Neutral Citation Number: [2023] EWHC 824 (Ch)

Case No: BL-2022-000158

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

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

Date: 6 April 2023

Before:

MASTER MCQUAIL

- -

(1) Josette Ann Prevost	**Claimants**
(2) Flynn Philip Prevost	
- and -	
(1) Timothy Edward McCarthy	**Defendant**

- -
- -

Mr Thomas Graham (instructed by **Geoffrey Leaver Solicitors LLP**) for the **Claimants**
Mr Matthew Weaver KC (instructed by **Wedlake Bell**) for the **Defendant**

Hearing date: 3 March 2023

- -

Approved Judgment

.....

MASTER McQUAIL

Crown Copyright ©

This judgment will be handed down remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 9.30 am on 6 April 2023

Master McQuail:

Background

1. The dispute between the parties concerns the sale of the claimants' 100 shares (**the Shares**) in Rainham Industrial Services Limited (**the Company**) to the defendant or to the defendant and others.

2. The claimants are wife and husband. The second claimant and the defendant were friends for many years. The Shares were purchased in 2005 in the name of the first claimant for £500,000. By 2014 they were registered in the joint names of the claimants. From 2005 to 2015 the claimants' evidence is that they were paid monthly dividend income of £3,000 rising to £5,000.

3. The claimants commenced the proceedings by claim form dated 26 January 2022 and served particulars of claim dated 7 March 2022. By the original particulars of claim the claimants pleaded that the Shares were sold to the defendant pursuant to a share purchase agreement signed in 2015 but not dated (**the 2015 SPA**). The claim was brought to recover the balance of the purchase price said to be outstanding pursuant to the 2015 SPA, giving credit for sums totalling £99,500 already paid to the claimants.

4. The 2015 SPA provided that the defendant would purchase the Shares for the sum of £800,000 to be satisfied by (i) setting off a loan of £131,463.16 due from the second claimant to the Company, (ii) 26 monthly instalments of £25,000 and (iii) a final balancing payment of £18,536.84 on 31 October 2017. So the total payment that might be anticipated by the claimants was some £668,000. The 2015 SPA was signed by the

defendant and by the claimants, but it was not signed before witnesses and is not dated (the agreed instalment pattern suggests signature occurred in about August 2015). There is no evidence that stock transfer forms or any other ancillary documents were completed in respect of the 2015 SPA, which the claimants say is the fault of the defendant.

5. The defendant's position as set out in his Defence is that the Shares were sold pursuant to a share purchase agreement signed in 2016 but not dated (**the 2016 SPA**) which, superseded and extinguished any previous agreement. He says that there is no sum owed to the claimants. The defence asserts that the 2015 SPA was conditional on a takeover of the Company which never took place and that completion of the 2015 SPA also never took place. It also denies that payments made to the claimants were made pursuant to the 2015 SPA, since the payments were made by the Company not the defendant and were recorded as loans from the Company to the claimants, were payments made at the request of the claimants on account of sums which might become due under the 2015 SPA but were repayable if it did not complete.

6. The 2016 SPA provided that the defendant and the other nine shareholders in the Company would purchase the Shares in consideration of the assumption by the purchasers of the second claimant's debt of £268,963.16 to the Company, in amounts pro rata to the numbers of shares each buyer was to acquire. The execution of the 2016 SPA is contested, but the signature pages make apparent that it was intended to be signed and witnessed as a deed by each party. In addition, ten stock transfer forms dated 30 September 2016 would appear to have been signed by the claimants transferring the numbers of shares listed in the 2016 SPA to each purchaser.

7. Deputy Master Arkush made a consent order giving the claimants permission to amend their particulars of claim on 21 July 2022. The claimants' revised position as set out in the amended particulars of claim (**APOC**) was that there was an oral agreement before the date of the 2015 SPA (**the Oral Agreement**) for the sale and purchase of the Shares and, to the extent that the 2015 SPA was not a concluded contract, the Oral Agreement remained enforceable. The APOC pleaded a further oral agreement that pending payment in full for the shares the claimants would receive a monthly dividend of £5,000 and asserted that, of the payments received by the Claimants, £25,000 were dividends and not payments of instalments of the claimed price, so that the credit to be given reduces to £74,500 The APOC claimed that the Oral Agreement or the 2015 SPA was effective to transfer the claimants' beneficial interest in the Shares to the defendant so that specific performance would be available.

