trustees. I consider that if the covenants had not been given by the New Trustees, it is unlikely that the Mauritian Trustees would have been willing to appoint the New Trustees. There is no evidence that the Mauritian Trustees had any inkling of any suggestion of a lack of capacity in the Claimant.

128. Accordingly, even if the Claimant had lacked capacity to enter into the DORA, it would not be void or voidable on the ground of any such lack of capacity.

129. Further, in the absence of any medical evidence as to the Claimant's capacity, I am unwilling to hold that she lacked capacity to enter into the DORA.

130. Section 1(2) Mental Capacity Act 2005 provides that a person must be assumed to have capacity unless it is established that he lacks capacity. By s.2(1) of the Act a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain. By s.2(2) of the Act it does not matter whether the impairment or disturbance is permanent or temporary.

131. Thus, it is possible that by reason of her extremely distressed, shocked and vulnerable state, the Claimant was incapable of the understanding the effects of the DORA. The possibility of recent bereavement resulting in a lack of capacity was recognised by Briggs J in *Re Key* [2010] EWHC 408 (Ch), [2010] 1 WLR 2020 at paragraphs 95 – 101.

132. S.3 Mental Capacity Act 2005 sets out the Circumstances in which, for the purposes of section 2, a person is unable to make a decision for himself. The s.3 test substantially though not exactly reflects the common law test. S.3 provides:

> "(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable–
>
> (a) to understand the information relevant to the Decision,
>
> (b) to retain that information,
>
> (c) to use or weigh that information as part of the process of making the Decision, or
>
> (d) to communicate his decision (whether by talking, using sign language or any other means).
>
> (2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).
>
> (3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the Decision.
>
> (4) The information relevant to a decision includes information about the reasonably foreseeable consequences of–
>
> (a) deciding one way or another, or
>
> (b) failing to make the Decision."

133. The Claimant's own evidence is that at the time she executed the DORA she was "consumed by grief and truthfully incapable of making any decisions." I say again that I accept the Claimant's evidence that she was consumed by grief. The Claimant was not cross-examined and I accept that she considers that by her own assessment she was incapable of making decisions at the relevant time. However, neither she, nor her sister or her husband in their evidence attempt to support and breakdown the Claimant's

statement as to her capacity by reference to the s.3 Mental Capacity Act 2005 and common law tests as to capacity and I do not read her evidence as being or as being any attempt to apply the s.3 Mental Capacity Act 2005 or common law tests as to capacity. Accordingly, I consider that the evidence before me does not amount even to a layman's view as to the Claimant's legal capacity and I find that a lack of capacity has not been established.

134. Further, in all except very clear cases expert evidence is necessary to establish a lack of capacity (see *Fehily v Atkinson* [2016] EWHC 3069 (Ch), [2017] Bus L R 695 per Mr Stephen Jourdan QC, sitting as a Deputy High Court Judge at paras.84 and 104). Even if I took the Claimant's evidence as evidence addressed to the legal test for capacity, and it (and that of her sister, husband and father) was clearer as to the factors which go to the issue of capacity, this would be far from being a very clear case. Accordingly, even if I read the lay evidence in that way, in the absence of medical evidence to support and breakdown the lay evidence by reference to the s.3 Mental Capacity Act 2005 or common law tests as to capacity, I would not be and I am not prepared to accept that it follows that on the balance of probabilities, the Claimant was incapable of making a decision as to entering into the DORA within the meaning of the ss.2 and 3 Mental Capacity Act or at common law.

Mistake

135. In equity a voluntary disposition can be set aside on the ground of mistake whenever there was a causative mistake which was so grave that it would be unconscionable to refuse relief (*Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108). The principle was summarised by Sir Terence Etherton C in *Kennedy v Kennedy* [2014] EWHC 4129 (Ch), [2015] WTLR 837 at paragraph 36:

> "The principles applicable to rescission of a non-contractual voluntary disposition for mistake were comprehensively set out in the judgment of Lord Walker in *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108, with which the other members of the Supreme Court agreed. They may be summarised as follows.
>
> > (1) There must be a distinct mistake as distinguished from mere ignorance or inadvertence or what unjust enrichment scholars call a "misprediction" relating to some possible future event. On the other hand, forgetfulness, inadvertence or ignorance can lead to a false belief or assumption which the Court will recognise as a legally relevant mistake. Accordingly, although mere ignorance, even if causative, is insufficient to found the cause of action, the Court, in carrying out its task of finding the facts, should not shrink from drawing the inference of conscious belief or tacit assumption when there is evidence to support such an inference.
> > (2) A mistake may still be a relevant mistake even if it was due to carelessness on the part of the person making the voluntary disposition, unless the Circumstances are such as to show that he or she deliberately ran the risk, or must be taken to have run the risk, of being wrong.
> > (3) The causative mistake must be sufficiently grave as to make it unconscionable on the part of the donee to retain the property. That test will normally be satisfied only when there is a mistake either as to the legal character or nature of a transaction or as to some matter of fact or law which is basic to the transaction. The gravity of the mistake must be assessed by a close

examination of the facts, including the Circumstances of the mistake and its consequences for the person who made the vitiated disposition.
(4) The injustice (or unfairness or unconscionableness) of leaving a mistaken disposition uncorrected must be evaluated objectively but with an intense focus on the facts of the particular case. The Court must consider in the round the existence of a distinct mistake, its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected.

136. In my judgment this principle is not applicable in the Circumstances of the present case for three reasons:

136.1. The appointment of the Claimant as a trustee was not effected by the Claimant. The appointment was effected by the Mauritian Trustees. There is no suggestion that the Mauritian Trustees were in any way mistaken.

