Neutral Citation Number: [2024] EWHC 1290 (Ch)

Case No: PT-2021-001068

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

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

Date: 30 May 2024

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

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Between :

MASUDUR RAHMAN	**Claimant**
- and -	
(1) DEWAN RAISUL HASSAN	**Defendants**
(2) LANA BASNEED ZAMAN	
(3) AMANI ZAMAN	
(4) FARIHAH ZAMAN	

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Kuldip Singh KC (instructed by **direct access**) for the **Claimant**
Owen Curry (instructed by **Trowers**) for the **Defendants**

Hearing dates: 28 November to 4 December, 11- 12 December 2023

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This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 12 noon on 30 May 2024.

HHJ Paul Matthews :

INTRODUCTION

General

1. This is my judgment on the trial of a claim for declarations relating to transactions alleged to have taken place between the claimant and the late Mr Al-Hasib Mian Muhammad Abdullah Al Mahmood (to whom I shall generally refer to as "the deceased", or "Mr Al Mahmood"). It is said that these amount to *donationes mortis causa*. That Latin phrase roughly means "gifts in contemplation of death". The claim is opposed. The first and second defendants are the executors and also beneficiaries of the deceased's will, and the third and fourth defendants are additional beneficiaries under that will. The claimant has previously been represented in this matter by Moore Barlow and later Crown Law solicitors, and until recently was represented by Gateley Legal and counsel. On 24 October 2023, Gateley Legal ceased to act for the claimant, and he is now acting in person. However, the day before the trial, the claimant managed to instruct Mr Kuldip Singh KC by direct access, and, to his great credit, Mr Singh KC was able to pick up the case rapidly, and to appear as advocate for the claimant thereafter. The claimant has cause to be very grateful to Mr Singh KC.

Procedure

2. The claim form was issued on 14 December 2021, accompanied by particulars of claim. The particulars of claim were later amended and re-amended, the latter on 15 March 2023. However, during the course of the trial I gave permission for a further amendment, which was made on 13 December 2023. The defence of all four defendants and the counterclaim of the first and second defendants (as personal representatives) are in re-re-amended form, dated 6 October 2023. The claimant's re-amended reply and defence to counterclaim is dated 21 April 2023. The claimant obtained permission to serve the claimant on the defendants out of the jurisdiction, in the United States of America, from Master Kaye by order dated 20 December 2021.

3. The matter was tried before me between 28 November and 12 December 2023. Oral closing submissions were made by counsel on Monday 11 and Tuesday 12 December 2023, accompanied in each case by a written notes as a kind of "roadmap". During closing submissions the claimant applied for permission to amend his particulars of claim to plead the sending of a text message by Mr Al Mahmood to a Mr Hafez early in the morning of 23 October 2020, the day of Mr Al Mahmood's death. After hearing counsel for the defendants, I permitted the amendment, on the basis that the evidence had covered the point, and the defendants would have the opportunity to make submissions on that matters raised by that amendment, which they did in writing on 8 January 2024. Those submissions were followed by further submissions by the claimant in writing dated 18 January 2024, for which the claimant strictly had no permission, as pointed out by the defendants in an email to me on 22 January 2024. The claimant then responded to that email in a Note to the court dated 25 January 2024. I have briefly considered the submissions of 18 and 25 January, and the

email of 22 January, but with respect I do not think they were necessary or have advanced matters.

4. I am nevertheless grateful to the parties for the immense amount of research and learning which both sides have put into the preparation of this case. I am only sorry for the delay since then in producing this judgment. This is largely the result of pressure of other work, but also of the novelty of the points raised by the case itself, and the need to reflect on the issues raised. I am accordingly grateful for the forbearance shown by the parties.

The claimant's case in summary

5. The claimant, who is from Bangladesh, claims to be a relative of the deceased, who also came originally from Bangladesh, but much earlier. The claimant says that he (the claimant) came to London in 2011 and there met the deceased and his wife (also from Bangladesh). He says he called them Uncle and Aunty, though he accepts that they were not his genealogical uncle and aunt. These were simply terms of respect for elders to whom he claimed to be related. Over the years, he says, he got to know them better, and they came to rely on him for assistance as they became older, and eventually became ill. The claimant says that he spent increasing amounts of time with them, visiting them several times a week and often staying overnight. Finally, he says, he moved in with them, at their house at 98 Streatham Road, Mitcham, London CR4 2AB. After the death of the deceased's wife, so did the claimant's wife and child.

6. The deceased's wife ("Aunty") died first, on 6 October 2020, essentially of pneumonitis, though other important medical conditions were also present. She was 75 years old. By her will, in the events that happened, she left her entire estate to her husband. He, the deceased himself ("Uncle"), died a little over two weeks later, on 23 October 2020. He was 82 years old, and died of bronchopneumonia. But he also was suffering from other medical conditions at the time he died. The claimant alleges that on 15 and again on 20 October 2020, the deceased did acts amounting to *donationes mortis causa*, in favour of the claimant, of all his assets in the UK. (It appears that he had assets also in Bangladesh, but these are not claimed by the claimant.) These assets include chattels, bank accounts and other choses in action, and registered land (both freehold and leasehold). They include assets formerly belonging to his late wife, either because they were inherited from her on her prior death, or because they were owned as beneficial joint tenants and he survived her.

7. The defendants are not blood relatives of the deceased. But they are blood relatives of his late wife. The first defendant is her brother. The second to fourth defendants are her nieces, the daughters of her sister (who is not a beneficiary of the deceased's will, and therefore not a defendant). They claim under the last will of the deceased, made in 2015. The claimant says that, at the time of his death, the deceased had given instructions for a new will, in the claimant's own favour, but this had not been executed at the date of the death. The first and second defendants have proved the deceased's 2015 will, and, as I have said, defend these proceedings as the deceased's personal representatives. The gross value of the UK estate for probate purposes was stated to be £1,408,634. However, interim administration accounts prepared on behalf of the first and

second defendants showed an estate with a total value of £3.15 million, although that includes non-UK assets valued at £310,000.

8. Obviously, to the extent that any of the claimed *donationes mortis causa* is valid and effective, the asset or assets so disposed of falls or fall outside the deceased's estate, and therefore the 2015 will. The defendants are highly suspicious of the claim of the claimant. It is a feature of this case that the only living witnesses to the events said to amount to *donationes mortis causa* are the claimant himself and, to a lesser extent, his wife. The defendants can say nothing directly about them. But, of course, there is considerable background and indirect evidence of which I must take account.

HOW JUDGES DECIDE CASES

9. For the benefit of the lay parties in this case I will say something about how English judges decide civil cases like this one. I borrow the following words largely from other judgments of mine in which I have made similar comments. First of all, judges do not possess supernatural powers that enable them to divine when someone is mistaken, or not telling the truth. Instead, they take note of the witnesses giving live evidence before them, look carefully at all the material presented (witness statements and all the other documents), listen to the arguments made to them, and then make up their minds. But there are a number of important procedural rules which govern their decision-making, some of which I shall briefly mention here, because non-lawyer readers of this judgment may not be aware of them.

Burden of proof

10. The first is the question of the *burden* of proof. Where there is an issue in dispute between the parties in a civil case (like this one), one party or the other will bear the burden of proving it. In general, the person who asserts something bears the burden of proving it. So, the claimant must prove that the acts he relies on as *donationes mortis causa* satisfy the requirements for that doctrine to apply. The position of the defendants as beneficiaries under the 2015 will is not challenged. They do not have to prove anything.

11. The importance of the burden of proof is that, if the person who bears that burden satisfies the court, after considering the material that has been placed before the court, that something happened, then, for the purposes of deciding the case, it *did* happen. But if that person does *not* so satisfy the court, then for those purposes it did *not* happen. The decision is binary. Either something happened, or it did not, and there is no room for 'maybe'. That may mean that, in some cases, the result depends on who has the burden of proof.

Standard of proof

12. Secondly, the *standard* of proof in a civil case is very different from that in a criminal case. In a civil case like this, it is merely the balance of probabilities. This means that, if the judge considers that a thing is *more likely to have happened than not*, then for the purposes of the decision it *did* happen. If on the other hand the judge considers that the likelihood of a thing's having happened

does not exceed 50%, then for the purposes of the decision it did *not* happen. It is not necessary for the court to go further than this. There is certainly no need for any *scientific* certainty, such as (say) medical experts might be used to. However, the more serious the allegation, the more cogent must be the evidence needed to persuade the court that a thing is more likely than not to have happened.

Role of judges

13. Thirdly, in our system, judges are not investigators. They do not go looking for evidence. Instead, they decide cases on the basis of the material and arguments put before them *by the parties*. So, it is the responsibility of each party to find and put before the court the evidence and other material which each wishes to adduce, and formulate their legal arguments, in order to convince the judge to find in that party's favour. There are a few limited exceptions to this, but I need not deal with those here.

The fallibility of memory

14. Fourthly, more is understood today than previously about the fallibility of memory. In commercial cases, at least, where there are many documents available, and witnesses give evidence as to what happened based on their memories, which may be faulty, civil judges nowadays often prefer to rely on the documents in the case, as being more objective: see *Gestmin SGPS SPA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), [22]. This is not a commercial dispute, but an estate dispute. Nevertheless, it concerns money and property, in the way that many commercial disputes do, and there are a number of useful documents available. This is important in particular where, as here, the relevant facts occurred some years ago, and the memories of the witnesses available have been dimmed by the passage of time.

15. In deciding the facts of this case, I have therefore had regard to the more objective contents of the documents in the case. In addition to this, and as usual, in the present case I have heard witnesses (who made witness statements in advance) give oral evidence while they were subject to cross-examination and re-examination. This process enables the court to reach a decision on questions such as who is telling the truth, who is trying to tell the truth but is mistaken, and (in an appropriate case) who is deliberately not telling the truth. I will therefore give appropriate weight to both the documentary evidence and the witness evidence, both oral and written, bearing in mind both the fallibility of memory and the relative objectivity of the documentary evidence available.

Reasons for judgment

16. Fifthly, a court must give reasons for its decisions. That is what I am doing now. But judges are not obliged to deal in their judgments with every single point that is argued, or every piece of evidence tendered. They deal with the points which matter most. Moreover, it must be borne in mind that specific findings of fact by a judge are inherently an incomplete statement of the impression which was made upon that judge by the primary evidence. Expressed findings are always surrounded by a penumbra of imprecision which may still play an important

part in the judge's overall evaluation. Put shortly, judgments do not explain all aspects of a judge's reasoning, although they should express the main points, and enable the parties to see how and why the judge reached the decision given.

WITNESSES

17. The following witnesses gave evidence before me for the claimant: the claimant himself, Jonathan Amponsah (will draftsman), Mohammed Naeem (work colleague of the claimant), Rafiq Ali (a butcher from whom the deceased bought meat), Iram Naeem (husband of Mohammed Naeem), Zakia Mandal (friend of the deceased's wife), Kowsar Ahmed (friend of the deceased), Shaila Sultana (the claimant's wife).

18. The following witnesses gave evidence before me for the defendants: the second defendant, Shamim Zaman (sister of the deceased's wife), Quamrun Nahar (friend of the deceased's wife), Sayam Bin Hafiz (husband of Quamrun Nahar), Ferdous Rahman (friend of the deceased's wife), Bodrul Alom (business friend of the deceased's wife), Fatema Khairunnesa (friend of the deceased's wife), the third defendant and the fourth defendant.

19. Of these witnesses, Mohammed Naeem was sworn and gave evidence in Urdu, and Rafiq Ali was sworn and gave evidence in Bengali. Each had an interpreter. Iram Naeem was sworn in English, but she was assisted by the interpreter to some extent. The other witnesses were sworn and gave evidence in English, varying in standard from adequate to mother tongue. Although there were occasional instances when an answer was not clear and had to be repeated or the question asked in a different way, I am satisfied that each witness was able to tell me the relevant evidence which that witness had to give.

20. Mr Amponsah, as an independent, professional witness, was particularly impressive, and I accept his evidence without hesitation. I am also satisfied that none of the other witnesses was deliberately telling untruths or trying to mislead the court. Each from his or her own perspective was saying what each thought had happened. But sometimes witnesses were confused or just mistaken, and this accounts for the fact that they did not agree on all points. I paid particular attention to the evidence of the claimant, as the only witness of some of the most important events. I am satisfied that I can properly rely on it. The evidence of some of the defendants' witnesses was coloured by their expressed suspicions of the claimant's involvement in the death of Mr Al Mahmood, and also suspicions of other wrongdoing by the claimant and his wife. I deal with these suspicions below. I also consider that on one or two occasions, witnesses told me what they had convinced themselves had happened, or even what *ought* to have happened. This is not unusual. Each witness has only to make sense of his or her evidence. I have to try to take account of all of it, against the backdrop of the documentary and other material available to me, bearing in mind (as I have said) the fallibility of memory.