8. The APOC disputes the validity of the 2016 SPA and pleads that it should be rescinded for misrepresentation or be void or voidable for mistake on the grounds that:
(i) the Claimants are unaware of having signed it;
(ii) if they did so they must have been tricked by a misrepresentation, the most likely explanation being that the defendant falsely told the second claimant the documents related to the 2015 SPA;
(iii) such misrepresentation was either fraudulent because the defendant must have known it was untrue because there was already a binding 2015 contract or was reckless to its truth or was negligent
(iv) the claimants relied on the representation;
or

(v) it was made under a mistake of fact because the claimants had already transferred their beneficial interest by the Oral Agreement or 2015 SPA.

9. The amended defence was dated 25 August 2022. It denies any binding Oral Agreement and denies any agreement that pending full payment for the purchase of the Shares the Company would continue to pay dividends to the claimants and denies that there was any consideration for such an agreement.

10. The amended defence goes on to deny any transfer of the beneficial interest in the Shares to the defendant by anything that occurred in 2015 and relies upon the terms of the 2016 Agreement as extinguishing or superseding any 2015 Agreement and as including the claimants' own warranty that they were the legal and beneficial owners of the shares so that they are estopped from denying that. The amended defence complains that the plea of misrepresentation or mistake is embarrassing for lack of particularity and liable to be struck out as a plea of misrepresentation is not consistent with a plea of being unaware of having entered the 2016 SPA and provides further particulars of that position.

The Applications

11. By application notice dated 10 November 2022 (**the Defendant's Application**), the defendant applied for an order dismissing or striking out these proceedings on the basis that they have no real prospect of success and/or they disclose no reasonable grounds for bringing the claim, pursuant to CPR 24 and/or 3.4(2)(a).

12. The Defendant's Application is supported by the information at section 10 of the application notice, the witness statements of the defendant dated 10 November 2022, and 26 February 2023 and the witness statements of Andrew Wrate dated 29 June 2022 and William Gilbert dated 27 June 2022

13. The claimants oppose the Defendant's Application and rely on the witness statements of the first claimant dated 20 February 2023, the second claimant dated 17 February 2023, Flynn Don Prevost (**Flynn Junior**) dated 20 February 2023 and Jill McCarthy dated 23 January 2023.

14. By cross-application dated 20 February 2023 (**the Claimants' Application**), the claimants seek permission to re-amend the APOC and to amend the reply. The Claimants' Application is supported by the same evidence as the claimants rely upon in opposition to the Defendant's Application.

The Proposed Amendments in Summary

15. Paragraph 11(7) of the proposed re-amended particulars of claim (**RAPOC**) pleads that there was no consideration for the 2016 SPA. Paragraph 11(8) pleads the lack of consideration as a ground of mistake alternatively as a ground rendering the 2016 SPA void or unenforceable.

16. Paragraph 11(9) of the proposed RAPOC pleads that the 2016 SPA was procured by undue influence and is therefore voidable.

17. Paragraphs 14(1) and 14(2) of the proposed amended reply deny that the 2016 SPA was concluded, on the basis that it was not signed by all the buyers and therefore could not take effect as a deed according to its terms and deny there was any intention for it to have contractual effect if it did not take effect as a deed.

18. Paragraphs 14(3) and 14(4) of the proposed amended reply deny that the 2016 SPA was completed, because it was not dated and because the novation agreements referred to in it were never executed or delivered.

19. Paragraph 14(5) of the proposed amended reply pleads that the 2016 SPA was unenforceable or void for want of consideration in terms that mirror the amendment at paragraph 11(7) of the proposed RAPOC

20. Paragraph 16 of the proposed amended reply pleads that the wording of clause 9 of the 2016 SPA was ineffective to supersede the 2015 arrangements because such effect was confined to previous arrangements between "them", which it is said must, without the additional words "or any of them", refer to arrangements between all of the parties to the 2016 SPA.

The Defendant's Position on the Amendments

21. The defendant does not oppose the claimants' application to amend subject to the following:

(i) he says it would be premature for permission to be given to amend the reply, before the defence is re-amended;

(ii) any order granting permission to amend the APOC should provide for the claimants to pay the defendant's costs of and occasioned by the amendment;

(iii) the proposed paragraph 14(1) and 14(2) amendments to the reply should not be allowed now that a full set of signed counterparts of the 2016 SPA has been exhibited to the defendant's second witness statement;

(iv) the paragraph 11(7) and 11(8) amendments to the proposed RAPOC should not be allowed as they do not have any prospects of success in that they claim a lack of consideration in respect of the 2016 SPA which was executed as a deed; and

(v) to the extent that the proposed amendments include an allegation of actual undue influence that should not be permitted because the claimants cannot consistently with their own evidence, that they cannot remember signing the 2016 SPA, establish actual undue influence.