136.2. The appointment of the Claimant as a trustee was not a disposition of property by the Claimant.

136.3. The appointment of the Claimant as a trustee was not "voluntary". The Claimant gave substantial and real consideration by giving the Mauritian Trustees the covenants of indemnity.

137. As regards the first of those reasons: it raises the question of whether the acceptance of an appointment as trustee is a necessary element of the process by which a person becomes a trustee. In my judgment it is not. The terms of clause 44 of the Settlement and, similarly, the terms of s.36 Trustee Act 1925 (England and Wales) provide that in certain specified circumstances the appointor "may appoint" a new trustee. Neither clause 44 of the Settlement, nor s.36 say anything about the appointee having to accept the trusteeship. It is of course trite law that no one is bound to accept the office of trustee. The office may be disclaimed at any time before acceptance and any such disclaimer would operate with retrospective effect so that the appointee would be treated for all purposes as if she had never become a trustee. The use of the language of "disclaimer" is itself indicative that pending the disclaimer the appointment is effective. There is authority for that proposition in *Mallott v Wilson* [1903] 2 Ch 494, per Byrne J at p.501. The position is analogous to a transfer of property where the transfer is effective even though the transferee may know nothing about it,, but the transferee may renounce or disclaim on learning of the purported transfer. Thus, in *Standing v Bowring* (1885) 31 Ch D 282, per Cotton LJ at p.288:

> "Now, I take the rule of law to be that where there is a transfer of property to a person, even although it carries with it some obligations which may be onerous, it vests in him at once before he knows of the transfer, subject to his right when informed of it to say, if he pleases, "I will not take it." When informed of it he may repudiate it, but it vests in him until he so repudiates."

138. In many circumstances it may make little or no practical difference whether as a matter of analysis the appointee had to accept the appointment before becoming a trustee or whether she became a trustee subject to the possibility of a retrospective disclaimer. But on the question of setting aside a transaction for mistake in the appointee it is a relevant distinction. On my analysis the Claimant became a trustee by reason of the appointment made by the Mauritian Trustees whether or not her acceptance was or could be vitiated under the *Pitt v Holt* mistake principle or otherwise. What she could have

done was to have disclaimed when she discovered that she had been appointed a trustee, but her case before me is not based on disclaimer; it is based on the vitiation of the original appointment of the Claimant as trustee for mistake. However, the appointment was not effected by the Claimant or by any act or omission of hers, but by the Mauritian Trustees and they were not mistaken. Accordingly the appointment cannot be vitiated for mistake.

139. As regards the second of the reasons for the equitable principle not applying: the equitable principle sought to be relied upon by the Claimant is concerned with mistaken gifts or voluntary dispositions. The whole of the relevant part of Lord Walker's judgment in *Pitt v Holt* is premised on that being the scope of the principle. The passage from Sir Terence Etherton C's judgment in *Kennedy v Kennedy* [2014] EWHC 4129 (Ch), [2015] WTLR 837 at paragraph 36, quoted above confirms that the principle or jurisdiction is concerned with setting aside a non-contractual voluntary disposition. In the present case the Claimant did not dispose of anything. At most she undertook the liabilities of a trustee and received the trust property. This reason applies even if, contrary to my judgment, the Claimant's acceptance was necessary in order for her to become a trustee.

140. Mr Chacko sought to argue that the DORA and the Claimant's acceptance of the trusteeship effected a vesting of the trust fund in the Claimant and hence was a disposition to which the equitable principle might apply. It is debateable whether the DORA did effect such a vesting, but even if it did it was a disposition to the Claimant not a disposition by the Claimant. The equitable principle is concerned with gifts or dispositions by a person who was labouring under a relevant mistake. The disposition of the trust fund by the Mauritian trustees to the New Trustees was not a disposition by persons who were labouring under any mistake. In my judgment the vesting of the trust fund in the Claimant was not a disposition to which could trigger the operation of the equitable principle. If the appointment of the Claimant was set aside, a consequence or consequential order might involve the setting aside of the disposition to her, but that would not be a ground for setting aside the appointment of the Claimant as a trustee.

141. I said that it was debateable whether the DORA operated to vest the trust fund in the New Trustees. Mr Chacko submitted that clause 2 of the DORA provided for the vesting of the trust assets in the New Trustees. That is not the effect of clause 2 of the DORA. Clause 2 of the DORA provided that its parties consented to the vesting in the names of the New Trustees of the assets comprising the Trust Fund and any undistributed income thereof. Clause 2 did not purport itself to be a transfer or vesting provision. That it was considered by the parties that the DORA did not effect the vesting of the Trust Fund in the New Trustees is demonstrated by the terms of the 26th March 2003 Agency Agreement executed by the New Trustees and the Mauritian trustees (defined in the Agency Agreement as "the Agents"). Recital (6) of the Agency Agreement recited that under the terms of the DORA "the assets comprising the trust fund of the Settlement (the "Trust Fund") are immediately to be transferred to or under the control of the New Trustees". In other words the DORA (dated 19th March 2003) did not by its terms effect the transfer. In fact the DORA did not go so far as expressly to provide for the immediate transfer of the Trust Fund, it merely contained a "consent" to the vesting of the Trust Fund in the names of the New Trustees.

142. Mr Chacko sought to argue that the acceptance of trusteeship includes the transfer of trust property (by virtue of s.40 Trustee Act 1925 where not provided for expressly) on terms that the new trustee accepts the responsibilities of trusteeship. In my judgment that is not necessarily the case. A person can become a trustee without having the trust property vested in her. If it was necessary to my decision, and it is not, I would hold that s.40 Trustee Act 1925 did not operate to vest the trust fund in the New Trustees. Briefly that is because:

142.1. The governing law of the Settlement was the law of the Isle of Man.

142.2. There was no direct evidence before me as to whether or not Manx law included a statutory provision to equivalent effect to s.40 Trustee Act 1925 (England and Wales).