FACTS FOUND

21. On the basis of the evidence before me, I find the following facts.

Mr and Mrs Al Mahmood

22. Mr and Mrs Al Mahmood originated from Bangladesh, but were living in London at least from the 1970s, although Mr Al Mahmood had lived in Germany before coming to London (he had studied German at university). He worked as a senior engineer for British Telecom. His wife was a teacher, though she retired in 2009, and thereafter worked with Bodrul Alom in a real estate management business until 2019. They had no children. They jointly owned a freehold house (98, Streatham Road, Mitcham CR4 2AB, registered in 1982) and had various investments, including two leasehold flats in Sutton, a managed share portfolio and a number of savings accounts. They had friends and contacts in the London Bangladeshi community. They were observant Muslims. By the time that they met the claimant in 2011 they were both retired, and each had a number of medical conditions. Mr Al Mahmood suffered from chronic kidney disease, ischaemic heart disease, diabetes, high blood pressure, hearing loss and also laryngeal cancer (for which he had been treated). Mrs Al Mahmood had diabetes, which led to high blood pressure, and pneumonitis, causing her breathing difficulties. She also had a knee operation in 2018, causing reduced mobility.

23. Mrs Al Mahmood had a younger sister who had married a man who worked for the United Nations, and they moved around. But eventually her sister and brother in law settled in America, where they brought up their three daughters. These three daughters, the nieces of Mrs Al Mahmood, are the 2nd to 4th defendants. They live full-time in the United States, either in Massachusetts or New York. Their father died in 2014. The first defendant is the brother of Mrs Al Mahmood, and also lives in America, in Texas. The first defendant did not give evidence in these proceedings, but the other defendants did. When the nieces were younger, they visited London and stayed with Mr and Mrs Al Mahmood relatively frequently. As they got older their visits were fewer.

24. The defendants' relationship with Mr and Mrs Al Mahmood changed over the years. As the nieces grew into adulthood their interests and their horizons widened, and family matters did not play so great a part. Mrs Al Mahmood was still their aunt, and they were in touch from time to time, but it was not as close as before. Mr and Mrs Al Mahmood did not visit the United States after 2001. The second defendant visited London every year between 2001 and 2007, but not thereafter until she came to give evidence at the trial, The third defendant had not visited London since 2000 (when she was 15 years old). The fourth defendant made a number of visits after 2000 to London where she visited Mr and Mrs Al Mahmood: 3 or 4 times between 2001 and 2005, another between 2005 and 2016, once in each of 2016, 2017 and 2018, and three times in 2019. Visits to London were sometimes specifically to visit Mr and Mrs Al Mahmood. But sometimes they were simply stopovers on the way to Asia, to visit other relatives.

The 2015 wills

25. On 10 July 2015, Mr and Mrs Al Mahmood made short wills in similar form. However, both contained an express provision that they were not "mutual wills", and that each of them was free to revoke his or her will at any time. The

will of each of them appointed the survivor as sole executor and trustee, and left the residue of the relevant estate for the benefit of that survivor. However, in case either died, the will of the survivor was expressed in the alternative to be for the benefit of Mrs Al Mahmood's brother and her three nieces (the four defendants) equally.

The claimant

26. The claimant was born in Bangladesh. He married Shaila Sultana, also Bangladeshi, in 2010. The claimant started a distance learning course for the University of London whilst in Bangladesh, but came to England in 2011 to study. Initially, he lived in Hertfordshire, and later Maidenhead, where he was working in the hospitality industry. His wife remained in Bangladesh to complete her studies. She came to join her husband in England in 2014, and they settled originally in east London. They have two children, a son, Safwan, born in August 2018, and a daughter, Sidratulmuntaha, born in December 2020. Before leaving Bangladesh, the claimant was told by his father to visit Mr and Mrs Al Mahmood in London, because he and Mr Al Mahmood were distantly related, sharing common ancestors. From a family tree enclosed with the papers, it would appear that the claimant was the second cousin once removed of Mr Al Mahmood, and Mr Al Mahmood was the third cousin once removed of the claimant. The claimant did visit, and struck up a relationship with Mr and Mrs Al Mahmood.

27. The claimant's relationship with Mr and Mrs Al Mahmood changed over time. At the beginning, it was formal, the young man paying his respects to older and distant relatives. He visited at religious festivals and at other times, and assisted them with little tasks and errands, including shopping. As time passed, and they got to know each other better, Mr and Mrs Al Mahmood began to rely even more on him, and he visited regularly, about once a week. Once the claimant's wife had come to London, she too used to visit Mr and Mrs Al Mahmood, though less frequently than the claimant. Mrs Al Mahmood made gifts to the claimant's wife, including a sari, jewellery and money. When the claimant graduated with his LLM degree in 2015, Mr Al Mahmood attended the graduation ceremony at the Royal Festival Hall with the claimant's wife. Mrs Al Mahmood did not attend, as she was unwell.

28. The immigration status of the claimant and his wife was unsettled. In 2015 the claimant and his wife were thinking of going back to Bangladesh. The reaction of Mr and Mrs Al Mahmood was to urge them to stay in England, on the basis that there was nothing for them in Bangladesh. It is also clear that by this time Mr and Mrs Al Mahmood were beginning to rely on the claimant more and more. Mr Al Mahmood wrote a letter of recommendation to the Home Office in connection with the claimant's immigration status.

29. The needs of Mr and Mrs Al Mahmood increased as they aged, and their medical conditions deteriorated. In addition to doing the shopping, the claimant helped them with home tasks such as cleaning, laundry, and gardening. From 2016 on, the claimant stayed overnight, if Mr and Mrs Al Mahmood were unwell, or if they had early appointments with which they needed help. After their son was born, the claimant's wife would also take him to visit Mr and Mrs Al Mahmood,

and later to play in their garden. By this time, Mr Al Mahmood was already treating the claimant and his wife as members of the family, and indeed almost as the children that he never had. In 2018, Mr Al Mahmood offered, and the claimant accepted, £10,000 to do the course in England, which would help the claimant with his immigration status. It appears that money was offered by Mr and Mrs Mahmood on other occasions but the claimant and his wife did not take it.

Mrs Al-Mahmood's final illness and death

30. In the summer of 2020, Mrs Al-Mahmood's health worsened. On 24 September 2020 she was taken into hospital by ambulance. On the same day she told the claimant's wife (then pregnant with her second child) that she wanted them to move in with them. She gave her her own set of house keys. From then on the claimant, his wife and his son slept at 98 Streatham Road, although because the claimant's wife had ante-natal appointments to rearrange they did not permanently change address until the end of September. Everyone (including Mrs Al-Mahmood herself) expected her to recover and come home. But only a few days later, on 6 October, Mrs Al Mahmood suddenly deteriorated and died in hospital. The primary cause of death was certified as pneumonitis, that is, inflammation of the lungs, leading to a lung infection, which in turn caused respiratory failure. The claimant was called to the hospital, but by the time he arrived she had already died. The claimant returned to 98 Streatham Road, where he had to break the news to Mr Al Mahmood. When the claimant eventually managed to do so, Mr Al Mahmood was understandably distraught.

31. On 8 October 2020, £25,000 was transferred from Mr Al Mahmood's bank account to the claimant's bank account. Mr Al Mahmood told the claimant that this was for funeral, grave and prayer expenses. But also it could be used to pay any small debts owed by the deceased at the time of death.

32. Following the death of Mrs Al-Mahmood, friends of Mr and Mrs Al Mahmood visited to pay their condolences. Mr Al Mahmood told them that the claimant (who was present during the visits) would be organising the funeral for his wife. He told some of them that, figuratively speaking, the claimant was his son, who would benefit after his death. He also said the same to some of his wife's relatives in Bangladesh when he telephoned them to let them know that his wife had died. He also called the first defendant in the United States to inform him, and in addition told him that "I have no claim to Bangladesh property, but in UK all is for Masud". With the assistance of Bodrul Alom, the claimant did indeed organise Mrs Al Mahmood's funeral in accordance with Mr Al Mahmood's wishes, and it took place on 9 October 2020. Because of his mobility issues, Mr Al Mahmood was unable to attend. Some of the defendants' witnesses gave evidence that the claimant controlled or restricted access to Mr Al Mahmood. I do not accept this. Mr Al Mahmood had not only problems with his mobility, but also with his hearing. So, meeting anyone in person outside his home and conversation on the telephone were both difficult activities for him. I accept that not all those who telephoned him were able to speak to him. But all those who wished to do so came to his home and could see and speak to him there.

33. At this time, Mr Al Mahmood was well aware that he had a number of important health conditions. He had been treated for laryngeal cancer, but he also had chronic kidney disease, ischaemic heart disease, diabetes, high blood pressure, and hearing loss. He was emotionally weakened by the unexpected death of his wife, whom (being seven years younger than him) he had supposed would survive him. The evidence shows that he was fatalistic, and believed that he had only a short time more to live. He wanted to put his affairs in order.

Jonathan Amponsah

34. After the funeral, the claimant on the instructions of Mr Al Mahmood contacted a man called Jonathan Amponsah, whose details were given in a documentation pack from the hospital as someone who could deal with probate and inheritance matters. As I have said, both Mr and Mrs Al Mahmood had made wills in 2015. Mr Al Mahmood told both the claimant and the claimant's wife that he wanted to make a new will now that his wife had died. He also said that he did not think he would live very long himself. The claimant explained to Mr Amponsah that Mr Al Mahmood wanted to administer his late wife's estate and make a new will for himself. He further explained that for health reasons Mr Al Mahmood could not visit Mr Amponsah's office. Mr Amponsah confirmed he would come to see Mr Al Mahmood at his home. The appointment was arranged for 15 October 2020.

35. Mr Al Mahmood told the claimant and his wife to go through the contents of the house at 98 Streatham Road and to throw away the unnecessary ones. He offered the claimant's wife all of his late wife's things. He also agreed to sell his late wife's car to the claimant's friend Naeem Mohammed. On 13 October 2020 Naeem arrived with his wife and met Mr Al Mahmood. He told them how much he missed his late wife and how his world was now focused on the claimant and his family. He told them that "he is my son". In relation to the sale of the car, he directed Naeem to pay the money to the claimant, as the money was to be his anyway.

36. As arranged, Mr Amponsah came to see Mr Al Mahmood at home on 15 October 2020. Their discussions took place in English. During this meeting Mr Al Mahmood gave instructions to Mr Amponsah to draw a new will for himself, under which the claimant was to be sole executor and beneficiary. Because of Mr Al Mahmood's poor hearing, Mr Amponsah told Mr Al-Mahmood to write down what he wanted to change on the copy will. The claimant wrote the questions "write name of the executor" and "who is the beneficiary" on the copy will. Mr Al Mahmood gave his instructions by writing on a copy of the old will, in response to the claimant's questions. The claimant was to be the executor and the sole beneficiary. In response to the questions about beneficiaries, Mr Al Mahmood also pointed at the claimant and said to Mr Amponsah, "Who else would it be?" Mr Amponsah asked Mr Al Mahmood about the change to the beneficiaries under the will, and in particular the American relatives. Mr Al Mahmood said they were not interested in him and he was not interested in them, as they did not come to visit or to help out. After instructions had been given for the new will, they discussed the probate process, how it worked and how long it would take. The meeting lasted 45 minutes to one hour. Mr Amponsah said he would speak to Mr Al Mahmood's GP and return on 22

October 2020 with the new will for execution. Mr Amponsah did this because, although it did not look to him as though Mr Al Mahmood did not know what he was doing, nevertheless, because of his physical condition, he was being cautious. Mr Amponsah was clear in his evidence that the claimant did not prompt, interrupt or seek to influence Mr Al Mahmood in the instructions he gave.

After Mr Amponsah

37. Following the meeting, when Mr Amponsah had gone, Mr Al Mahmood asked the claimant to bring down some bags situated in his office upstairs. Mr Al Mahmood opened the bags and explained that these were the documents relating to his properties, bank accounts and so on. He had a very large number of bank accounts. In addition, he had an account with Hargreaves Lansdown who acted as his agents for buying and selling both quoted and unquoted company shares. He also had land registry certificates and other documents concerning the house at 98 Streatham Road and the two flats which he owned in Sutton (Flats 2 and 51, Leben Court, 36 Sutton Court Road, Sutton SM1 4FF). It took about 40 minutes to go through all of the documents. Mr Al Mahmood explained each one to the claimant. The claimant asked him why he was doing this. Mr Al Mahmood replied that he was getting old and would die soon, and he would be giving all these assets to the claimant. I find that he was concerned to make sure that the claimant had all the necessary information to take control of all of the UK based assets.

38. Mr Al Mahmood had been eating and drinking less after his wife's death. He did not move about the house much, and needed more assistance from the claimant and his wife. He referred frequently to his own death. On 19 October 2020 he stopped taking his medicines. Mr Al Mahmood seemed sufficiently unwell that the claimant called his GP and asked if Mr Al Mahmood could be taken to hospital. (In retrospect, this was probably the onset of the bronchopneumonia.) The doctor said that they should wait a few days to see if Mr Al Mahmood got any better first. Nevertheless, the claimant asked Mr Al Mahmood if he could take him to hospital, but Mr Al Mahmood refused.