22. At the start of the hearing Mr Graham, recognising that if the Defendant's Application succeeded the proposed amendments to the reply might never fall to be considered, invited me to proceed on the basis that he sought permission to amend the APOC to include the proposed pleas in paragraphs 14 and 16 of the proposed amended reply. Mr Weaver did not object to that course and I will adopt it.

23. Mr Graham also confirmed that proposed paragraph 11(9) of the RAPOC was not intended to include any allegation of actual undue influence and offered to clarify that so far as necessary.

The Positions of the Parties

24. For the purposes of the Defendant's Application only, Mr Weaver was content that the Court should proceed on the basis that the 2015 SPA was valid and enforceable. He said that the only relevant issue for the purposes of the Defendant's Application is whether the claimants can demonstrate a real prospect of persuading the Court that the 2016 SPA is invalid or somehow unenforceable.

25. Mr Graham's position was that the 2015 SPA was a concluded, binding contract which was part performed and therefore it would not be right to ignore it as part of the background to the 2016 SPA.

Amendments

26. Amendments after service of a pleading which are not consented to require consent or permission (CPR 17.1(2)(b)).

27. The note at 17.3.6 of the White Book explains:

"A proposed amendment must be arguable, carry a degree of conviction, be coherent, properly particularised and supported by evidence that establishes a factual basis for the allegation: see *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 at [18]. However, whether to be allowed it must show it has "a real prospect of success", as draws upon the test for summary judgment, depends upon whether the amendment: (i) introduces a new claim or alternatively (ii) provides further particulars, based on factual material, in support of an existing pleaded point. The former will not be permitted if the new allegation carries no reasonable prospect of success. To the contrary, the latter should not invite an assessment whether the particulars have a real prospect of success, these being matters for trial. See *Phones 4U Ltd (In Administration) v EE Ltd* [2021] EWHC 2816 (Ch) at [11], as followed HH Judge Eyre QC (as he then was), sitting as a judge of the High Court, in *Scott v Singh* [2020] EWHC 1714 (Comm) at [19] and *JFC Plastics Ltd v Motan Colortronic Ltd* [2019] EWHC 3959 (Comm) at [14] and [34]."

Strike Out/Summary Judgment

28. Where an application is made under CPR 3.4(2)(a) to strike out on the basis that the claimant has not shown reasonable grounds for bringing the claim, the focus is on the way in which the claim is put forward in the claim form and the particulars of claim. The applicant must show that the claim is bound to fail. On an application under CPR 24.2 the applicant must show that the claimant has no real prospect of success in the claim and there is no other compelling reason why the claim should go to a trial.

29. The judgment of Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] provides a well-known and convenient summary of the principles the court must apply when dealing with an application under CPR 24.2.

30. In *TFL Management Services Ltd v Lloyds Bank PLC* [2013] EWCA Civ 1415 the Court of Appeal added the following at [27]:

"the court should still consider very carefully before accepting an invitation to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross examination in any event, or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial of the action: see Potter LJ in *Partco v Wragg* [2002] EWCA Civ 594; [2002] 2 Lloyds Rep 343 at 27(3) and cases there cited. Removing road blocks to compromise is of course one consideration, but no more than that. Moreover, it does not follow from Lewison J's seventh principle that difficult points of law, particularly those in developing areas, should be grappled with on summary applications; see Partco at 28(7). Such questions are better decided against actual rather than assumed facts. On the other hand it may be possible to say that the trajectory of the law will never on any view afford a remedy: see for example *Hudson and others and HM Treasury and another* [2003] EWCA Civ 1612."

31. In *John Hall (in his own right and as assignee of 1st Class Legal (IS) Limited) v Saunders Law Limited, Subir Kumar Karmakar, Saunders & Partners LLP* [2020] EWHC 404 (Comm) Richard Salter QC addressed the alleged contradiction in the approach set out by Lewison J in *Easy Air Limited* as to whether a Court ought to dispose of legal questions by way of summary judgment as follows:

"17. In my judgment, there is no tension whatsoever between these different concluding paragraphs in Lewison J's formulations of the correct approach, both of which are amply supported by authority. The issue of whether a case can properly be disposed of without a trial is one of proper case management and procedural justice. In cases where the relevant law is in a state of incremental development or of uncertainty, a court will for sound practical reasons usually be reluctant to come to any final conclusion on the basis of assumed rather than actual facts. As Mummery LJ observed in *Doncaster Pharmaceuticals Group Ltd v The Bolton Pharmaceutical Co 100 Ltd* (a case cited by Lewison J):
"..there can be more difficulties in applying the "no real prospect of success" test on an application for summary judgment .. than in trying the case in its entirety .. The decision-maker at trial will usually have a better grasp of the case as a whole, because of the added benefits of hearing the evidence tested, of receiving more developed submissions and of having more time in which to digest and reflect on the materials.
The outcome of a summary judgment application is more unpredictable than a trial. The result of the application can be influenced more than that of the trial by the degree of professional skill with which it is presented to the court and by the instinctive reaction of the tribunal to the pressured circumstances in which such applications are often made.."
18. However, where a point of law or construction which is not fact-sensitive (or where the court can be confident that it is seized of all the relevant facts) is both short and likely to be determinative of the whole (or at least of a substantial part) of the case, the overriding objective under CPR 1.1(1) of dealing with cases justly and at proportionate cost will usually favour summary determination.

32. In the case of *Goldtrail Travel Limited (In liquidation) v Malcolm Grumbridg*e [2020] EWHC 1757 Chief Master Marsh pointed to a further principle that was then summarised at paragraph 24.2.5 in Civil Procedure 2020 (now in Civil Procedure 2022):

"the overall burden of proof rests on the applicant to establish that there are grounds to believe that the respondent has no real prospect of success and that there is no other reason for a trial… The essential ingredient is the applicant's belief that the respondent has no real prospect of success and that there is no other reason for a trial."

The note goes on to deal with the case where the applicant's case has crossed the evidential threshold. If the respondent does not make out a case showing some real prospect of success, the applicant will be entitled to judgment, which is explained as follows:

"If the applicant for summary judgment adduces credible evidence in support of their application, the respondent becomes subject to an evidential burden of proving some real prospect of success or some other reason for a trial. The standard of proof required

of the respondent is not high. It suffices merely to rebut the applicant's statement of belief."

33. In *Anan Kasei Co Ltd v Neo Chemicals & Oxides (Europe) Ltd* [2021] EWHC 1035 (Ch), Fancourt J addressed both the questions whether to determine legal issues at the summary judgment stage and whether determination of certain issues by way of summary judgment was appropriate. The learned judge said this at [81] to [83]:

"81. The justification for allowing the parties to bring forward a summary judgment application is the asserted strength of the case against the respondent and the fact that a final trial of at least part of the claim will be disposed of (CPR 24PD , para 2(3) : " The application notice or the evidence … must – …(b) state that it is made because the applicant believes that on the evidence the respondent has no real prospect of succeeding on the claim or issue or (as the case may be) of successfully defending the claim or issue to which the application relates, and … states that the applicant knows of no other reason why the disposal of the claim or issue should await trial ")."
82. The "issue" to which rule 24.2 (" the claimant has no real prospect of defending the claim or issue ") and PD24 refers is a part of the claim, whether a severable part of the proceedings (e.g. a claim for damages caused by particular acts of infringement or non-payment of several debts) or a component of a single claim (e.g. the question of infringement, or the existence of a duty, breach of a duty, causation or loss). It is not any factual or legal issue that is one among many that would need to be decided at trial to resolve such a claim or part of a claim. If the determination of an issue before trial has no consequences except that there is one fewer issue for trial then the court has not given summary judgment and the application was not for summary judgment. If it were otherwise, parties would be able to pick and choose the issues on which they thought their cases were strong and seek to have them determined in isolation, in an attempt to achieve a tactical victory and cause the respondent to incur heavy costs liability at an early stage.
83. The fact that the summary judgment application raises for determination issues of law does not make a relevant difference. Legal issues are often the only relevantly disputed question in a claim or part of a claim. Where the issue of law is relatively straightforward and the court is satisfied that it has before it all relevant material and that a trial judge would be in no better position to decide it, the court generally decides the issue of law finally, on a balance of probabilities, and not merely on the basis of whether the respondent has a realistically arguable case: see per Lewison J in Easyair v Opal Telecom [2009] EWHC 339 (Ch) at [15] . That does not mean that any issue of law can properly be the subject of a summary judgment application."

The 2016 SPA More Detail

34. The 2016 SPA provided that:

(i) The claimants would sell their shares to the defendant, David Paget, Andrew Rynston, Terence Toulson, Marc Humphries, Michael Scaife, Karen Richards, Dean Morgan, Nicholas Winks and Andrew Pearson (defined in the 2016 SPA as the "Buyers");

(ii) Consideration for the shares was defined in the 2016 SPA as "the assumption by the Buyers of the Debt". The "Debt" being defined in the 2016 SPA as "the sum of £268,963.16 owed by [the second claimant] to the Company";

(iv) the shares to be acquired by each Buyer were proportionate to the amount of the Debt each took on. The defendant acquired 38 of the claimants' shares in exchange for assuming £102,206 of the Debt.