142.3. The English law rule ("the Default Rule") is that generally where foreign law is not pleaded and proved, the Court presumes that in the absence of evidence as to what foreign law is, an English court should presume it to be the same as English law. However, the applicability of that rule is doubtful where the English law relied upon is statutory rather than the common law. In such circumstances the English court may simply regard a party who has pleaded but who has failed to prove foreign law with sufficient specificity as will allow an English court to apply it, as having failed to establish his case without regard to the corresponding principle of English domestic law.

142.4. The Particulars of Claim allege that the Settlement was founded in the Isle of Man. Clause 2 of the Settlement provides that subject to a power to change the proper law, the Settlement is established under the laws of the Isle of Man.

142.5. There is no evidence that the power to change the proper law was changed to English law.

142.6. At common law (including the rules of equity and as to trusts) the appointment of a new trustee did not of itself cause the trust fund to become vested in the new trustee.

142.7. In broad terms s.40(1) Trustee Act 1925 (England and Wales) provides that where a new trustee is appointed by deed, subject to any express provision to the contrary therein contained, the deed operates as if it had contained a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover or receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become or are the trustees for performing the trust, and that the deed shall operate, without any conveyance or assignment, to vest in the new trustee with the other trustees as joint tenants and for the purposes of the trust the estate interest or right to which the declaration relates. By s.40(4) the section does not extend to (amongst other things) any share, stock, annuity or property which is only transferrable in books kept by a company or other body, or in manner directed by or under an Act of Parliament.

142.8. Without more I might have had some doubt as to whether I should presume Manx law to have included an equivalent provision to s.40 Trustee Act 1925 (England and Wales). However, there is more. There are the terms of clause 2 of the DORA and there is the Agency Agreement of 26th March 2003. I

infer from both of these that the draftsman of those documents did not think that the DORA operated to vest the trust fund in the New Trustees. That is some evidence that under Manx law there was not an equivalent provision to s.40 Trustee Act 1925 (England and Wales). Accordingly I will not apply the Default rule and will hold that the Claimant has failed to establish that there was a Manx equivalent of s.40 Trustee Act 1925 (England and Wales); with the result that the DORA did not operate to vest the trust fund in the New Trustees.

143. As regards the third of the reasons for the equitable principle not applying: the Claimant gave substantial and real consideration for the appointment by giving the Mauritian Trustees the covenants of indemnity. That means that looking at the DORA as a whole, it was not purely voluntary. Accordingly looked as a whole it is outside scope of the equitable principle. In this context and in the context of the first of my reasons, it is instructive to look at the relief that is sought on the Claim Form, the Particulars of Claim, the application notice for summary judgment and in the draft order attached to that application. In all four documents what is sought is not a setting aside or rescission of the DORA, but, to quote from the prayer for relief at the end of the Particulars of Claim, "rescission of her appointment as Trustee of the Trust on 19 March 2003". On that footing the focus would be on the appointment; not on any of the other elements of the DORA, and the first and second of my reasons would apply.

144. Even if the facts could otherwise be brought within the equitable principle, I consider that the Claimant's execution of the DORA was not the result of a mistaken tacit assumption, but of causative ignorance. Mr Chacko submitted that the Claimant believed that the Defendant would not ask her to sign documents which would put her in danger. I accept and agree with that submission as a matter of fact. Mr Chacko then submitted that that amounted to a tacit assumption by the Claimant that by signing the DORA she would not be putting herself in danger, specifically not the danger of becoming liable to HMRC for £1 million to £1.6 million. Again, I agree with and accept that submission. What I have difficulty with is the last step of Mr Chacko's submission on this point which is that that assumption was a distinct mistake within the meaning of the equitable principle as expounded by Lord Walker in *Pitt v Holt* and summarised by Sir Terence Etherton C in *Kennedy v Kennedy*, as set out above.

145. Mr Chacko drew my attention to *Freedman v Freedman* [2015] EWHC 1457 (Ch), [2015] WTLR 118 (Proudman J) at paragraph 26 as explained in *Hartogs v Sequent (Schweiz) AG* [2019] EWHC 1915 (Ch) (HH Judge Hodge QC) at paragraphs 21 – 23. He submitted that the Claimant's tacit assumption that her father was not asking her to do anything dangerous was a serious mistake which could trigger the operation of the equitable principle. In my judgment it was undoubtedly a mistake, but in my judgment the tacit assumption was too wide and vague to be a relevant mistake. The submission amounts to saying that the Claimant did not believe that the DORA would have any bad effects. That appears to me to be always going to be the case when a document has unanticipated effects It is not a "distinct" mistake of the kind which is capable of triggering the operation of the equitable principle.

146. In *Freedman v Freedman* [2015] EWHC 1457 (Ch), [2015] WTLR 1187 the Claimant ("Melanie") on the advice of her father and a solicitor ("Mr Fraser") settled two properties into a settlement under which she was given a life interest. Mr Fraser had failed to realise that the rules of Inheritance Tax had changed with effect on and from 22nd March 2006, so that, to the extent that the values of the properties exceeded Melanie's zero rate band, there was an immediate charge to IHT at 20%. A consequence of this was that there would be insufficient money left in the settlement after payment of the IHT to enable an appointment to be made to Melanie of a sufficient sum which would enable her pay off a debt owed by her to her father. Mr Fraser also failed to realise that there would be a 10 yearly charge to IHT and exit charges. These failures appeared from the terms of a letter dated 6th November 2012 which Mr Fraser wrote to Melanie's father and which Melanie saw before the settlement was created.