39. The next day, 20 October 2020, Mr Al Mahmood was agitated, asking when Mr Amponsah was coming with the will for execution. The claimant reminded him that he was not due until 22 October 2020. I find that, by this stage, Mr Al Mahmood was actively contemplating his own death. He thought that he did not have long to live. Mr Al Mahmood became more agitated, and asked the claimant to bring all the bags from his office into the bedroom where he was. He opened the bags and took out the documents. This time, however, Mr Al Mahmood explained all the login details for the online accounts and handed over bank cards, cheque books and login devices, pin readers and other security items to the claimant. This included the Hargreaves Lansdown share-dealing account. In the present case Mr Al Mahmood did not have share certificates for the investments he had in quoted and unquoted companies. Instead he had the account with Hargreaves Lansdown, and so held his shares in dematerialised form. It appears that he was able to give instructions online to buy and sell. On the evidence, the login and password for this were amongst those given to the claimant by Mr Al Mahmood. At the end, he told the claimant that the claimant

now had access to all his accounts and that everything was his, and he could take the money straight away or wait until after he was dead. I find that Mr Al Mahmood did all these things, not because he was trying to make an oral will, but because he wished, and was thereby attempting, to give the entire contents of these accounts to the claimant, on the basis that he contemplated his own impending death.

40. I referred above to "bank cards". At the trial, it was formally admitted by the parties that no bank cards were handed over in relation to twelve of Mr Al Mahmood's accounts. These were as follows:

1. ING Bank, No 9072484;

2. Hargreaves Lansdowne, Client No 404065;

3. Premium Bonds, account no 3139827857;

4. Premium Bonds, account no 3139826544;

5. Yorkshire Building Society, customer no 0004008571;

6. Yorkshire Building Society, customer no 0005068685;

7. National Savings and Investments, account no 21065749864;

8. National Savings and Investments, account no 41042205159;

9. Chelsea Building Society, customer no 6959264672;

10. Chelsea Building Society, customer no 6959274974;

11. National Westminster Bank, account 60-21-08, 59573783;

12. National Westminster Bank, account 60-21-08, 59573759.

41. Next, Mr Al Mahmood handed over the registered land certificate for 98 Streatham Road to the claimant, and said it was for him. He told him where the spare keys for the house were (although the claimant and his wife already had keys). He further told the claimant that 98 Streatham Road and everything in it was to belong to the claimant after his death. Mr Al Mahmood handed over two envelopes to the claimant relating to the flats in Sutton. They contained the long leases of the flats and documents relating to the registration of the leasehold titles (but not land certificates, because these were no longer issued by the time the leases were granted). He said that the claimant could either take the rents from the flats or sell them to release the capital, and that the envelopes and all the documents in it were for the claimant. The whole conversation lasted about an hour, during which time Mr Al Mahmood repeatedly told the claimant that "Whatever you see of mine is all for you, and you know nothing, for we all belong to God". He also said "It does not matter if Jonathan comes or not. You know everything, and everything is for you." Again, I do not consider that Mr Al Mahmood was trying to make an oral will. He was trying to make a gift, on the basis that he contemplated his own impending death.

Mr Al Mahmood's death

42. By 22 October 2020, Mr Al Mahmood was not getting any better. Nevertheless, he refused to go to hospital, saying there was nothing a doctor could do, and his time was short. He said that he could die at any time. During the morning, Mr Amponsah telephoned to say that he had not yet been able to speak to Mr Al Mahmood's doctor. He also said that he had not been able to secure any witnesses, and asked the claimant to do so. (He appears not to have been aware of the temporary alteration to the law during the time of Covid to allow the witnessing of wills by videoconferencing.) This was of course at a time of continuing restrictions on movement and meetings because of Covid. The claimant agreed to try and find witnesses. Subsequently, Mr Al Mahmood and the claimant called Mr Amponsah, and Mr Al Mahmood asked him to come over to get "the will done now". The claimant spoke to Mr Al Mahmood's doctor again, and, after a short consultation about Mr Al Mahmood's health, the doctor prescribed a further medicine for Mr Al Mahmood. The claimant went to the pharmacy, but they did not have the medicine in stock, and, after a further telephone call to the GP practice, the prescription was changed to one which the pharmacy was able to dispense. In fact, Mr Al Mahmood declined to take the medication anyway.

43. At 11:13 that morning, a text message was sent from Mr Al Mahmood's phone to Mr Amponsah. It read as follows:

> "Jonathan, I am al-Mahmood. I agreed that Masudur Rahman will be the absolute own of all my assets and the executor of my new and last will. This is my final word. I revoked all my previous will done by me and my wife. It's a difficult time for me. Please help Masud."

I find that that was sent by Mr Al Mahmood himself.

44. That evening, after Mr Al Mahmood had gone to bed, the claimant went to him, and was surprised to see that instead of being in the bed he was now seated next to it. The claimant asked Mr Al Mahmood if he wanted anything or any help, but he did not. He put his hand on the claimant's head, and the claimant began to cry. Mr Al Mahmood said, "Do not cry my son, and do not give up on Jonathan". The claimant put Mr Mahmood back to bed.

45. Mr Al Mahmood's mobile telephone shows that a text message was sent from it at 00:42 on 23 October 2022 to Sayam Bin Hafez, who gave evidence for the defendants at the trial. The message read:

> "Sayam, pray for me. Masud is my son. He is the absolute owner of all my assets. This my final word."

At the trial, Mr Bin Hafez gave evidence that he was suspicious of this text. He said that the timing of the message was quite abnormal, and the English used was unusually poor for Mr Al Mahmood. On the material before me, I am quite satisfied that neither of the claimant and his wife sent the text. On the contrary, I find that Mr Al Mahmood himself did so. I am not concerned about the late hour, because Mr Al Mahmood may well have thought he was dying at the time,

and that would have justified the message. Moreover, although Mr Al Mahmood's English was good, other documents written by him, and in evidence before me, show that it was not perfect. In emotionally charged circumstances, small lapses in grammar and spelling in a second language are not unlikely.

46. After midnight that day, so in the early hours of 23 October 2020, Mr Al Mahmood called the claimant to put him on the sofa, as he wanted to sleep there. But the claimant was afraid of how Mr Al Mahmood looked, and called his wife. She brought Mr Al Mahmood some water, while the claimant called an ambulance. However, by the time the ambulance arrived, Mr Al Mahmood had already died.

Subsequent events

47. Although it involves referring to subsequent events, I think it is appropriate to say the following at this point. At the trial, evidence was given by some of the defendants to the effect that they suspected that the claimant had been in some way, or to some extent, responsible for the death of Mr Al Mahmood. The second defendant, for example, in cross examination said that she believed it was possible the claimant had deliberately withheld medicine from Mr Al Mahmood which was vital to his life. She found the timing of his death suspicious. She said that her sisters shared her suspicions. Because no doctor had seen Mr Al Mahmood in the period leading up to his death, no medical certificate of the cause of death could be given.

48. Accordingly, the death was reported to the coroner, who opened an investigation. She directed that a post-mortem examination of the body of Mr Al Mahmood be carried out by a forensic pathologist. On the results of that examination, and from the other enquiries made by the coroner, she was satisfied that the cause of death was a natural one. The coroner concluded the investigation without holding an inquest, and the death of Mr Al Mahmood was registered in the register of births, marriages and deaths. The cause of death was given as bronchopneumonia, with ischaemic heart disease, diabetes, chronic kidney disease and hypertension also contributing, though unrelated to the cause of death. (From my past experience as a coroner, I know that bronchopneumonia is sometimes called "the old man's friend", because it is the commonest certified cause of death in the elderly.) I make clear that there is absolutely no evidence to suggest that either the claimant or his wife had anything (whether positive or negative) to do with either the death itself or the timing of the death of Mr Al Mahmood. The defendants' suspicions were accordingly unfounded.

49. On the day of Mr Al Mahmood's death, Mr Amponsah telephoned, to say that he had now spoken to the GP, but of course it was too late. On 29 October 2020, the claimant organised the funeral and the ceremonial prayers after death for Mr Al Mahmood and attended the burial at Lambeth Cemetery.

50. Strictly speaking, what the claimant did in relation to the assets of Mr Al Mahmood (in particular, his bank accounts) after his death is irrelevant. But it appears that he did transfer money from Mr Al Mahmood's accounts to his own in November and December 2020. To the extent that it is relevant, I find that he did this believing that all that money was his to deal with as he thought fit.

Mental capacity and intention

51. There was no expert evidence before me as to the state of the mental capacity of Mr Al Mahmood in the period leading up to his death. There was however some lay and professional evidence. This included the evidence of Zakia Mandal, who said that in that period Mr Al Mahmood was working on his laptop, and, although he was physically fragile, "his mind was clear". Mr Amponsah, not medically qualified, but a professional will writer, said that, although Mr Al Mahmood did not look to him as though he lacked capacity, nevertheless out of caution he did contact Mr Al Mahmood's GP, Dr Lall. The latter told him (unfortunately only after Mr Al Mahmood's death) that he had had no concerns about his mental competency when he saw Mr Al Mahmood in September 2020, and also that he was "in his right mind to make a will". The doctor's view is confirmed by an email from him in the materials before me. I bear in mind that Mr Al Mahmood was elderly and ill, and that his wife of many years had just died. But there is no evidence that he lacked capacity.

52. On the basis of the evidence before me, I find that, by the time of his death, Mr Al Mahmood wished his UK assets to go to the claimant rather than to the defendants. Amongst other things, by this time he had (i) told his friends that the claimant was (figuratively speaking) his son, and that everything was for him, (ii) allowed the claimant to receive and keep the purchase price of his wife's former car, (iii) allowed the claimant and his wife to take possession of personal items belonging formerly to his wife, (iv) handed over documents and other items to the claimant (including documents relating to the properties referred to in paragraph 41 above), saying that they were for him, (v) given instructions for a new will entirely in the claimant's favour, (vi) given the claimant information about accessing his bank accounts, and (vii) told him the contents were his. In substance, the question for me now is what was the legal effect of all of the actions and events which I have described.

Issues arising for decision

53. What I must deal with are the following issues:

(1) Was Mr Al Mahmood attempting to make a nuncupative will or a gift of his assets?

(2) If a gift, was it made in contemplation of his impending death?

(3) If a gift, was it made conditionally on his death?

(4) If a gift, did Mr Al Mahmood deliver and "part with dominion" of the subject matter or some equivalent?

(5) Was there any legal bar to the subject matter being subject to a donatio mortis causa?

(6) Did Mr Al Mahmood have capacity to make the gift?

LAW: GENERAL

54. There are three main areas of law which I must deal. The first relates to *inter vivos* gifts. The second relates to wills. The third relates to *donationes mortis causa*. In fact, there was potentially also a fourth. In his skeleton argument, the claimant argued that, if his claims were otherwise unsuccessful, he should succeed by way of a claim in proprietary estoppel. But this was not at that time reflected in the statements of case. At trial, therefore, the claimant applied for permission to amend his case to plead an alternative claim in proprietary estoppel. After hearing argument, I refused this application, for reasons which I gave at the time. Accordingly, it is not necessary for me to spend any further time on that.

55. This case highlights the differences between three types of gift. The word 'gift' simply means a benefit conferred on one person by another, without any linked payment or compensation for that benefit. But English law knows several kinds of gift. Without being exhaustive, for present purposes I differentiate between (i) an ordinary, *inter vivos* gift, (ii) a *donatio mortis causa*, and (iii) a testamentary gift (or gift by will). The first is an everyday event. The third, if not an everyday event, is common and well-known. The second is however rare. The first and second may be carried out with or without writing, but the third (with very limited exceptions) only in writing. The first almost invariably takes effect immediately, but the second and third only on the subsequent death of the donor. However, in the second case the death usually occurs shortly after the gift, whereas in the third case it may be much later, years or even decades later. Each of these kinds of gift responds to particular needs. And the requirements for each are subtly (and not so subtly) different.

INTER VIVOS GIFTS

56. At common law, an *inter vivos* gift is a bilateral (or multilateral) transaction whereby property in a thing is immediately and gratuitously vested by its owner in another or others. It is called *inter vivos* ("between living people") because it does not take effect on death. The donor must know the extent of the property to be transferred, and must intend to make the gift. In addition, the donee must accept the gift. However, the donee is *presumed* to accept it unless, upon learning of the gift, the recipient repudiates it. Next, the property in the thing the subject of the gift must be validly transferred to the donee. The formalities for this will vary with the nature of the property: see *Scott v Bridge* [2020] EWHC 3116 (Ch), [120]-[123], and cases there cited.

57. Chattels must be delivered to the donee, or a deed of gift executed. However, delivery of a key to a locked room where goods are stored may be sufficient to transfer possession of them, and thus pass property in the goods: *Hilton v Tucker* (1888) 39 Ch D 669; *Wrightson v McArthur and Hutchisons (1919) Ltd* [1921] 2 KB 807. A gift can be made subject to a power of revocation (*TMSF v Merrill Lynch Bank & Trust Co Ltd* [2012] 1 WLR 1721, PC), or on condition, whether precedent or subsequent (*Ellis v Chief Adjudication Officer* [1998] 1 FLR 184, CA). In the case of a gift on condition precedent, property will generally not pass until the condition is fulfilled.