35. Clause 9 of the 2016 SPA provided that:

> "This Agreement constitutes the entire agreement between the parties and supersedes and extinguishes all previous discussions, correspondence, negotiations, drafts, agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter".

36. The defendant's second witness statement exhibits a full set of counterparts which on their face show that the 2016 SPA was signed as a deed, before witnesses, by all parties to it. The first claimant's signature was purportedly witnessed by Andrew Wrate and the second claimant's by William Gilbert.

37. The Company's directors passed a resolution approving the 2016 SPA on 30 September 2016 and ten stock transfer forms dated 30 September 2016 transferring the claimants' shares to the Buyers in the amounts set out in the 2016 SPA were executed by both claimants in each case.

Relevance of the 2015 SPA

38. I accept Mr Graham's submission that the 2015 SPA cannot be ignored as part of the background, but there can have been no barrier to the possibility of the parties to it renegotiating matters as between themselves (and others) and, if necessary, reducing their new agreement into writing in a document executed as a deed and in due course performing those terms.

39. Questions may of course arise whether such new terms are binding or enforceable as the pleadings to date and in their proposed amended forms demonstrate.

Undue Influence - The Law

40. *Snell's Equity* (34th Edition) at [8-031] deals with proof of a relationship (outside the special class):

"… the essential question is whether A or X, the alleged influencer, "is in a position to influence [B] into effecting the transaction of which complaint is later made". It is not necessary for B to show that the relationship was one of domination, but clearly the finding of a relationship of influence should not be made on slim grounds, and a mere inequality of bargaining power between B and the alleged influencer cannot suffice.
A relationship of influence can be established by proof that B "placed trust and confidence in the other party in relation to the management of [B's] financial affairs", but it would be a mistake to think that B must prove such trust and confidence existed specifically in relation to financial affairs, or that the only relevant relationships are ones of trust and confidence. The question is one of influence, and a relationship of influence may be proved by, for example, evidence of B's dependence or vulnerability. Conversely, closeness or mutual trust between the parties will not, by itself, suffice; nor will the fact that the relationship imposes fiduciary duties on the alleged influencer. Everything turns on the specific facts: "relationships which may develop a dominating influence of one over another are infinitely various. There is no substitute in this branch of the law for a 'meticulous examination of the facts'".

41. *Snell* deals at [8-032] with transactions calling for explanation:

"The existence of a relationship of influence between B and A or X shows that it is possible that B was subject to undue influence when entering into a particular transaction. A presumption of undue influence will arise only if, in relation to that specific transaction, there is "something more … something which calls for an

explanation". It must therefore be shown that the transaction "cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship". Accordingly, the presumption that the transaction was procured by undue influence does not arise unless the nature of the transaction is sufficiently unusual or suspicious that, "failing proof to the contrary, [it] was explicable only on the basis that undue influence ha[s] been exercised to procure it". It should not therefore suffice for B to show that the transaction had unusual features and "calls for an explanation" in that broad sense only

The conclusion that the transaction calls for explanation is not based simply on the objective, general features of the transaction: it can be reached only once the specific facts of the case have been considered, and no explanation can be found as to why B should have chosen to enter into the transaction, except that his or her intention was procured by undue influence. As a result, there is a conceptual distinction between, on the one hand, A's providing an explanation for a transaction and, on the other, A's failing to do so, but then rebutting the presumption of undue influence by providing evidence that B entered into the transaction after "full, free and informed thought" and so free of undue influence."

As is the case with establishing a relationship of influence, the examination of the nature of the transaction is simply part of the central factual inquiry into the presence of undue influence. As a result, the examination is heavily fact-sensitive and cannot be wholly separated from the other factors relevant to the general inquiry, such as those going to the existence of a relationship of influence, nor from those used to rebut a presumption of undue influence should one arise. When considering the transaction, the court must "look at it in its context and see what its general nature was and what it was trying to achieve for the parties". It would therefore be a mistake to think that, because the impugned transaction can be equated with one found to satisfy the test in a previous case, the presumption of undue influence necessarily arises in the present case."