147. In *Freedman* it was submitted on behalf of HMRC that Melanie's mistake was one of ignorance or disappointed expectation, "a general feeling that everything would be all right, which does not give rise to the remedy". Melanie trusted her father implicitly and simply did what he said.

148. On the facts of *Freedman* the Court was able to conclude that by reason of Melanie having seen Mr Fraser's letter of 6th November 2012, her evidence that she "broadly understood" the letter to mean that the Settlement would not have any tax consequences she needed to worry about, could be taken as evidence of a conscious belief that there would be no adverse tax consequences, with the result that the Court could and did set aside the settlement. The key passages of Proudman J's reasoning are at paragraphs 30 and 31 where she said:

> "… In the present case Mr Fraser admittedly gave wrong advice and such advice was seen by Melanie. It is therefore entirely reasonable for her to say, as she does, that based on that advice she broadly understood that there would be no adverse tax consequences for her in entering into the settlement. I do not accept Mr Slater's analysis that "saw" does not equal "read". He did not cross-examine Melanie and on that basis it must follow that her broad understanding was based on a reading of the letter of 6 November 2012.
>
> 31. Accordingly it seems to me that Melanie made a distinct mistake of the kind described by Lord Walker."

149. The paragraph relied upon by Mr Chacko is paragraph 26. That is as follows:

> "26. Miss Stanley asked rhetorically what the distinction was between ignorance and a tacit assumption. Ignorance meant that the person simply did not think about the consequences of an action. However, a tacit assumption does not involve a thought process involving a series of steps culminating in the thought, "I believe I will be able to comply with the loan agreement". That would be a conscious belief and there are some things that are simply taken for granted. Melanie's assumption is to be inferred because she proceeded on the basis of legal advice coupled with a belief that her father would not advise her

> to do something dangerous. Accordingly there was at the least a tacit assumption that entering into the settlement did not involve any impediment to compliance with her agreement to repay the loan."

150. My reading of that paragraph in context, and in particular having regard to Proudman J's ultimate finding of a conscious belief as to no adverse tax consequences, is that it is a recital or summary of the submissions of Miss Stanley QC, counsel for Melanie, and does not represent the views of Proudman J. The reference to "a belief that her father would not advise her to do something dangerous" resonates with the facts of the present case, but whether paragraph 26 of Proudman J's judgment represents her views or merely the submissions of Melanie's counsel, it is not there suggested that Melanie's belief that her father would not advise her to do something dangerous by itself and uncoupled from her having proceeded on the basis of legal advice would be a mistake of a kind which could trigger the operation of the equitable principle.

151. *Hartogs v Sequent (Schweiz) AG* [2019] EWHC 1915 (Ch) was a case of conscious mistaken belief or at least of tacit assumption based on erroneous professional advice that transfers into two offshore trusts would not give rise to immediate adverse IHT charges. In that case the applicant settlor's evidence was that his mistake in structuring his personal affairs using the trusts was that he thought that he was (as he had been advised) structuring them in the most tax-efficient way possible when, in fact, he was doing anything but that. He said that whilst he understood that his estate might have to pay IHT in relation to the assets transferred (property and classic cars) when he died, he did not believe that purchasing the property, or transferring or purchasing the classic cars through the trusts, would result in an immediate inheritance tax liability of at least £2.9 million, plus a recurring charge, levied at a rate of up to 6 per cent every ten years, and an exit charge at the same (or a similar) rate if all the assets were removed from the trusts, or that he would suffer any other adverse tax consequences.

152. At paragraph 21 of his extempore judgment HH Judge Hodge QC expressed the view (with which I agree) that paragraph 26 of Proudman J's judgment in *Freedman* recorded the submissions of Miss Stanley. HH Judge Hodge QC considered that Proudman J had accepted Miss Stanley's line of argument that Melanie at the least had a tacit assumption that entering into the settlement did not involve any impediment to compliance with her agreement to repay the relevant loan. I agree, but it does not follow that a general understanding that the execution of a document would not "be dangerous" is a sufficiently distinct belief to trigger the operation of the equitable principle.

153. At paragraph 23 of his extempore judgment HH Judge Hodge QC accepted the submission of counsel that, as demonstrated by the decision of Morgan J in *Van de Merwe v Goldman* [2016] EWHC 790 (Ch), ignorance of a matter which gives rise to a mistaken belief is not mere ignorance for the purposes of the possible applicability of the equitable principle. If the belief is mistaken, it does not matter that the applicant was ignorant of the fact or law which caused the belief to be mistaken. I agree, but again it does not follow that a general understanding that the execution of a document would not

"be dangerous" is a sufficiently distinct belief to trigger the operation of the equitable principle.

154. There must be a line between what is and what is not a sufficiently distinct mistake. In my judgment it is insufficient for an applicant under the equitable principle to have a general conscious belief or to have had a tacit assumption that generally the transaction being entered into would not have any adverse effects. The belief or assumption has to be more distinct and specific than that. The line of cases, including the *Freedman* case and *Pitt v Holt* itself where the applicant had a belief that there would be no adverse tax effects or consequences from the transaction is in my judgment very close to the line between what is sufficiently distinct or specific on the one hand and what, on the other, is not. In my judgment the Claimant's belief that her father would not ask her to sign documents that would put her in danger is on the "insufficiently distinct" side of the line. If it was not it is very difficult to see what sort of mistake would not be sufficiently distinct. Accordingly that is a fourth reason why in my judgment the equitable principle does not apply in the circumstances of the present case.