58. At common law, the degree of capacity required by a donor to make an *inter vivos* gift will vary with the circumstances of the transaction. A gift that is trivial

by comparison with the donor's estate requires only a low degree of understanding. But a gift of most or all of a donor's estate requires the same level of understanding as a will: see *Re Beaney* [1978] 1 WLR 770, 774 E-F. I am not aware of any authority addressing the question how far the common law test for *inter vivos* gifts may have been affected by the terms of the Mental Capacity Act 2005. This provides *inter alia* that (i) for the purposes of the Act, a person must be assumed to have capacity unless it is established that he lacks it (s 1(2)); (ii) a person lacks capacity in relation to a matter if he is unable to make a decision about it because of impairment or disturbance of the mind or brain (s 2(1)); (iii) the donee of a lasting power of attorney has limited power to make gifts of the donor's property (s 12); and (iv) the court has power to make a decision for a person who lacks capacity to make a gift (ss 16, 18(1)(b)). However, the point was not argued before me and, in the circumstances of this case, I do not think that it makes any difference which test is applied, and therefore I need not express a view.

WILLS

59. Testamentary gifts are those made by will. Until 1837 wills of personalty could be made orally (so-called "nuncupative" wills), though since the Statute of Frauds 1677 only before three witnesses. Since 1677 wills of land had to be made in writing, with three or four witnesses. Nowadays, the conditions for the validity of a will in English law are set out in section 9 of the Wills Act 1837, as amended. In brief summary, and subject to minor exceptions, a will, whether of realty or personalty, must be made in writing and signed by the testator intending to give effect to it, and the signature attested by two witnesses present at the same time. There was no dispute before me about those conditions. One aspect of them was temporarily relaxed during the Covid pandemic, by the Wills Act 1837 (Electronic Communications) (Amendment) Order 2020/952, as extended by the Wills Act 1837 (Electronic Communications) (Amendment) Order 2022/18, so as to permit witness attestation by video conferencing. However, no advantage was taken of that possibility in the present case.

60. The claimant accepted that the intended new will of Mr Al Mahmood had not been presented to him, let alone executed in accordance with the 1837 Act. Although Mr Al Mahmood crossed out provisions of his existing will during the meeting with Mr Amponsah, there was no argument before me about revocation, presumably because the relevant rules on revocation had not been complied with: see the Wills Act 1837, ss 20, 21. Accordingly, the claimant did not challenge the validity of the existing 2015 will of Mr Mahmood. Consequently, to the extent that assets remained in his estate at his death and were not subject to either a valid *inter vivos* gift or a *donatio mortis causa*, the 2015 will would apply to them.

61. Given what I have said about the question of capacity to make an *inter vivos* gift, I should add this in relation to capacity to make a will. The common law test for capacity to make a will is that expressed by Cockburn CJ in the well-known decision in *Banks v Goodfellow* (1870) LR 5 QB 549, 565:

> "It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the

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

62. Again, the question has arisen as to whether and if so how far the terms of the Mental Capacity Act 2005 have affected that common law test. A number of recent authorities have held that, although the 2005 Act contains power for the court to make a will for a person who lacks capacity to do so, it has not affected the common law test for capacity to make a will, as laid down in *Banks v Goodfellow* (1870) LR 5 QB 549, 565. Thus, in *Re Clitheroe, deceased* [2021] WTLR 449, Falk J (as she then was) said:

> "79 … Parliament did not intend to alter the common law in respect of testamentary capacity, other than in providing a regime to allow statutory wills to be made on behalf of an individual who is demonstrated to lack capacity."

And, in the most recent decision of the Court of Appeal on the point, that court was content to proceed on that basis, without hearing argument or deciding the point: see *Hughes v Pritchard* [2022] Ch 339, [62].

DONATIO MORTIS CAUSA

Background

63. *Donatio mortis causa* is a Latin phrase meaning "gift in contemplation of death". It describes a doctrine of the Roman law whereby such a gift, whether made "generally or with a view to a particular contingency such as an existing serious illness or on the eve of battle, became absolute only upon the event of the diagnosed death and thus was inherently revocable, being automatically revoked by the prior death of the donee or the insolvency of the donor": Thomas, *Textbook of Roman Law*, 1976, Ch XIV, 193-194. It appears that, in Roman law, the condition could be suspensive (so that no property passed until death) or resolutive (so that property passed immediately, but subject to a condition for return): *ibid*.; Buckland (ed Stein), *A Textbook of Roman Law*, 3rd ed 1963, CUP, 257.

64. In *King v Dubrey* [2016] Ch 221, Jackson LJ (with whom Patten and Sales LJJ agreed), observed that the doctrine

> "37. … made its first appearance in English law in Bracton's *De Legibus Et Consuetudinibus Angliae* … "

And that he

> "53. … must confess to some mystification as to why the common law has adopted the doctrine … at all. The doctrine obviously served a useful

> purpose in the social conditions prevailing under the later Roman Empire. But it serves little useful purpose today, save possibly as a means of validating deathbed gifts."

65. In fact, as scholars have shown, Bracton's work on "the laws and customs of England" was an updating by Henry de Bracton (or Bratton), a cleric and jurist, in the years to 1260, of a treatise written earlier in the century by William of Raleigh, an English judge and (later) bishop. It relied heavily on Roman law. Indeed, scholarship has shown that the treatment of the *donatio mortis causa* in the treatise was simply lifted verbatim from sections of Justinian's *Digest* and *Institutes*, and put together in a form which pleased the author: see Woodbine, *The Roman Element in Bracton's de Adquirendo Rerum Dominio*, (1922) 31 Yale LJ 827, 837-38. On this topic at least, medieval English lawyers looking for their own law in Bracton would (unconsciously) be adopting that of Rome.

66. Despite Jackson LJ's "mystification", this resort to Roman law was not unusual in Europe at that time. The study of Roman law had been revived by the discovery of a complete copy of the Digest in Amalfi in 1135, and knowledge of it was diffused throughout the western world thereafter, particularly via the nascent universities. Where jurists could find no local law on a point, Roman law was looked at, and often pressed into service to fill in the gaps. In England, this was unlikely in relation to land law, where the feudal system already provided the structure and most of the answers.

67. But in relation to a few areas of law, such as the law of wills and probate, which were within the jurisdiction of the ecclesiastical courts, dominated by clerics learned in the civil law, it was otherwise. The jurisdiction of the ecclesiastical courts in matters of probate lasted until the establishment of the Court of Probate in 1857. As it happens, however, jurisdiction in relation to the validity of a donatio mortis causa fell outside the ecclesiastical courts' jurisdiction (except, apparently, in the Isle of Man: *Cosnahan v Grice* (1862) 15 Moo PC 215. 223), because it was not a probate matter. The donee took *against* the estate, rather than *under* it. That meant that occasionally the ordinary civil courts would have to send an issue in a case of donatio mortis causa to the ecclesiastical courts for their opinion: see *eg Hurst v Beach* (1820) 5 Madd 351.

68. Later English judges, such as Lord Hardwicke LC in *Ward v Turner* (1752) 2 Ves Sen 431, 439-42, were well aware of the Roman origins of the doctrine of *donatio mortis causa*, and took care to set out the by-then perceived differences between the original Roman law itself and that part which had been received by English law. An even more elaborate and scholarly opinion was given by Lord Loughborough LC (later the Earl of Rosslyn) in *Tate v Hilbert* (1793) 2 Ves Sen 111. This opinion even took the trouble to point out inconsistencies both in the part of the Digest dealing with *donationes mortis causa*, and also in Henry Swinburne's famous treatise on wills. (But then Lord Loughborough had been born and educated in Edinburgh, where his father was a judge, and indeed had originally trained as a Scottish advocate, before coming to the English bar.)

69. The doctrine was known in Scots law (no doubt because of the civilian influence). The first reference to it in a Scots case which I have found was in 1624: *Lord Curriehill v Currie*, Mor 3591. However, the earliest English

judicial decisions on the subject of which I am aware date from the early eighteenth century. The first appears to be *Hedges v Hedges* (1708) Prec Ch 269, a decision of Lord Cowper LC. There the Lord Chancellor said (269-70) that the doctrine was:

> "where a man lies in extremity, or being surprized with sickness, and not having an opportunity of making his will; but lest he should die before he could make it, he gives with his own hands his goods to his friends about him: this, if he dies, shall operate as a legacy: but if he recovers, then does the property thereof revert to him".

The modern formulation

70. This formulation of the doctrine has been criticised, and indeed overtaken by later decisions. A more modern formulation is that of Buckley J in *Re Beaumont* [1902] 1 Ch 889, 892:

> "A donatio mortis causa is a singular form of gift. It may be said to be of an amphibious nature, being a gift which is neither entirely inter vivos nor testamentary. It is an act inter vivos by which the donee is to have the absolute title to the subject of the gift not at once but if the donor dies. If the donor dies the title becomes absolute not under but as against his executor. In order to make the gift valid it must be made so as to take complete effect on the donor's death. The court must find that the donor intended it to be absolute if he died, but he need not actually say so."

71. On this formulation, it is a gift made in contemplation of death subject to a condition precedent, that is, that the donor dies. On death the condition is fulfilled and the property passes to the donee at that moment, without need of any assent or other formality: *Duffield v Elwes* (1827) 1 Bli NS 497, 530; *Edwards v Jones* (1836) 1 My& Cr 226, 235. Until that moment the gift is revocable: *Hedges v Hedges* (1708) Prec Ch 269, *Jones v Selby* (1709) Prec Ch 300, 303, *Bunn v Markham* (1816) 7 Taunt 224. 232, *Re Korvine's Trusts* [1921] 1 Ch 343, 348, *Sen v Headley* [1991] Ch 425, 431H, *King v Dubrey* [2016] Ch 221, [50]. A similar statement to that in *Re Beaumont* was made by Farwell J in *Re Craven's Estate* [1937] Ch 423, 426, although in fact there the transfer of the property appears to have been complete before the death, so that the condition would have been a condition *subsequent*: see at 429. In such a case, until death the donee would hold the property on trust for the donor: *cf Staniland v Willott* (1850) 3 Mac & G 664. Both *Beaumont* and *Craven* were cited with seeming approval by the Court of Appeal in *King v Dubrey* [2016] Ch 221, one of two recent decisions of the Court of Appeal on the subject.

72. In *Moore v Darton* (1851) 4 De G & Sm 517, Knight Bruce V-C held that the doctrine had not been abolished by the Wills Act 1837. Despite that, a donatio mortis causa is not an *inter vivos* gift, divorced from the inheritance. Because it is in the nature of a legacy, taking effect from death, it therefore is subject to the deceased's debts for the purposes of administration: *Smith v Casen* (1718) 1 P Wms 406n; *Tate v Hilbert* (1793) 2 Ves Sen 111, 120; *Re Korvine's Trust* [1921] 1 Ch 343, 348. It will also lapse if the donee dies first: *Tate v Hilbert* (1793) 2 Ves Sen 111; *Walter v Hodge* (1818) 2 Swanst 92.

73. The condition precedent upon which the gift is made (that the donor dies) is not by itself enough. The gift must also be made *in contemplation* of *impending* death, that is, in the near future, rather than some indefinite time in the future: *Cain v Moon* [1896] 2 QB 983, 986; *Re Craven's Estate* [1937] Ch 423, 426; *Delgoffe v Fader* [1939] 1 Ch 922, 927. The policy is that, where the donor does not contemplate impending death, he or she should make a will in the usual way: see *King v Dubrey* [2016] Ch 221, [56]. Similarly, if the gift is made in contemplation of impending death, but the donor *recovers* from the dangerous situation which causes that contemplation, the gift is automatically revoked (*Woodard v Woodard* [1995] 3 All ER 980, 984, CA), and, if property has already passed to the donee, the donee holds it on trust for the donor: *Staniland v Willott* (1850) 3 Mac & G 664 . On the other hand, if the donor, *still being in contemplation of death* from one cause, *in fact* dies from another cause, the donatio mortis causa is valid: *Wilkes v Allington* [1931] 2 Ch 104, 110-11.

Capacity

74. The question of capacity to make a donatio mortis causa has not been the subject of much discussion in the cases. However, it has been held that a person who is "insane" cannot make a valid donatio mortis causa: *Re Dudman* [1926] 1 Ch 553, 555; see also *Staniland v Willott* (1850) 3 Mac & G 664. (There was no suggestion of "insanity" on the part of Mr Al-Mahmood, and what exactly "insane" means in today's more sophisticated mental health world must therefore be left to another case.) And, in *Re Korvine's Trust* [1921] 1 Ch 343, 348, it was held that, at least for choice of law purposes, the law governing a donatio mortis causa was that of *inter vivos* gifts rather than succession. That apart, those writers on the subject that consider the question of capacity treat it as similar to the question arising in relation to *inter vivos* gifts. There was no argument before me for a different test. If that is so, and for the purposes of the present case I shall so treat it, then the discussion earlier in this judgment about the possible impact of the Mental Capacity Act 2005 applies also in this context.