42. *Snell* at [8-033] deals with rebutting the presumption:

"If a court finds that there is a relationship of influence and a transaction calling for explanation, the doctrine of undue influence will apply unless A can show that, in fact, B's entry into that transaction was not procured by undue influence. To do so, A must present evidence to justify a finding that, in relation to the transaction in question, B was in fact sufficiently229 independent of A and so was able to, and did, consent to the transaction free from any undue influence. The presumption of undue influence arises only if there is no explanation for B's entry into the transaction other than the exertion of undue influence, so, technically, evidence rebutting the presumption does not go to the question of whether there was an understandable reason for which B entered the transaction, but to the different question of whether B's admittedly poor decision-making was the product of undue influence. A must convince the court that B's decision to enter the transaction was made as a result of "full, free and informed thought about it". The presence of such thought is not, of course, a general requirement for the validity of a transaction; but it must be remembered here that, ex hypothesi, there is a relationship of influence between A and B and the transaction is one which, in its nature, can only be explained as a result of undue influence. Those concerns can only be met, in effect, by A's showing the procedure through which B formed his or her consent. If the presumption of undue influence is rebutted, then the court has found that B's consent to the transaction was not procured by undue influence and so the doctrine cannot apply.

The question of whether the presumption of undue influence has been rebutted is a question of fact to be determined on all the evidence. It is not sufficient for A to show simply that B understood what he or she was doing and intended to do it: undue influence consists not of a lack of understanding or an absence of consent but of a lack of sufficient independence in relation to the transaction. Nor is it enough for A to show that his or her behaviour prior to and at the time of B's entry into the transaction was free from any moral blame: as discussed at para.8–018, undue influence may arise even if A's conduct is, in that specific sense, unimpeachable. Nor will it necessarily suffice to show that the initial idea for the transaction was B's. It has been said that:

"[t]he gift or transaction will be set aside, unless it is proved to have been the spontaneous act of the donor or grantor acting in circumstances which enable him to exercise an independent will and which justify the court in holding that the gift or transaction was the result of a free exercise of his will."

Undue Influence - The Proposed Amendments

43. Proposed paragraph 11(9) of the RAPOC pleadss a relationship of trust and confidence primarily between the second claimant and the defendant but the pleaded relationship extends to that between both claimants and the defendant.

44. It is claimed that the claimants reposed trust and confidence in the defendant in relation to all matters relating to the Company and the Shares. This is said to be evidenced by

(i) the second claimant's long-standing friendship with and loyalty to the defendant;

(ii) the defendant's dominant position in his relations with the second claimant;

(iii) the second claimant's (formally undiagnosed) learning disability, which it is said makes reading written material very difficult, means he has difficulty with arithmetic, confusion about money, poor concentration and has a need to have matters explained to him in simple terms;

(iv) the defendant's knowledge of these intellectual deficiencies;

(v) the acquiescence of both claimants in whatever the defendant advised or instructed in relation to the Shares from the time of purchase until agreeing to the defendant's

request to buy their shares in 2015 at a price fixed by him and without knowing about the prospective sale of the Company;

(vi) the claimants' failure to instruct their own solicitors in connection with the Shares;

(vii) reliance upon the defendant's assurances after the payment of instalments said to be due under the 2015 SPA stopped, that payments would be reinstated; and

(viii) the defendant as director of the Company owing fiduciary duties to the claimants because of their relationship and the nature and circumstances of the transaction.

45. The proposed RAPOC assert that the 2016 SPA, if otherwise valid, was plainly a disadvantageous transaction calling for explanation. The particulars relied upon are:

(i) the disparity between the terms of the 2015 SPA and the 2016 SPA;

(ii) the lack of information provided to the claimants prior to entry into the 2016 SPA;

(iii) the sale taking place at a low point in the Company's fortunes;

(iv) the claimants not initiating the sale of their shares in 2016;

(v) the claimants not being given an opportunity to negotiate terms for repayment of the loan account balance, if the 2015 SPA was for some reason ineffective; and

(vi) the terms of the 2016 SPA leaving the claimants without any income from the Shares and, on their case, unable to pay off the mortgage used to purchase the Shares.

46. The witness statements of the claimants provide much background detail covering the whole period of their ownership of the Shares and the nature and manner of their dealings with the defendant from which the pleaded particulars are distilled.

47. The claimants therefore say it is to be presumed that the 2016 SPA was procured by the undue influence of the defendant and, absent proof by him to the contrary, it is explicable only on the basis of such undue influence and ought to be set aside.

48. In response it is said that insofar as actual undue influence is pleaded that cannot possibly succeed, as it is incompatible with the claimants' evidence that they do not recall signing the 2016 SPA. As I have said Mr Graham acknowledges that his pleading is intended to be confined to a case of presumed undue influence.