155. If, contrary to my judgment, the requirements for the equitable principle were satisfied, then in my judgment, subject to the question of whether rescission is an available remedy in respect of the relief sought, and to questions of delay, ratification and the interests of other parties, in my judgment it would be unconscionable, or unjust, to leave the mistake uncorrected. To my mind it is unconscionable, unjust and unfair that merely through signing a document which she did not conceive would do her harm, the Claimant should become liable for some £1 million to £1.6 million tax and interest.

156. Even if the equitable principle applied, there would remain the problem of what it is that is sought to be rescinded. It is apparent from the terms of the Claim Form and the Particulars of Claim, the application notice for summary judgment and the draft order attached to that application that what is sought is not a setting aside or rescission of the whole of the DORA, but only that part of it which effected the appointment of the Claimant as a trustee. That can also be inferred from the fact that neither the evidence nor the submissions made any real attempt to grapple with the possible impact of setting aside the whole of the DORA. For example, the impact of setting aside the DORA on any decisions made by the New Trustees after the DORA was executed.

157. I was not given any satisfactory explanation as to why a setting aside of the whole of the DORA was not being sought. I speculate that the reason for the limited relief being sought might be that if the whole of the DORA was set aside, then s.86 TCGA would apply and the Defendant would be liable for CGT on the gains realised by the Mauritian Trustees. Even though, as the evidence indicates, the Defendant is now virtually penniless, a liability imposed on him under s.86 might, by paragraph 6 of Schedule 5 to the TCGA, be recoverable from the Claimant in her capacity as trustee of the Settlement. Be that as it may, the relief sought was and remains limited to a setting aside of the appointment of the Claimant as a trustee.

158. There is authority that there cannot be partial rescission of a contract; it must be set aside in whole and not merely as to part because otherwise the Court would in effect be imposing a different contact to the one the parties actually made (*Kennedy v Kennedy* [2014] EWHC 4129, per Sir Terence Etherton C at paragraph 46). That is in substance the same point as my third reason given above. Even if that was not itself a bar to the rescission sought in the present case, the appointment of the Claimant as a trustee is not a self-contained and severable part of the transaction effected by the DORA, and the rescission sought would be barred on that ground. The rescission sought is of the same kind as, even in the case of a voluntary disposition, Sir Terence Etherton C held in *Kennedy* could not be granted.

159. In *Kennedy* three trustees had, by clause 2.1(c) of a Deed of Appointment, appointed the whole of "the remainder of the Trust Fund". The remainder of the Trust Fund comprised cash and shares. The trustees were mistaken for various reasons as to the inclusion of the shares. They sought an order setting aside the transfer of the shares effected by clause 2.1(c). In the absence of a case for rectification the Chancellor held that that could not be done because it would result in a mismatch between the unrectified terms of the deed and the legal effect of the partial rescission sought. Thus, at paragraph 43 the Chancellor said:

> "Mr Herbert submitted that the first head of relief should be treated as an application to set aside the transfer of the relevant shares purportedly effected by clause 2.1(c) of the October 2008 Appointment. That proposition faces the fundamental difficulty that clause 2.1(c) does not separately identify the relevant shares but effects a disposition of "the remainder of the Trust Fund". The remainder of the trust fund included a large cash amount in addition to the relevant shares. Indeed, it is precisely because the Claimants would like clause 2.1(c) to remain valid and effective as regards the disposition of the cash sum that they seek relief which strikes down clause 2.1(c) only as regards the relevant shares. That, however, can only be achieved by rectification of clause 2.1(c) by adding words excluding the relevant shares. There would otherwise be a mismatch between the unrectified wording of clause 2.1(c) and the legal effect of partial rescission of the disposition of "the remainder of the Trust Fund". Mr Herbert cited no authority which would support such a result."

160. The Chancellor was willing to order the setting aside of the whole of clause 2.1(c) of the deed of Appointment on the basis that if they had been aware if their mistakes, the trustees would not have omitted that clause. The Chancellor held that that was a self-contained severable part of the transaction and accordingly that it could be rescinded, but that is not the present case. The Claimant does not seek an order setting aside the appointment of all three of the New Trustees.

161. In the present case the appointment of the Claimant as a trustee is not a self-contained severable part of the transaction. Clause 1 of the DORA appoints "the New Trustees" to be trustees of the Settlement. If the appointment of the Claimant alone was rescinded, then there would be an impermissible mismatch between the unrectified wording of clause 1 of the DORA and the legal effect of the partial rescission sought, in the same way as rescission only in respect of the shares would have resulted in a mismatch in the

Kennedy case. The nature of the relief sought is therefore a fifth reason for the equitable principle not being applied in the present case.

162. *Bainbridge v Bainbridge* [2016] EWHC 898 (Ch), [2016] WTLR 943 which Mr Chacko relied upon for the proposition that rescission is a fact-sensitive remedy allowing the Court to do what is practically just was a very different case to the present. There the applicants had made three transfers of properties to the trustees of an existing settlement. The transferors were mistaken as to the tax consequences. Master Matthews confirmed his holding at an earlier hearing that he could see no reason why in a non-contractual case relief could not be sought in relation to only part of the property transferred subject to a vitiating factor and not all of it. Although Master Matthews referred to the Chancellor's judgment in *Kennedy*, he did not refer to the part of the judgment quoted by me above as to the need for the partial rescission not to result in a mismatch with the unrectified wording of the transactional document. That is not surprising because as Master Matthews explained in paragraph 23 of his judgment in *Bainbridge*, the transfers of the three properties in that case were all contained in separate Land Registry Forms TR1. To quote from Master Matthews at paragraph 23:

> "… the transfers to the trustees of the registered estates in Seamer Grange Farm, Harker Hill and Fox Covert were all contained in separate forms TR1. Each transfer had a different transferor or transferors, because the legal ownership of each parcel was different. Each was therefore self-contained and entirely severable from the others. Each transferor could make an independent decision about whether to apply for relief from the effect of the mistake, or not."