Formalities

Chattels

75. A more critical question for me is what formalities are involved in such a gift. The authorities relating to gifts of chattels establish the need for a delivery by the donor to the donee of the thing being given. Nearly all the earlier cases referred expressly to *delivery*: see *Ashton v Dawson* (1725) Sel Cas t King 14; *Miller v Miller* (1735) 3 P Wms 356, 358; *Hardy v Baker* (1738) West t Hard 519; *Ward v Turner* (1752) 2 Ves Sen 431; *Tate v Hilbert* (1793) 2 Ves Sen 111; *Duffield v Elwes* (1827) 1 Bli NS 497. In *Hedges v Hedges* (1708) Prec Ch 269 the phrase "gives with his own hands his goods" was used, and *Drury v Smith* (1717) 1 P Wms 404, 405, referred to "transmutation of possession. But these are synonyms of delivery. Indeed, the chattel concerned may have already been handed over to the donee by the donor on an earlier occasion and for a different reason: *Cain v Moon* [1896] 2 QB 283; *Woodard v Woodard* [1995] 3 All ER 980, 984, CA. It does not matter if the property is handed back to the donor for safekeeping in the meantime: *Re Hawkins* [1924] 2 Ch 47. In *Wilkes v Allington* [1931] 2 Ch 104, 109, a case about a donatio mortis causa of

mortgages, where the deeds were handed over, Lord Tomlin simply said that there must have been delivery to the donee of the subject matter of the gift, which succeeded.

76. Judges over the years have sometimes made the point that allowing a donatio mortis causa to be established without the formal and legal safeguards involved in making a written will risks fraud and worse. Here is Lord Chelmsford in the Privy Council case of *Cosnahan v Grice* (1862) 15 Moo PC 215, 223:

> "Cases of this kind demand the strictest scrutiny. So many opportunities, and such strong temptations, present themselves to unscrupulous persons to pretend these deathbed donations, that there is always danger of having an entirely fabricated case set up. And, without any imputation of fraudulent contrivance, it is so easy to mistake the meaning of persons languishing in a mortal illness, and, by a slight change of words, to convert their expressions of intended benefit into an actual gift of property, that no case of this description ought to prevail, unless it is supported by evidence of the clearest and most unequivocal character."

Similar statements may be found in other cases, such as *Staniland v Willott* (1852) 3 Mac & G 664, 669-70 (Lord Truro), and *King v Dubrey* [2016] Ch 221, [51], [64], [90].

77. The problem is that the formal and legal safeguards involved in making a written will, although needed for those particular transactions, are *not* engaged in many categories of transactions which effectively deal with the devolution of a person's property on death. Constructive trust cases and proprietary estoppel cases (which may just be a subset of the former) are obvious examples. So too are life assurance policies, tontine contracts, and joint tenancies (of realty or personalty). Less obvious, perhaps, are the disappointed beneficiary cases against negligent solicitors, where the deceased's testamentary wishes are proved, *ex hypothesi* not by a properly executed will, but by all manner of other evidence, not in writing, and even uncorroborated.

78. Indeed, even in relation to a donatio mortis causa, as Cotton LJ said in *Re Dillon* (1890) 44 Ch D 76, 80-81,

> "It was urged that [the donee's] evidence was not corroborated, and that the Court will not establish a claim against the estate of a deceased person on the evidence of the claimant alone unless it is corroborated. I do not think that this proposition is now law. Where a claimant's case depends entirely on his own evidence the Judge ought to sift that evidence very carefully; but if the claimant gives evidence which is not shewn to be inaccurate in any material point, and which satisfies the Judge of its truthfulness, he ought, I think, to act upon it though it be not corroborated."

79. Even so, there are some formalities required for a valid donatio mortis causa, just as there are for a contract, or a trust, or other legal transactions, and, if in issue, these will be tried in the usual way. Thus, in *Re Wasserberg* [1915] 1 Ch 195, a husband who was about to undergo a surgical operation owned bearer bonds which he kept at his bank. He wished his wife to have them in case of his

death. He visited the bank, and, in the presence of his wife, he put the bonds into an envelope on which he wrote his wife's name, and replaced the envelope in his deposit box. He left the locked box at the bank but took away the key. He gave the key and a list of the bonds to his wife, which she locked in her own drawer. Sargant J held that there was no sufficient delivery of the bonds to the wife which would have passed property in an *inter vivos* gift. But he held that that was not fatal, and that in the instant case the donatio mortis causa was valid.

80. The judge said (at 203-04):

> "When it is once admitted that any property is a possible subject-matter for a donatio mortis causa—and in fact chattels of all kinds are much more obviously and readily within this category than choses in action—I can see no more reason for declining to give effect to an incomplete or inchoate gift in the case of the one class of property than in the case of the other. The requirement that there should be some act towards gift or transfer avoids equally in both classes of property the dangers of attaching to mere nuncupative legacies which were guarded against by the Statute of Frauds, the predecessor in this respect of the Wills Act, 1837; and there is no reason in the nature of things why chattels as well as choses in action should not be in such a position that there should be some physical thing the possession of which should be required in order to get at the property and the transfer of which should accordingly amount to a transfer of the means or part of the means of getting at the property."

81. The point is that, once you accept the very idea of a donatio mortis causa, a gift made in life to take effect on death, and once you accept that, in principle, it applies to chattels, choses in action and land (as the cases now establish) it is impossible to object to it in a particular case by saying that it avoids the requirements of the Wills Act 1837, or lends itself to the defrauding of heirs. Of course it does, but the objection proves too much. The safeguard is the ability of the trial judge to discern who is telling the truth, an everyday exercise for judges in our system.

82. Going beyond mere transfer of possession, in *Hawkins v Blewitt* (1798) 2 Esp 663, Lord Kenyon CJ not only referred to parting with possession, but also said that the deceased must "part with dominion" of the thing given. Similar references are found to retaining dominion in *Reddel v Dobree* (1839) 10 Sim 244 and *Re Johnson* (1905) 92 LT 357. In modern times, Farwell J in *Re Craven's Estate* [1937] Ch 423, 426, and the Court of Appeal in *Birch v Treasury Solicitor* [1951] Ch 298, used the same phrase, that the donor "must part with dominion over" the subject matter of the gift. The question is what exactly that means.

83. In *Vallee v Birchwood* [2014] Ch 271, [42], the deputy judge called the concept of dominion "a slippery one", and, in *King v Dubrey* [2016] Ch 221, [59], Jackson LJ agreed with him. In fact, in that case Jackson LJ actually conflated the two concepts of delivery and dominion, by saying (emphasis supplied) that

> "59 … D [*ie* the donor] should *deliver 'dominion'* over the subject matter. Since property will not pass until a future date (if ever) and D has the right

> to recover the property whenever he chooses, it is not easy to understand what 'dominion' actually means. I take comfort from the fact that even chancery lawyers find the concept difficult. Buckley J in *In re Beaumont* [1902] 1 Ch 889 said that it was 'amphibious'. The deputy judge in *Vallee v Birchwood* [2014] Ch 271 said that the concept was 'slippery'. I agree. From a review of the cases I conclude that 'dominion' means physical possession of (a) the subject matter or (b) some means of accessing the subject matter (such as the key to a box) or (c) documents evidencing entitlement to possession of the subject matter."

I will come back to the last sentence of this paragraph a little later in this judgment.

84. The first three of the "dominion" cases (*Hawkins v Blewitt*, *Reddel v Dobree*, and *Re Johnson*) are all "locked box" cases, where the putative donor gave possession to the putative donee of a locked box, but either the key was retained by the putative donor, or it was given but to be held to the putative donor's order. In each case the claim to a donatio mortis causa of the contents of the box (cash or securities) failed, because although possession of *the box* was given the putative donor retained control ("dominion") of *the contents* through the key. In these cases, the opposition between physical possession of the box and dominion over the contents is clear. On the other hand, *Jones v Selby* (1709) Prec Ch 300, *Re Taylor* (1887) 56 LJ Rep 597, *Re Mustapha* [1891] WN 201, 8 Times LR 160; *Re Wasserberg* [1915] 1 Ch 195, and *Re Lillingston* [1952] 2 All ER 184, are all cases of the converse situation, where the donor gave the key of a deposit or cash box (or to a piece of furniture where the key to such a box was to be found) to the donee, but the box itself remained with the donor or an agent of the donor. In *Jones v Selby* the claim to a donatio mortis causa failed on the facts (for two independent reasons: first, the plaintiff had not proved that the contents claimed were in the trunk at the time of the gift at all, but, second, there was a subsequent will which satisfied the gift: *cf Hudson v Spencer* [1910] 2 Ch 285, 289). However, in the other cases it was held that there was a good donatio mortis causa of the contents. Only in *Wasserberg* was any mention made of "dominion", and even then it was only partial.

Choses in action

85. **General:** The concepts of delivery and of transferring possession are particularly apposite for chattels, the property of which can be changed by such delivery or transfer, if accompanied by the intention to pass the property. But even from an early date there were cases of attempted donatio mortis causa involving choses in action rather than chattels. Yet choses in action, not being things in possession, do not pass by delivery. (Indeed, until the coming into force of the Judicature Act 1873, s 25(6), most choses in action could not be transferred *at law* at all; see now the Law of Property Act 1925, s 136.) The first reported case of a donatio mortis causa of a chose in action appears to be *Jones v Selby* (1709) Prec Ch 300. Another was *Snelgrave v Bayly* (or *Baily*) (1744) Ridg t H 202, 3 Atk 213. In the former the claim failed on the facts and no particular consideration was given to the question of the nature of the property purportedly given. In the latter, Lord Hardwicke LC held that, since an equitable interest in chattels could be the subject of a donatio mortis causa, and the chose

in action represented by a bond under seal could be assigned in equity, so it could be the subject of a donatio mortis causa, so long as *the bond itself* was physically delivered to the donee. He referred to the decision in *Jones v Selby*, which he said did not contradict his view.

86. In *Ward v Turner* (1752) 2 Ves 431, Lord Hardwicke LC went into the subject of a donatio mortis causa of a chose in action in more detail. He examined several civil law texts, and considered (at 441) that

> "the civil law has been received in England in respect of such donations only so far as attended with delivery, or what the civil law calls *traditio* …"

In that case, he held that delivery to the putative donee merely of receipts for the purchase money of three annuities was no sufficient delivery for a valid donatio mortis causa of the annuities themselves. He accepted (at 443) that delivery of a symbol such as a key to a trunk containing chattels could create a valid donatio mortis causa of the chattels because

> "delivery of the key of bulky goods … has been allowed as delivery of the possession, because it is the way of coming at the possession, or to make use of the thing."

However, receipts for the purchase price of stock or annuities were of no value after receiving the property: they were

> "no evidence of the thing or part of the title to it".

87. The idea of *the title* to the property was picked up by later judges. In *Duffield v Elwes* (1827) 1 Bli NS 497, Lord Eldon said (at 537) that Lord Hardwicke LC in *Ward v Turner* had been of opinion that "where *no document of the title* has been delivered there can be no transfer of the property" (emphasis supplied). In *Re Dillon* (1890) 44 Ch D 76, the donor had a banker's deposit note for £580, which bore a form of cheque indorsed on it. In his last illness he filled out the cheque form on the reverse "pay self or bearer" and signed it, and gave the note to his sister in law then present, conditionally on his not recovering from his illness. The donor died four days later. Cotton LJ said (at 82):

> "The case of *Moore v Darton* [(1851) 4 De G & Sm 517] is very instructive as to the class of instruments which are subjects of donatio mortis causa. There a document was executed when a deposit of money was made. The mere fact of the deposit would create a debt; but the document, beside acknowledging the receipt of the money, expressed the terms on which it was held, and shewed what the contract between the parties was. It was held that the delivery of that document was a good donatio mortis causa of the money deposited, and so, in my opinion, was the delivery of the deposit note in the present case. The delivery gives no legal title to the donee, nor did the delivery of the security in *Duffield v Elwes*; but the House of Lords there laid it down that the executors were trustees for the donee and must do what was necessary to perfect the transfer."

Lindley and Lopes LJJ gave concurring judgments. The cheque form on the reverse was irrelevant. It was the delivery of the deposit note which mattered.

88. By contrast, *Re Beaumont* [1902] 1 Ch 889 was the case of a man signing and giving his *own* cheque to a recipient, but dying before the cheque was paid. The account was in overdraft, so there were no funds capable of being assigned. Buckley J examined cases dealing with promissory notes, bills of exchange and cheques payable to the donor. He referred (at 894-95) to the question of the donor's having "handed over either property, or *the indicia of title to* property" (emphasis supplied). He concluded (at 896-97) that drawing the cheque and handing it to the donee "did not amount to such a traditio as was required in order to give the donee a right" on the death of the donor to the sum indicated, even if the account had been in credit.