49. As to the claim of presumed undue influence Mr Weaver complains that there is no plea of a relationship of trust and confidence as between the first claimant and the defendant and therefore that she has no prospect of succeeding in this part of the claim.

50. As to the claim by the second defendant Mr Weaver says that the pleaded basis of the relationship is not sufficient to amount to an arguable case of undue influence, relying as it does on undiagnosed special educational needs. He says also that reliance on previous transactions in which there was no such influence is impermissible.

51. Finally, Mr Weaver disputes that the transaction was one that calls for an explanation. He relies upon the explanation that has now been given, namely that the Company's financial position had deteriorated.

Undue Influence - Analysis

52. The presumed undue influence case was pleaded subsequently to the summary judgment application being issued and is not therefore the subject of that application.

The question is whether or not I should allow the amendment in this respect and the test is a real prospect of success.

53. I accept that the core relationship of trust and confidence is claimed to arise between the second claimant and the defendant. However, the proposed pleaded case does extend to there being a relationship of trust and confidence between both claimants and the defendant and there are pleaded matters and supporting evidence from which a court might conclude after a trial at which the facts are fully examined that there was such a relationship between all three parties. The friendship of the second claimant and the defendant was longstanding and in that context the purchase of the Shares, initially by the first claimant, the regular payment of monthly dividend income to the claimants and the claimants' apparent unquestioning reliance upon the defendant in decisions about the Shares means that the claimants have a real prospect of establishing a relationship of the necessary kind at trial.

54. I do accept that the tri-partite nature of the relationship may make the claimants' case more difficult, particularly as to causation, than if the second claimant alone had entered into the 2016 SPA.

55. The absence of a formal diagnosis of learning difficulties cannot be fatal to a case that there was a relationship of the necessary type. If a party establishes at trial by admissible evidence that he has characteristics making him or her vulnerable to the other party's dominance it cannot matter whether those characteristics had previously been the subject of formal diagnosis.

56. I do not accept that where a party claims to set aside a transaction for undue influence and points to earlier transactions in which he relied upon the influencer as evidence of the relationship, that those earlier transactions must have been subject to undue influence. Those earlier transactions, if not the subject of undue influence, are part of the basis for the relationship within which influence may be exerted at a later time.

57. Even if the first claimant were to fail to establish such a relationship herself while the second claimant did so, the first claimant's failure would not necessarily disentitle the second claimant to relief, if he were also to establish that the transaction in question called for explanation.

58. In my judgment, against the background of the 2015 SPA, the 2016 SPA does call for some explanation. The defendant's explanation for the worse terms of the 2016 SPA from the claimants' point of view is, in brief, the relative financial position of the Company at the two dates. In his second witness statement he says that he tried to explain the events of 2015 to 2016 in a letter written to the second claimant in the summer of 2020 and in a letter written by his solicitors to the claimants' solicitors in August 2020. There is, however, nothing in the defendant's evidence or in the documentation presently available which shows that the claimants were offered that explanation or any other at or about the time the 2016 SPA was signed.

59. It is the defendant's case that the 2015 SPA was conditional on the Company being taken over, notwithstanding there being no express mention of any conditionality in the 2015 SPA. If he fails to establish that conditionality, the significantly less

advantageous terms of the 2016 SPA compared to the terms of the 2015 SPA certainly call for explanation.

60. Even if the defendant establishes that the 2015 SPA was conditional on the sale of the Company and was not binding by the time of the 2016 SPA and that the claimants knew the 2015 SPA was or might not be binding, that does not explain why the claimants would freely agree to the 2016 SPA in the context of the terms of the previously agreed 2015 SPA.

61. I am therefore persuaded that the amendments presently in paragraph 11(9) of the RAPOC should be permitted as having a real prospect of success and, had these amendments been the subject of the defendants' summary judgment application, they would have survived.

Clause 9 Argument

62. The defendant's point on clause 9 of the 2016 SPA is that it should be construed as binding on the claimants such that all prior agreements or understandings concerning the Shares are extinguished, including the 2015 SPA and the Oral Agreement and that that is a matter of construction which could be decided summarily. If, however, the claimants' case on undue influence succeeds the 2016 SPA including clause 9 will fall away. It is not therefore necessary to decide the Clause 9 construction question.