163. In contrast in the present case the appointment of the New Trustees was not severable as between the three New Trustees.

164. The authorities which Master Matthews relied upon for saying that the remedy awarded was "fact sensitive" and "permits what is practically just" were *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428, 466-467, CA, and *Cheese v Thomas* [1994] 1 WLR 129, 137.

165. The point which Fox LJ was concerned with at pp.466-467 of the report in *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428 was not the question of whether partial rescission was possible, but was the question whether complete restitution of the other party to a contact which was being rescinded to the position he would have been in but for the contract which was sought to be rescinded ("*restitutio in integrum*") had to be possible in order for the remedy of rescission to be granted. Fox LJ held that complete restitution was not necessary in equity and that in that context the Court would do what "was practically just". That was highly relevant to the second point dealt with by Master Matthews in Bainbridge, that is whether rescission was possible notwithstanding that part of one of the properties had been sold on to a bona fide third party purchaser who took free from the equity to rescind; but it is a different point from the question of whether a non-severable part of a transaction can be rescinded in a way in which Sir Terence Etherton C held in *Kennedy* could not be done. I therefore attach no weight to Master Matthews' reference to what Fox LJ said in *O'Sullivan* so far as that question is

concerned; that question was simply not before Master Matthews or relevant to his decision. In contrast it formed part of the *ratio decidendi* of Sir Terence Etherton C's decision in *Kennedy*.

166. Similarly with *Cheese v Thomas* [1994] 1 WLR 129 and with what Sir Donald Nicholls V-C said at p.137. That was an undue influence case and the issue at p.137 was whether complete *restitutio in integrum* was a necessary requirement before rescission was ordered.

Undue Influence

167. The Claimant relies upon "presumed" undue influence. The principle in that regard is set out by Lord Nicholls in *Royal Bank of Scotland Plc v Etridge (No.2)* [2001] UKHL 44, [2002] 2 AC 773 at paragraph 14 of his speech in the following terms:

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

168. What Lord Nicholls said at paragraph 7 is also relevant:

> "… The law will investigate the manner in which the intention to enter into the transaction was secured: "how the intention was produced", in the oft repeated words of Lord Eldon LC, from as long ago as 1807 (*Huguenin v Baseley 14 Ves 273, 300*). If the intention was produced by an unacceptable means, the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or "undue" influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will. It is impossible to be more precise or definitive. The Circumstances in which one person acquires influence over another, and the manner in which influence may be exercised, vary too widely to permit of any more specific criterion."

169. I am quite satisfied on the evidence that I have recited above that the Claimant placed trust and confidence in her father, the Defendant, in relation to the management of her financial affairs.

170. I am also satisfied that the transaction whereby the Claimant became a trustee "calls for an explanation". The extraordinary result whereby, by reason of her signing a piece of paper (the DORA), the Claimant became liable for some £1 million to £1.6 million tax

and interest with no fund out of which to indemnify herself is something that calls for an explanation. The explanation given by the Defendant is that he had no reason to think that the Round the World Scheme would not work or that the Claimant was therefore potentially becoming liable for a substantial amount of tax and interest. In my opinion that is an unsatisfactory explanation. The Defendant knew that the appointment of the new Trustees was a step taken in a tax avoidance scheme. Only the hopelessly over-optimistic would be 100% certain that a tax avoidance scheme would work. Consideration should have been given to the possibility that it did not and to the possible consequence for the New Trustees.

171. Even if, subjectively, the Defendant was not aware of the risks, Mr Chacko submitted that the question whether the transaction called for an explanation had to be assessed objectively. I accept that submission.

172. The Claimant was not given any, let alone any independent advice about the DORA before she executed it. At the time she signed the DORA the Claimant was in an extremely distressed, shocked and vulnerable state. If the DORA was a simple bilateral transaction between the Claimant and the Defendant and an application had been made promptly to set it aside on the grounds of undue influence, I would have had no hesitation in doing so. However, the DORA was not a bilateral transaction between the Claimant and the Defendant. The Claimant is not seeking to have the DORA set aside, only the element of it that appointed her as trustee. 16 years went by before the Claimant applied to set the appointment aside during which the residue of the trust fund was paid or distributed and various other trust documents were executed by the Claimant.

173. I have explained above why, if the element of the DORA that appointed the Claimant as trustee is looked at in isolation, it was not a transaction to which the Claimant was a party. It follows that in terms just of the Claimant's appointment, that appointment is not susceptible to being set aside for undue influence on Claimant or otherwise. Looked at in isolation the appointment of the Claimant was simply a unilateral action by the Mauritian Trustees, wholly untainted by any suggestion of undue influence. I have explained above why the Claimant's "acceptance" of the trusteeship by execution of the DORA was not a necessary element of her appointment as a trustee. She was appointed by the unilateral act of the Mauritian trustees. She then had the option of disclaiming. That is not an option which she has sought to take. Therefore looking at the appointment as an isolated element the transaction is not avoidable for undue influence.