89. On the other hand, in *Gardner v Parker* (1818) 3 Madd 184, and in *Re Mustapha* [1891] WN 201, 8 Times LR 160, the deceased handed over possession of bonds to the donee (in the latter case by handing over a key giving access to them), and it was held in each case that there was a good donatio mortis causa. Plainly, the bonds themselves were documents or indicia of title, even though the right to sue on them was not thereby transferred at law from the donor to the donees. There were good gifts of the bonds in equity, and the donees could if necessary sue the obligees in the names of the donor's personal representatives.

90. **Bank and other accounts:** Some choses in action consist of running accounts with banks or similar institutions. Here there is no single piece of paper like banknotes or a bond, possession of which can be handed over as a chattel. An example of this kind of donatio mortis causa was *Re Weston* [1902] 1 Ch 680. There, the donor was ill in hospital. He gave the donee (to whom he was engaged to be married) the key to a drawer at his home, and told her to take some building society shares and his Post Office Savings Bank book that were in the drawer (together worth £330), which he wished her to have in case of his death, save for the sum of £100 which was to go to his uncle. The donee used the key to obtain possession of the shares and passbook, and brought them all back to the donor in hospital. The donor told her to keep them, which she did. On other occasions when the donee visited the donor in hospital, he told her that, with the exception of the £100 for the uncle, everything was for her. A few weeks later he died in hospital, and letters of administration were granted to the uncle, who brought the proceedings for the court's decision as to the validity of the donatio mortis causa.

91. Byrne J distinguished between the two kinds of chose in action, the building society shares and the Post Office savings account. First he held that the shares could not the subject of a valid donatio mortis causa at all, as it was indistinguishable from railway stock, which had been so held in *Moore v Moore* (1874) LR 18 Eq 474. (I will return to gifts of shares.) Secondly, he held that the Post Office savings account could be the subject of a valid donatio mortis causa. He said (at 685):

> " … the test appears to be whether or not the document, besides acknowledging the receipt of the money, expresses the terms on which it is held, and shews what the contract between the parties is. … An examination

> of the savings bank book in the present case appears to me to shew a fulfilment of the test; and although every rule regulating the contract is not set out in the book itself, all the essential rules are. The book is not a mere receipt."

92. In *Delgoffe v Fader* [1939] 1 Ch 922, the donor whilst seriously ill at the house of a friend asked her friend to visit the donor's house and bring her back a handbag. The donor checked its contents and asked for it to be placed in a wardrobe in the room. She told her friend that, if the donor died, the friend was to have it and its contents. The donor died a few days later, when the bag was found to contain money, jewellery and a bank deposit book Luxmoore LJ held that there had been a valid donatio mortis causa of the money and jewellery, but not of the deposit book. The judge said (at 928):

> "Of course, in the case of a chose in action, physical delivery is impossible, but it has been held that in such cases the delivery of a document essential to its recovery may be sufficient. The test whether the delivery of the document constitutes a good donatio mortis causa of a chose in action depends on the answer to the question whether the document expresses the terms on which the subject-matter of the chose in action is held by the donor or the terms under which the chose in action came into existence."

93. The evidence showed that the deposit book did not need to be produced to the bank on paying in or drawing out, and that it contained none of the terms of the contract between the parties, save that requiring seven days' notice of withdrawal. The judge concluded (at 932) that

> "I see no difference between this deposit book and the ordinary pass-book of a current account. That being so, I must hold that, at any rate so far as the deposit book is concerned, it is not the subject-matter of a valid donatio mortis causa."

94. In more recent times, the notion of "parting with dominion over" the property from the locked box cases has been applied to at least some of the chose in action cases. Thus, in *Re Craven's Estate* [1937] Ch 423, there was no locked box at all. A mother had an account with a bank in Monaco, which was in credit, and the bank also held certain securities on her behalf. She had given her son a power of attorney to operate this account. Fearing that she might not survive a forthcoming surgical operation, she directed her son to get the securities and bank balance into his own name, as she wanted him to have them in the event of her death. He gave the relevant instructions to the bank, which complied with them. His mother indeed died following the operation. The question was whether this amounted to a valid donatio mortis causa.

95. Farwell J referred to the decision of his late father, then also called Farwell J (but later Farwell LJ), in *Re Johnson*. This was a "locked box" case, where that judge referred to the need for the donor to have "parted with dominion" of the subject of the gift. Indeed, it was the only decision referred to in the judgment. It was not however mentioned in the summary of the arguments of counsel, although the decision in *Cain v Moon* was. Farwell J (*fils*) said (at 427):

> "I have considered what was the reason for imposing as a condition of a valid donatio that the donor must part with dominion over the subject-matter thereof and the answer seems to me to be that the subject-matter of the donatio must be some definite property, and, to ensure that, the donor must put it out of his power between the date of the donation and the date of the death to alter the subject-matter of the gift and substitute other chattels or property for it. Otherwise, so long as the subject-matter of the gift remained in the dominion of the donor, the donor might at any time between the donatio and the gift deal with it as he or she pleased."

96. Subsequently, he alluded to the possibility that the donor might hand over one key to a box, whilst retaining another. He said (at 428):

> "I know of no decided case in which the question has arisen whether the handing over of a box and one key, it being proved that there was another key retained by the donor, would be sufficient, but in the absence of authority, in my judgment, it would probably be held not to be sufficient parting with dominion because the donor would have retained dominion over the box and the contents of the box by retaining the power to open it although it might be in the possession of the donee. However that may be, it seems to me that there must be such a parting with the dominion over the chattels or the property as to prevent the subject-matter of the donatio being dealt with by the donor in the interval between the donatio and either the death or the return of the articles by the donee to the donor."

97. The judge then addressed the facts of the present case, where there was no locked box, but there was a power of attorney. He said this (also at 428):

> "Having regard to those principles I must consider what is the effect of the giving of the power of attorney in this case. The position of the donee of a power of attorney is merely to act as agent for the principal and there is nothing to prevent the principal dealing with the property notwithstanding it, and in my judgment the mere giving of a power of attorney to the donee is not such a parting with dominion as is required to constitute a valid donatio mortis causa."

98. However, that was not the end of the story. Here the son, acting as attorney for his mother, and at her direction, had obtained a transfer to himself of the credit balance and an attornment to himself of the securities. That made all the difference. The judge concluded (at 429)

> " … in my judgment by procuring the transfer of the property into her son's name the testatrix did what was necessary in order to part with dominion. Accordingly in my judgment, if this question is a question which has to be decided according to English law, the necessary conditions for a valid donatio mortis causa have been fulfilled and the defendant is now entitled beneficially to this property and it did not form part of the estate of the testatrix at her death."

99. So the donee son succeeded in his claim to a donatio mortis causa by virtue of the donor's having transferred to him the property in the assets the subject of

the gift before her death. The gift was not one on condition *precedent*, passing the property only in the event of death. Instead it was one on condition *subsequent*, so that if the donor had recovered she could have sought a retransfer to herself if she had wished (*cf Staniland v Willott* (1850) 3 Mac & G 664). In my judgment, reference to "parting with dominion", as in the locked box cases, was unnecessary for the decision. The fact that the subjects of the gift were choses in action, rather than choses in possession, was therefore rendered irrelevant.

100. I mentioned above that Farwell J referred to the possibility that the donor might hand over one key to a box, whilst retaining another. In that connection, I note that in *Woodard v Woodard* [1995] 3 All ER 980, 984, CA (a case concerning an alleged donatio mortis causa of a motor car) Dillon LJ, with whom Nicholls LJ and Sir John Megaw agreed, said:

> "It seems to me that the question is perhaps not so much one of dominion as of evidence of intention. If there are several keys to a box and the donor retains one, one would naturally ask 'Why is he retaining it?' and 'Did he intend to make an immediate gift? Did he intend to part with dominion?' Where one is concerned with a motor car, however, and a man who is in hospital suffering from a very grave illness makes a donatio mortis causa, intending to give the car to his son who already has the use and possession of the car and one set of keys, subject to the condition inherent in such a donatio that the gift is revocable during the donor's lifetime and will become effective only if he does not recover from the illness from which he is then suffering, it would seem to me to be wholly unreal to conclude that the son has not been given dominion of the car because the donor has at home a second set of keys, or may have at home a second set of keys, which he could not anyhow use unless circumstances arose in the way of his recovery which would anyhow operate to revoke the gift."

101. A case which is more important for a donatio mortis causa of "running account" choses in action is that of the Court of Appeal in *Birch v Treasury Solicitor* [1951] Ch 298. In that case, the donor had been taken to hospital following an accident. The plaintiffs, the first of whom was her late husband's nephew, and his wife (the second plaintiff), were her best friends. They visited her in hospital on a number of occasions. On one occasion, she asked them to find certain savings deposit passbooks at her home, and keep them safe, as they were to have the money in the accounts in the event of her death. The second plaintiff did as she asked. On further visits she reminded them that the money was for them, and the first plaintiff confirmed that they had the passbooks. The four passbooks with which the litigation was concerned were: one for the Post Office Savings Bank, one for the Trustee Savings Bank, and two others for ordinary joint stock banks. After the donor's death, the Treasury Solicitor obtained letters of administration *ad colligenda bona* to her estate, and the plaintiffs brought the present claim on the basis of a valid donatio mortis causa of the credit balances in the accounts.

102. Sir Raymond Evershed MR, delivering the judgment of the court (consisting of himself, Asquith and Jenkins LJJ), said that the evidence established that the acts of the donor showed that any valid gifts were made in contemplation of

death, to take effect conditionally on death. But there were three further questions to decide: (1) In view of the fact that only the second plaintiff had been told to and had collected the passbooks, were there sufficient acts of delivery of the subject matter of the gifts to *both* plaintiffs? (2) Did the donor's subsequent acts amount to the "assertion and exercise of continued dominion" over the subject matter after the acts of gift? And (3) were the documents handed over sufficient "indicia of title" to make a donatio mortis causa of choses in action?

103. Although all the outstanding questions were important from the point of view of the parties to that case, the least important question from my point of view now is the first. The passbooks had been collected by the second plaintiff, but were now held by both. The court held that the pre-existing context and the subsequent interviews made clear that, although the delivery was originally to the second plaintiff alone, the holding by her was for both of them. There was accordingly a sufficient delivery to *both* plaintiffs. It is a question of fact which does not arise here, where the claimant claims to be the sole donee of the property concerned.

104. The second question was whether, assuming otherwise a valid donatio mortis causa, the disposition was vitiated on the ground that the donor, though she parted with possession, "did not part with *dominion* over the subject-matter of the gift". As the court put it (at 304), "For this she must do, or there is no donatio." The defendant (the Treasury Solicitor) had cited the decision in *Reddel v Dobree*, one of the locked box cases, which referred to the parting with or retaining "dominion" test. The acts relied on by the defendant to show that the donor had not parted with dominion were that, after the acts said to amount to gifts to the plaintiffs, she had asked them to arrange to pay a builder's bill for work done for her out of the savings balances being given to them, and the plaintiffs arranged for this to happen. But the court held that the donor had not retained "dominion" of the credit balances. She had made no antecedent reservation of the right to call upon the plaintiffs to pay sums out at her direction, and her request to them to do so was precatory rather than peremptory. At worst it might amount to a revocation *pro tanto* of the gifts made.

105. Thirdly, there was the question of the sufficiency of the "indicia of title" for the choses in action intended to be given. The judge below had held that the debt shown in the Post Office passbook was the subject of a valid donatio mortis causa by virtue of the decision in *Re Weston*, referred to above, and the defendant had not challenged this. The argument was accordingly about the other three bank balances, that is, one with the Trustee Savings Bank, and two with ordinary joint stock banks. The court held that the law on this point rested on the judgment of Lord Hardwicke LC in *Ward v Turner*. The court would reject any attempt to make a nuncupative or otherwise informal will. As a result, a donatio mortis causa of a chose in action could take place only if there was a transfer or (in the words of Lord Hardwicke) "something amounting to that".

106. Thus, said the court in *Birch* (at 308),

> "As a matter of principle the indicia of title, as distinct from mere evidence of title, the document or thing the possession or production of which entitles

> the possessor to the money or property purported to be given, should satisfy Lord Hardwicke's condition. On this ground, in our judgment, the validity of a donation of money standing to the donor's credit in a Post Office Savings Bank deposit, or a mortgage debt, should be sustained; and it appears to us irrelevant in such cases whether all the terms of the contract out of which a chose in action arises are stated in the document of title."

107. In making the final point (no need to state all the terms), the court said that it did not consider that Cotton LJ in *Re Dillon* had laid down a contrary principle, but that in any event Lindley and Lopes LJJ had not done so. Accordingly (at 311), both

> "Byrne J, in *In re Weston* … and Luxmoore, LJ, in *Delgoffe* v. *Fader* … went further than was necessary in stating that a record of all the essential terms of the contract in the document handed over was a condition or test of the validity of the donation. For reasons which we have attempted to give, we think that the real test is whether the instrument 'amounts to a transfer' as being the essential indicia or evidence of title, possession or production of which entitles the possessor to the money or property purported to be given."