Other Claims and Amendments

The Claimants' Signatures

63. The key points of the claimants' position about their signatures on the 2016 documents are these:

(i) Neither the APOC nor the proposed RAPOC deny that the claimants signed the 2016 SPA (a suggestion in pre-action correspondence that their signatures were not genuine is no part of the claimants' pleaded case);

(ii) the first claimant says she has no recollection of signing the 2016 document, or any document effective to change the 2015 SPA and denies ever meeting or ever signing any document in the presence of Andy Wrate who appears to be the witness to her signature;

(iii) the first claimant's evidence is that, although the signatures on the stock transfer forms look like hers she never knowingly signed any documents transferring the Shares to anyone other than the defendant;

(iv) the second claimant also says that he has no recollection of signing any document to do with the Shares other than the 2015 SPA and that he does not think he signed any document to do with the Shares in front of a witness. He suggests that William Gilbert would do what he was told by the defendant, including purporting to witness a signature; and

(v) both claimants suggest that the only way in which their signatures can have come to be on the SPA 2016 and the stock transfer forms was if they had been tricked by the defendant in some way.

64. The first claimant points to a number of matters in the 2016 SPA which she claims she would have noticed and objected to or questioned, had she read the document.

65. The witness statements of William Gilbert and Andrew Wrate contain a number of paragraphs in identical form and cannot have been written in their own words. The witness statements also contain no detail about the circumstances in which each of the claimants' signatures were witnessed. However, each one is verified by a statement of truth as required by PD32 and each witness clearly states that he witnessed the signature of the respective claimant.

66. Mr Graham suggested that there were doubts about the honesty of the defendant and doubts about the honesty of the witnesses and their possible willingness to purport to witness signatures at the request of the defendant such that they should be cross-examined at trial. Mr Weaver pointed out doubts about the honesty of the second claimant also.

67. In the absence of positive denials by the claimants that they signed a total of eleven documents on which their signatures appear, I have significant doubts about the claimants' prospects of persuading a Court that they did not sign the 2016 SPA or the stock transfer forms, but I cannot conclude that the claim in this respect discloses no reasonable ground for bringing it such that it should be struck out. In light of my conclusion on the presumed undue influence case the issue of the validity of the 2016 SPA will proceed to trial. Bearing in mind [82] of the *Anan Kasei* case to which I have made reference, the claim as to the signatures should not be singled out for dismissal pursuant to CPR Part 24 because that will not be determinative of the issue of the validity of the 2016 SPA. It is therefore appropriate, in furtherance of the overriding objective, that the claim as to signatures is one of the issues to be considered at trial.

Misrepresentation/Mistake

68. The claimants' case is that they would only have signed the 2016 SPA if they had been tricked in some way, but neither is able to say how they were tricked.

69. The claimants plead misrepresentation but they fail to identify the words or deeds comprising that misrepresentation. In circumstances where the claimants cannot recall signing the 2016 SPA it is difficult to see how they can consistently advance any positive case that there was any operative misrepresentation, which the defendant in any event denies, or mistake.

70. Again, I have some doubts that the claimants will succeed on their pleas of misrepresentation or mistake but I do not conclude that this plea should be struck out. In light of my conclusion on the presumed undue influence case the issue of the validity of the 2016 SPA will proceed to trial. Bearing in mind [82] of the *Anan Kasei* case to which I have made reference, the claims as to mistake or misrepresentation should not be singled out for dismissal pursuant to CPR Part 24, because that will not be determinative of the issue of the validity of the 2016 SPA. It is therefore appropriate, in furtherance of the overriding objective, that the claims as to mistake and misrepresentation are left to be considered at trial.

The Missing Signatures Amendments

71. Now that the counterpart pages showing the witnessed signatures of each of the purchasers have been put in evidence, having read the Board Minute of 30 September 2016 and seen the ten executed stock transfer forms the prospect of the claimants

establishing that the 2016 SPA was not signed as a deed by all parties (possibly other than the claimants) by no later than 30 September 2016 seems remote.

72. However, given that the claim is to proceed to trial I propose to permit the amendments presently framed as paragraphs 14(1) and 14(2) of the proposed amended reply to be made by inclusion in a revised form of RAPOC.

Lack of Consideration

73. If the 2016 SPA was executed as a deed by all parties to it any lack of consideration would prima facie become irrelevant and any argument based on a plea that there was no consideration would appear to cease to have real prospects of success.

74. Mr Graham's position was that he nevertheless wished to plead the lack of consideration point (i) in order to avoid any possibility at trial of it being found that there was no valid deed but that the 2016 arrangements might otherwise have contractual force and (ii) as part of his case on mistake.

75. Again, since this claim is to proceed to trial and the full circumstances of the coming into being and execution of the 2016 SPA will need to be examined I propose to allow paragraphs 11(7) and 11(8) of the proposed RAPOC.