174. In my judgment the approach of seeking to isolate the appointment of the Claimant as trustee from the other elements of the DORA is incorrect. The DORA was a single composite document which effected a number of transactions. Be that as it may, to set aside the appointment of one only of the New Trustees only would, as discussed above, fall foul of Sir Terence Etherton C's reasoning in *Kennedy v Kennedy* [2014] EWHC 4129 that the unrectified document, in this case the DORA should not be a mismatch or inconsistent with the result which would be achieved by setting aside only the appointment of the Claimant as a trustee. That is a second reason for not setting aside the appointment of the Claimant under the head of "undue influence".

175. There is a final and overarching ground on which equitable relief setting aside the DORA in whole or in part might not, and in my judgment on the existing evidence should not, be granted. That is that rescission should not be granted where the order would not operate justly and fairly.

176. In the case of a voluntary disposition the rules as to affirmation, change of position, and the possibility of complete or near complete or equivalent restitution and counter-restitution are not absolute. They are all matters which can be taken into account in an overall assessment of whether it would be unjust, unfair or unconscionable to leave the relevant disposition in place. The impact of any relief and of the terms of any condition or counter-restitution which might be required needs to be considered with a view to ensuring that in all the circumstances the order would operate justly and fairly See paragraphs 162 – 175 of my judgment in *Rogge v Rogge* [2019] EWHC 1949 (Ch), [2019] WTLR 1305.

177. If the DORA was set aside as a whole, that would cause the Round the World scheme definitely to fail because of the impact of s.86 TCGA as explained above. The consequences or possible consequences of setting the DORA aside as a whole were not discussed in argument to any substantial extent nor, more importantly, were they addressed in the evidence. In the absence of both I would not be prepared to hold that an order setting aside the whole of the DORA would operate justly and fairly. But in any case, as mentioned above, that is not the relief which is being sought.

178. If, contrary to my judgment above, I had jurisdiction just to set aside the appointment of the Claimant as a trustee without setting aside any other elements of the DORA, then I would accept that, as pleaded in paragraph 30 of the Particulars of Claim, because there were two other trustees appointed under the deed, the setting aside of the Claimant's appointment would not have impugned the activities under the Settlement subsequent to the DORA.

179. What the setting aside of the Claimant's appointment alone would do would be to remove the availability of the Claimant as a person from whom her co-trustees might seek a contribution for their liabilities to HMRC. So far as the Defendant was concerned, that would not be unfair or unjust because it was his undue influence on the Claimant which gave rise to the Claimant's potential liability in the first place. So far as Browne Jacobson Trustees Ltd is concerned: it is in liquidation. There is no evidence before me as to what, if any assets or creditors it has, save that on the footing that the Round the World scheme fails, HMRC must be a creditor. There is no evidence before me that Browne Jacobson Trustees Ltd has made a claim for contribution against the Claimant, and the question of whether any such claim would now be time-barred was not discussed before me. The correspondence indicates that Browne Jacobson denies responsibility for the Claimant having become a trustee. In these circumstances I would not be prepared to hold that an order setting aside just the appointment of the Claimant as a trustee would not operate unjustly or unfairly on Browne Jacobson Trustees Ltd and its creditors.

180. If the possible impact of rescission on Browne Jacobson Trustees Ltd and its creditors had been the only reason why I refused relief in this case I would have seriously considered adjourning the matter before making my final order, so as to give the Claimant the opportunity of putting in evidence on the point. But that is not the only reason for my refusing relief. For the reasons given above, in my judgment this case does not get as far as raising the rescission jurisdiction under any of the heads relied upon, so even if the point went in favour of the Claimant, I would still not grant any relief. Accordingly, it would be a waste of time and costs to grant such an adjournment and I do not do so.

181. For the reasons given I therefore dismiss the Claim and the application for summary judgment.

Deputy Master Henderson
18th May 2020

ADDENDUM

JUDGMENT AS TO PERMISSION TO APPEAL AND PERMISSION TO AMEND

1. The Claimant has sought permission to appeal in writing and this is my judgment thereon in writing. The Claimant has also sought permission to amend her Claim Form and Particulars of Claim. I deal with these matters in writing in accordance with and for the reasons given in my direction of 23rd March 2020 and my order of 3rd April 2020.
2. The Claimant's application for permission to appeal is supported by draft grounds of appeal, a draft of proposed amendments to the Claim Form and Particulars of Claim and a skeleton argument of Mr Nicholas Le Poidevin QC.
3. Permission was sought in respect of the claims in mistake and undue influence. Permission was not sought in respect of incapacity or non est factum.
4. In my judgment the following individual grounds or arguments sought to be relied upon when considered in isolation have a real prospect of success on appeal:
   4.1. That the equitable jurisdiction to set aside a transaction for mistake is not confined to a voluntary disposition of property but extends to any voluntary transaction.
   4.2. That the Claimant's belief that the Defendant would not ask her to sign documents which would put her in danger amounted to a mistake for the purposes of the equitable principle.
   4.3. That the Claimant's appointment as trustee was severable from that of her co-trustees.
   4.4. That the verbal conflict which would result from a partial rescission is immaterial.
   4.5. That there could be no unfairness to Browne Jacobson Trustees Limited or its creditors if the Claimant's appointment as trustee was set aside or, alternatively, her acceptance of the appointment was set aside.
5. However, success on all those grounds or arguments would not, without more, result in an order setting aside the appointment or the Claimant' acceptance of it.
6. No such order would be made unless the Claimant was also successful on the issue of whether her acceptance of her appointment as a trustee was a necessary element of her appointment as

trustee so that a tainting of her acceptance by undue influence or mistake would enable the appointment to be set aside.