108. On the facts of that case, the court was satisfied that each of the three passbooks in question stated as a term that it had to be produced in order to make a withdrawal, although the court noted that the evidence was that this was not invariably insisted upon, for example, when to do so would cause hardship. Accordingly in each case "the book was and is the essential indicia of title and … delivery of the book 'amounted to transfer' of the chose in action" (at 313), such that the claim to a donatio mortis causa succeeded.

109. **Company shares:** I referred above, in connection with *Re Weston*, to shares registered in the name of a particular shareholder (*ie*, not bearer shares). Under section 768(1) of the Companies Act 2006, the share certificate issued by the company is prima facie evidence of the shareholder's title to the shares. Such shares are transferable in the books of the company using a prescribed form of stock transfer: Companies Act 2006, s 770; Stock Transfer Act 1963. It is clear that, when such shares are transferred using due formality by donor to donee, a valid donatio mortis causa can be created: see *Staniland v Willott* (1850) 3 Mac & G 664; *Re Craven's Estate* [1937] Ch 423.

110. The position is less clear, at least in English law, when such shares have not yet been transferred at law, but documents relating to the donor's ownership of the shares have been handed over to the donee. In *Moore v Moore* (1874) LR 18 Eq 474 Hall V-C relied on *dicta* of Lord Hardwicke LC in *Ward v Turner* to hold that railway stock could not be the subject of a donatio mortis causa at all. In *Re Weston* [1902] 1 Ch 680 Byrne J followed that decision, in relation to shares in a building society. In *Re Andrews* [1902] 2 Ch 394, Kekewich J took the same view. But what Lord Hardwicke had held in *Ward v Turner* was that the handing over of *receipts for the purchase money* of stock was insufficient to constitute a donatio mortis causa, not that stock could never be the subject of a donatio mortis causa. Indeed, he said (at 444)

> "But it is said, if this is not allowed, it will be impossible to make a donatio mortis causa of stock or annuities, because in their nature they are not capable of actual delivery. I am of opinion, it cannot without a transfer, *or something amounting to that* … " (emphasis supplied).

111. To my mind, therefore, on the authorities there is no absolute bar to company shares being subject to a donatio mortis causa. Indeed, I consider that that position is confirmed by the width of the decision of the Court of Appeal in *Sen v Headley* [1991] Ch 425 (concerning land), which I will discuss later in this judgment. Instead, the real question is whether what is handed over is a sufficient "indicium of title" to satisfy the donatio mortis causa rules in respect of a chose in action. I note that it has been held in both Australia (*Dufficy v Mollica* [1968] 3 NSWLR 751, CA of NSW, and *Public Trustee v Bussell* (1993) 30 NSWLR 111, Cohen J)) and in Hong Kong (*Cheng Lap Kai v Secretary for Justice* [2013] HKCFI 184, Deputy Judge Chu) that company shares *can* be the subject of a donatio mortis causa, and also that share certificates *are* a sufficient *indicium* of title for the purpose. In fact, as I have said, in the present case Mr Al Mahmood did not have share certificates for the investments he had in quoted and unquoted companies. Instead he had an online account with Hargreaves Lansdown, and so held his shares in dematerialised form. The next section deals with this.

112. **Online accounts:** There is a final matter concerning choses in action which I should discuss. Many of the cases which I have discussed have dated from a time when bank and other accounts with financial institutions were conducted through the medium of, first of all, deposit notes and certificates, and later passbooks. These deposit notes and certificates, and passbooks, may have been kept in locked drawers, deposit boxes or at the customer's bank. That era has now almost completely gone. In the modern era, such accounts are conducted with the aid of computers, usually (though not invariably) accessed over the internet, usually from the account holder's own computer or other device. Entries denoting in payments and payments out are made in a computer file, and made visible by way of a computer screen. Regular statements may be printed and sent out to customers, but more often are imply left for customers to print out at home if they wish. Access to these computer accounts is generally by way of security devices such as tokens (*eg* cards with computer chips imprinted upon them) and passwords which customers are exhorted never to write down or give to other people, although many do.

113. In the present case, Mr Al Mahmood had a number of such accounts. The question arises how the law of donatio mortis causa as set out in the deposit notes and passbook era applies to the modern online account, with its tokens and passwords. In an article called "*Donationes Mortis Causa* in a dematerialised world", published in March 2013 in *The Conveyancer and Property Lawyer*, Dr Nicholas Roberts, who was then a Principal Teaching Fellow in the School of Law at the University of Reading, considered some of these issues. One was whether there was anything which fulfils the same function as the deposit notes and the passbook in relation to online accounts.

114. Dr Roberts said (at 123):

> "The obvious candidate for such in this year would be the password, and any other 'secure information' required to access an account. Could one argue that the donor could make a DMC of such an account by giving the beneficiary these pieces of information? The writer's immediate reaction is that these should not be treated as the indicia of a DMC: it would simply be too open for abuse. The donor might have given the putative beneficiary this information simply in order that the latter could, if necessary, effect a transaction that the former was physically unable to carry out. Such an instinctive reaction needs to be examined. There may be no more scope for abuse in treating the password, etc, as the indicia of title than there is in upholding the handing over of the passbook."

115. Dr Roberts went on to emphasise that the burden lay on the donee to prove the alleged donatio mortis causa, and referred to the statement of Cotton LJ that I have already quoted, at [78] above. Nevertheless, he concluded that passwords ought not be enough. Fundamentally, he considered the disclosure of the password to the donee as akin to *sharing the ability to access* an asset rather than to *handing over* the asset to the donee. So it might be the functional equivalent of a power of attorney, or of a revocable authority to pay (like a cheque). And yet, as we have seen, the Court of Appeal in *Woodard v Woodard* [1995] 3 All ER 980, 984, thought that, even if there were several keys to a car the subject of a donatio mortis causa, the question was, with what intention the particular key had been handed over to the donee. Was it to share access, or to give short-term authority to use, or was it to make a gift of the car? In my judgment, the same question can be asked in relation to a password, especially when (as I have observed) we are constantly exhorted *not* to share them with others.

116. Moreover, if you ask, how does a customer prove his or her title to give instructions to the bank or other financial institution, the answer is, by using the token or device and/or password. Even if you go into the bank branch, you will still be asked to identify yourself using a token and password. Paradoxically, nowadays, old-fashioned face recognition seems to be trusted only by computer systems. In *Birch v Treasury Solicitor*, the court referred (at 308) to the "thing the possession or production of which entitles the possessor to the money or property purported to be given". By virtue of the contract between the customer and the bank or other financial institution, that is exactly what the device/login and password constitute. I referred above (at [83]) to the statement of Jackson LJ in *King v Dubry*, decided after Dr Roberts' article was published, that

> "59. … From a review of the cases I conclude that 'dominion' means physical possession of (a) the subject matter or (b) some means of accessing the subject matter (such as the key to a box) or (c) documents evidencing entitlement to possession of the subject matter."

Just like a key, the device/login and password are a "means of accessing the subject matter" of the gift, and so for this purpose amount to "dominion".

Interests in land

117. **General:** I move now from choses in action to interests in land. In strict English law, no-one *owns* land but the King. This is a product of the feudal system of landholding, largely, but not entirely dismantled today (though, for a striking reminder of its pervasiveness, see the Land Registration Act 2002, s 79). What "landowners" in England own is not therefore *the land itself*, but instead *a bundle of rights* in relation to the use and enjoyment of the land. These bundles of rights are called estates, interests and charges, in accordance with the simplification scheme laid down in the Law of Property Act 1925, s 1. Unlike in the Roman law, where the concept of *dominium* implied the existence of a single person with all the rights in the thing, which we might call ownership (although there was eventually a limited number – *numerus clausus* – of subordinate real rights as well), in English law the feudal system meant that from the outset it was inevitable that several people would have rights in the same land at the same time. It is therefore a metaphysical, rather than a physical, system, and although the *land* itself is tangible, the bundles of rights are not, and raise similar problems for the donatio mortis causa as do choses in action.

118. Indeed, the formalities for the transfer *inter vivos* of such bundles of rights all in land are more onerous than in relation to choses in action, and. where legal rights are concerned, generally include a deed, as well as registration at HM Land Registry. But not all the existing estates, interests and charges in land are registered at present. Many are not. Some of them, currently unregistered, will however become *registrable* the next time they are dealt with. These unregistered-but-registrable bundles will generally have been in the same ownership since before compulsory registration was introduced for the area concerned. (Since December 1990 the compulsory registration area has covered the whole of England and Wales.) Frequently such bundles of rights belong to ecclesiastical corporations and charitable foundations, or they are ungranted lands of the Royal demesne, and it may be that many of them will not be dealt with in the foreseeable future, and will therefore continue unregistered.

119. **Security interests:** *Duffield v Elwes* (1827) 1 Bli NS 497 was a case concerning a successful donatio mortis causa of a debt secured by a legal mortgage of land, where the donor had delivered the mortgage deed to the donee. So it combined a chose in action (debt) with a security interest in land (mortgage). At that date, such a mortgage would have been constituted by conveying the fee simple estate itself to the mortgagee, albeit conditionally. In the House of Lords, reversing the decision below, the Earl of Eldon referred (at 541) to the decision of Lord Mansfield CJ in *Martin v Mowlin* (1760) 2 Burr. 979, where a testator by his will gave a debt secured by a mortgage of land in a will which would be effective as regards the bequest of a debt but arguably ineffective for the devise of an estate in land. One question was whether this gift was a bequest of personalty or a devise of realty. Lord Mansfield had given the judgment of the court, saying (at 978-79):

> "A mortgage is a charge upon the land; and whatever would give the money, will carry the estate in the land along with it, to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts: it will go to executors; it will pass by a will not made and executed with the solemnities required by the Statute of Frauds. The assignment of

> the debt or forgiving it, will draw the land after it, as a consequence: nay, it would do it, though the debt were forgiven only by parol, for the right to the land would follow notwithstanding the Statute of Frauds."

120. Lord Eldon criticised part of this statement as follows (at 541-42):

> "I ought to do it in a spirit of great humility, when I question the doctrine of Lord Mansfield. If he meant by that to say that such acts done with the money will have the effect in a Court of Equity of enabling you to call for a conveyance of land, I am ready to agree with him, but to say that the land is to be considered as passing under such circumstances, is that to which I cannot agree; but still I maintain that the doctrine from first to last is correct, provided you lay the foundation in the intent of the gift, that the debt is well given or well forgiven; and then as the result of that interest so given, you say that the party who has the land becomes in equity a trustee for the person entitled to the money and to the personal estate."

121. The difference between the two views is that (if Lord Eldon's alternative view was correct) Lord Mansfield thought that when the debt was transferred by the will the mortgage of land securing it was also transferred (at law). Lord Eldon however said that the security estate in the land could not thereby be transferred *at law*, but in equity the donee of the debt had the right to call for a conveyance of the security interest too. Lord Eldon concluded (at 543)

> "Then the question is, whether, regard being had to what is the nature of a mortgage, contra distinguishing it from an estate in land, those circumstances do not as effectually give the property in the debt as if the debt was secured by a bond only?
>
> The opinion which I have formed is, that this is a good donatio mortis causâ, raising by operation of law a trust; a trust which being raised by operation of law, is not within the statute of frauds, but a trust which a Court of Equity will execute; and therefore, in my humble judgment, this declaration must be altered by stating that this lady, the daughter, is entitled to the benefit of these securities … "

122. Lord Eldon's important conclusion that there was a trust by operation of law of the mortgage estate in that case because the legal title could not pass by delivery of the deeds was picked up in other cases subsequently, such as by Cotton LJ in *Re Dillon* (1890) 44 Ch D 76, 82, the case of a donatio mortis causa of a banker's deposit note. Its significance was extensively considered in the much more recent decision of the Court of Appeal in *Sen v Headley*, to which I now turn.

123. **Other interests in land:** *Sen v Headley* [1991] Ch 425 was not about a mortgage at all, but instead about an attempted donatio mortis causa of the fee simple estate in *unregistered* land. It is necessary to examine this case closely. I begin with the facts. During a stay in hospital, suffering from pancreatic cancer, the owner of a house asked his close friend (and former partner), who still had a set of keys to the house which he owned and they had shared for some years, to fetch a bunch of keys from the house and bring them to him. She did so. On a later occasion, during his final illness in a different hospital, she asked

what she should do about the house in case anything should happen to him. He told her that the house was hers, and that she had the keys in her bag which would give access to the title deeds in a locked steel box at his house. She asked about the contents of the house, and the donor told her it was for her to do as she liked, for it was all hers. He died three days later, intestate.