7. I consider that the Claimant has no real prospect of success on that issue and accordingly, without amending her pleadings, has no real prospect of success on an appeal against the dismissal of her claim.
8. As a matter of analysis the issue is whether the Claimant's appointment takes effect as a result of (i) the unilateral act of the outgoing trustees in appointing the Claimant or (ii) the Claimant's acceptance of that appointment or (iii) a combination of the two.
9. To some extent this issue can be confused by the terminology employed. I consider that there is no real prospect of arguing successfully that an appointment of a new trustee is not effected by the act of the appointor. In this case the old trustees. They are the appointors. They make the appointment. It is absolutely clear that a simple appointment of a trustee can be effected by a deed without the new trustee being a party to that deed.
10. I accept and endorse Mr Le Poidevin's argument that it should not be possible to force the obligations of a trustee upon a person if that person is unwilling to accept them. Therefore, as Mr Le Poidevin argues, until the new trustee accepts the office she is free not to do so or to disclaim. If she disclaims, she will be treated as never having been a trustee and a matter of the general law will not be subject to the responsibilities or liabilities of a trustee. If she accepts she will be treated as having been a trustee from the time of the original appointment. In my view this in itself confirms that the appointment takes effect before the acceptance and hence the unilateral nature of an appointment of a new trustee.
11. I consider that that conclusion is confirmed in such a way that there is no real prospect of the contrary argument being successful by the following analysis:
    11.1. A simple appointment of a trustee can be effected by a deed without the new trustee being a party to that deed.
    11.2. Mr Le Poidevin's argument must entail that in such case the appointment would not be effective until the new trustee accepted it.
    11.3. I do not agree with that argument for the reasons given in my main judgment, but, if it was correct, the taking up of office would then involve two elements: first the outgoing trustees execute a document called an appointment. Second, possibly at a considerably later date, the new trustee does an act which amounts to an acceptance.
    11.4. If the appointment was effected by a deed to which the new trustee was not a party, the acceptance could be effected in some other way. For example by the new trustee acting as a trustee or by the new trustee giving their formal consent by way of a separate document. That last possibility is reflected in the practice of the court when it makes an order appointing a new trustee. As a matter of practice the court will usually, but not invariably, require to see a written consent of the new trustee before making the order. However, it is the order of the court, like the appointment by the old trustees, which effects the appointment.
    11.5. In my judgment in the circumstances of the present case as it stands the two element nature of the process is fatal to the Claimant's case and the contrary argument does not have a real prospect of success. The Claim Form and Particulars of Claim do not ask for the setting aside of the acceptance or of the DORA. They only ask for the setting aside of the first element, the appointment of the Claimant. The appointment is the act of the old trustees. The acceptance is the act of the Claimant. It is the combination which imposes the responsibilities of a trustee on the Claimant as a matter of general law; but it is the act of the old trustees which makes her a trustee subject to her possible disclaimer.

11.6. The act of the old trustees is not tainted by mistake or undue influence. What is or may be tainted by undue influence or mistake is the acceptance of the Claimant.

12. Accordingly, whatever view is taken on the other points, there is no real prospect of the claim or an appeal being successful as the claim is currently formulated.

13. I have considered whether there is some other compelling reason for an appeal to be heard. In particular whether clarification of the nature of the mistake required to enable the equitable jurisdiction to set aside for mistake was desirable in the public interest. I consider that that is not the case. That question is very fact specific. This case in which there was no cross-examination and no argument against the relief sought would not make a satisfactory test case. In my judgment there is no other compelling reason to hear an appeal against my order.

14. The Claimant seeks at this very late stage to escape what I see as the inevitable conclusion from the way her case was drafted and put, by seeking permission to amend her Claim Form and Particulars of Claim to seek in the alternative a setting aside of the Claimant's acceptance of the trusteeship and a declaration that she is thereupon at liberty to disclaim the trusteeship.

15. I am not willing to allow such amendments at this stage of the proceedings. Not only are the amendments sought very late, but also:
    15.1. They are either ineffective or insufficiently precise. It is unclear whether they are aimed just at the acceptance effected by the Claimant's execution of the DORA or whether they are aimed at any acceptance by her of the trusteeship. If the former they are insufficient because it is clear that subsequent to her appointment the Claimant did various acts which, in the absence of an express acceptance, would or could have amounted to an acceptance of the trusteeship (see paragraphs 66 to 92 of my main judgment), so a setting aside of the acceptance in the DORA would not release the Claimant from the burdens of the trusteeship. If the latter, the acceptances which it is sought to set aside are not adequately particularised
    15.2. If the amendments were allowed, it would become necessary to admit further evidence or at least a great deal more in the way of investigation of the evidence that was before me would need to take place. That is because even if Mr Le Poidevin was correct and the Claimant's acceptance of the trusteeship by executing the DORA could be set aside; it is clear that after the DORA was executed the Claimant acted in the administration of the trust in the capacity of a trustee of it. The court would need to be satisfied as to whether any and if so which of the transactions and events summarised in paragraphs 66 to 92 of my main judgment, alone or together, amounted to acceptances of the trusteeship and if so whether they could or should be set aside on the grounds of mistake or undue influence. That would almost be a new piece of litigation. I also bear in mind that Master Kaye effectively gave the Claimant and her advisers a second bite at the cherry by her order of 19th December 2019 permitting them to put in further evidence to strengthen their case. At that stage an amendment might well have been allowed. The point about the nature of an appointment was raised in the course of argument during the hearing before me. If the proposed amendments were permitted now, the Claimant would in substance be having a third bite at the cherry.
16. Having regard to those considerations; to the importance of finality in litigation, even one sided litigation such as this case; and applying the overriding objective and in particular the allotment

to the case of an appropriate share of the court's resources in my judgment the proposed amendments should not be permitted and I do not do so.

Deputy Master Henderson
18th May 2020