124. After the death, the donee found the bunch of keys in her bag which he had asked her to bring to him on an earlier occasion. It was supposed that the deceased had placed it there without her knowing. One of the keys was the sole key to the deed box. Inside the box were the deeds to the house. A nephew took out letters of administration to the late owner's estate. The donee brought this action claiming that the nephew held the house on trust for her following a successful donatio mortis causa. The nephew resisted the claim. At first instance, Mummery J dismissed the claim, holding that there could be no donatio mortis causa of an estate in land. The donee appealed, successfully (and perhaps to the surprise of many commentators).

125. The single judgment of the court (Purchas, Nourse and Leggatt LJJ) was given by Nourse LJ. The court reviewed the authorities in great detail, and with much learning. It summarised the reasoning of Lord Eldon in *Duffield v Elwes* as follows (at 435 G-H):

> "Accepting that money secured by a bond was capable of passing by way of a donatio mortis causa, he explained equity's insistence that the donor's executors should permit their names to be used by the donee in order to recover the money at law as a consequence of a trust to perfect the gift which arose by operation of law on the death of the donor. In reliance on *Richards v. Syms,* Barn. C. 90 and *Martin* v. *Mowlin,* 2 Burr. 969, he extended that principle to a donatio mortis causa of money secured by a mortgage, holding that a like trust bound the mortgagee's conditional estate in the land in the hands of the heir at law, a trust which, because it arose by operation of law, was not within the Statute of Frauds."

126. Nourse LJ continued (at 436 B-C):

> "Lord Eldon's emphasis of the distinction between the absolute estate of the mortgagor and the conditional estate of the mortgagee necessarily presupposed an opinion, in which the arguments of counsel for Mrs. Duffield had throughout concurred, that the absolute estate could not have passed by delivery of the title deeds. That opinion was based on the provisions of the Statute of Frauds … But those provisions apart, it was not suggested that delivery of the title deeds would not have been a sufficient transfer of the underlying property, any the less than in the case of a bond or a mortgage."

So the court was reasoning that, just as choses in action did not pass at law by delivering title documents, but could be the subject of a donatio mortis causa converting the donor into a trustee for the donee, so too interests in land which did not pass at law by the delivery of title deeds might still be capable of passing *in equity*, thereby raising a trust by operation of law for the donee. (As I have

said, this was also the reasoning of Cotton LJ in *Re Dillon* (1890) 44 Ch D 76, 82, in a case dealing with a banker's deposit note.)

127. The court went on to consider the sufficiency of delivery in the case of a chose in action, and in particular the decision of that court in *Birch v Treasury Solicitor*. It examined the notion of parting with dominion, which it observed was derived from the "locked box" cases, but in *Birch* had been applied to a chose in action. Nourse LJ observed (at 437 H – 438A:

> "In *Birch* v. *Treasury Solicitor* [1951] Ch. 298, as we have seen, a similar need [*ie* for there to be a parting with dominion] was recognised where the subject matter of the gift was a chose in action. Without in any way questioning that need, we think it appropriate to observe that a parting with dominion over an intangible thing such as a chose in action is necessarily different from a parting with dominion over a tangible thing such as a locked box and its contents. We think that in the former case a parting with dominion over the essential indicia of title will ex hypothesi usually be enough."

128. As to the last point, the court in *Sen v Headley* had already decided (at 437 C-D) that "title deeds are the essential indicia of title to unregistered land", and that there had been a constructive delivery of the title deeds to the donor's house by the donor to the donee. The donor had parted with dominion over the *house* by parting with dominion over the essential indicia of title, namely, the *title deeds*. The argument that the donor had not yet parted with dominion over the house because he could for example declare a trust for a third party or enter into a binding contract to sell the land proved too much, because the same would be true in the case of a chose in action.

129. In fact, there is a further point, not (so far as I can see) noticed by the court in its judgment. This is that the essence of a donatio mortis causa is that it is inherently revocable until the death occurs, as stated at [71] above. The donor could revoke the gift and demand the return of the deeds or other indicia of title. If the donor before dying declared a trust over or sold the property that would presumably amount to an implied revocation (*cf Birch v Treasury Solicitor* [1951] 1 Ch 298, 305-06). What this suggests is that the concept of "parting with dominion" does not refer to removing the donor's continued ability to deal with the legal rights to the asset, or indeed to revoke the gift (how could it, if the gift is revocable until death?), but instead to the physical control, whether of the thing if a chattel, or the indicia of title for choses in action or indeed land, that the donor gives up to the donee, which endures unless and until the gift is revoked.

130. The court in *Sen v Headley* went on to discuss the general question whether land was capable of passing by way of a donatio mortis causa. It pointed out that the notion of a trust for the donee arising on the donor's death had been inherent in the decision in *Snellgrove v Baily* (in relation to a chose in action). But, since the property concerned in that case was not land, such a trust could be created by parol. The innovation of Lord Eldon in *Duffield*, where land was concerned, albeit as security, was to designate the trust as one *arising by operation of law*. This enabled the case to escape the requirements of the Statute of Frauds in

relation to a trust of land (now contained in the Law of Property Act 1925, s 53(1)(b)). The court discussed the developments in the modern doctrine of the constructive trust, including proprietary estoppel and the common intention constructive trust. The constructive trust could be said to have been "a ready means of developing our property law in modern times, and that the process is a developing one".

131. Nourse LJ then went on to say (at 440 B-D):

> "Let it be agreed that the doctrine [of donatio mortis causa] is anomalous. Anomalies do not justify anomalous exceptions. If due account is taken of the present state of the law in regard to mortgages and choses in action, it is apparent that to make a distinction in the case of land would be to make just such an exception. A donatio mortis causa of land is neither more nor less anomalous than any other. Every such gift is a circumvention of the Wills Act 1837. Why should the additional statutory formalities for the creation and transmission of interests in land be regarded as some larger obstacle? The only step which has to be taken is to extend the application of the implied or constructive trust arising on the donor's death from the conditional to the absolute estate."

132. The court pointed out that the two previous decisions of the Court of Appeal on donatio mortis causa (*Re Dillon* and *Birch v Treasury Solicitor*) had actually extended the doctrine, and that, while certainty of precedent was desirable, it mattered less in an area as infrequently invoked as that of donatio mortis causa. Although the policy of the law in relation to formalities for the creation and transmission of interests in land should be upheld, that policy had been substantially modified by the developments in the law relating to constructive trusts. As a result, the court held "that land is capable of passing by way of a donatio mortis causa" and that the requirements had been met in that case. The appeal was accordingly allowed.

133. I should next mention the decision in *Vallee v Birchwood* [2014] Ch 271, even though it has now been overruled, for it provides the context for the more important case following, namely, *King v Dubrey* [2016] Ch 221. This was a decision of Jonathan Gaunt QC as a deputy judge of the High Court, dismissing an appeal from the decision of the county court holding that a gift amounted to a valid donatio mortis causa. A daughter who lived in France visited her father, who was originally from the Ukraine, in England in August 2003. He was in generally poor health, although not suffering from any terminal disease. She told him she would visit again at Christmas. He said he might not be alive by then, and gave the title deeds and a set of the keys to his house to her, saying that he wanted her to have the house when he died. In fact, he died in early December, intestate.

134. The judge said that cause of his death was certified by the coroner after an autopsy as "bronchopneumonia, chronic obstructive pulmonary disease and dilated cardiomyopathy". I assume from the order in which they are set out that the primary cause of death was bronchopneumonia, and that the other conditions were present and may have contributed, but were not themselves primary causes. After the death, the daughter discovered that, because she had been

formally adopted by third parties some years after her birth, she was not her father's next of kin in law. It turned out that the father had a surviving brother, and also children of another deceased brother, all in the Ukraine, where her father was originally from. The defendant was a genealogist who had found and contacted the Ukrainian relatives, presumably for reward (the judge described him as an "heir hunter"). He became the attorney for one of the brothers, and obtained letters of administration to the father's estate. Litigation between the daughter and the attorney over the house followed. As I have said, the county court judge held that the handing over of the title deeds amounted to a valid donatio mortis causa of the house.

135. On appeal, the deputy judge affirmed that decision. He set out the law as expounded in *Sen v Headley*. The (unsuccessful) appellant had three criticisms of the judgment below:

> "23. … (1) in finding that dominion in the property had passed to the claimant; (2) in failing to consider whether the facts of this case brought it within the rationale and proper application of the law in relation to donatio mortis causa; and (3) in finding that the alleged gift was made in contemplation of impending death."

136. The judge rejected each of them, but I need deal only with the third. The judge held that it was not necessary that the gift be made in the *expectation* of death, and that the contemplation of death within five months could still be regarded as "impending" death, even though the donor had time to make a will. On the authorities, it was not necessary for the donee to prove that the donor had no opportunity to make a will, so "impending" could not be equated to the lack of such opportunity. Doing so would "introduce a further condition by the backdoor".

137. This decision was overruled by the next case, the most recent decision of the Court of Appeal in this area of the law, *King v Dubrey* [2016] Ch 221, to which I have already referred. In that case the deceased had made a will in 1998 leaving most of her estate, including her house, to charity. In 2007 her nephew came to live with her as her carer. In 2010 and 2011 the deceased signed documents purporting to leave all her property to the nephew, but they did not comply with the formalities for valid wills. More than four months before her death, when she was frail but in reasonable health, she gave the title deeds of her house to her nephew, saying "this will be yours when I go". After she died, the nephew claimed against the executors of her 1998 will that there was a valid donatio mortis causa of the house. At first instance the claim succeeded, but the Court of Appeal reversed this decision. The deceased at the time of handing over the title deeds, and thus "parting with dominion" of the house, did not then "contemplate her impending death".

138. Jackson LJ (with whom Patten and Sales LJJ agreed, though Patten LJ delivered a short concurring judgment), recited the facts and examined the authorities. He then said:

> "50. Let me now stand back and summarise the legal principles which emerge from the case law. I have enumerated all the authorities which

> counsel have cited. I have also taken into account the numerous other authorities which are discussed in those judgments. It is clear that there are three requirements to constitute a valid DMC. They are as follows. (i) D [the donor] contemplates his impending death. (ii) D makes a gift which will only take effect if and when his contemplated death occurs. Until then D has the right to revoke the gift. (iii) D delivers dominion over the subject matter of the gift to R [the recipient].
>
> 51. As many judges have observed, the doctrine of DMC in the context of English law is an anomaly. It enables D to transfer property on his death without complying with any of the formalities of section 9 of the Wills Act or section 52 of the Law of Property Act. Thus the doctrine paves the way for all of the abuses which those statutes are intended to prevent.
>
> […]
>
> 54. In my view therefore it is important to keep DMC within its proper bounds. The court should resist the temptation to extend the doctrine to an ever wider range of situations."

139. Unfortunately, this was a case where not just the law, but also the findings of fact of the deputy judge at first instance, were subject to considerable attack in the Court of Appeal. Jackson LJ said that counsel for the appellant charities

> "62 … points out that the claimant was a man with a criminal record for dishonesty. She points to evidence (not mentioned by the judge) suggesting that the claimant had forged a letter to buttress his case. She relies on other instances of dishonesty by the claimant as mentioned in the judgment. … She therefore argues that the judge ought not to have accepted the claimant's evidence concerning the crucial events in the months before the deceased died.
>
> 63 I see the force of these arguments. Indeed the judge acknowledged the strength of the attacks on the claimant's credibility … Yet still he accepted that evidence.
>
> 64 The authorities stress the need to subject R's [the recipient's] evidence to close scrutiny in cases such as this. … It is easy for unscrupulous treasure hunters to adjust their recollections in order to gain huge rewards. …
>
> 65 I am bound to confess some doubt as to whether the judge subjected the claimant's evidence to the requisite degree of scrutiny. … In the end I have come to the conclusion that it is not necessary to decide this issue. For reasons that will become apparent, no party will be prejudiced if I proceed on the assumption that the judge's findings of fact are unassailable.".

140. The "reasons that [became] apparent" have already been mentioned. These were that the claim failed (and the appeal succeeded) because (i) at the relevant time the deceased did not then contemplate her impending death, and so the first requirement for a donatio mortis causa was not met, and (ii) the deceased did not make clear that the gift was conditional on her death rather than

testamentary, which was confirmed by the ineffective documents that she signed. However, Jackson LJ accepted that, on the authority of *Sen v Headley*, by handing over the title deeds, she had succeeded in "delivering dominion over the property" to her nephew. Nevertheless, it is clear that the Lord Justice regarded the facts found as perhaps less robust than usual.

141. The court in *King v Dubrey* was bound by the decision in *Sen v Headley*, as indeed am I, and the law is not differently expressed by Jackson LJ from that decision, except for the emphasis on "delivering dominion". The references to not extending the law any further make sense in the context of the earlier decisions in *Vallee v Birchwood* and in the court below, which had sought to relax the existing requirements for the donor (1) to be in contemplation of impending death, and (2) to be giving assets immediately but conditionally.

Conclusions on donatio mortis causa

142. After that unfortunately lengthy survey of the caselaw, I should shortly state the conclusions which I draw from it about the doctrine of donatio mortis causa, and which I shall apply to the facts of this case:

(1) A donatio mortis causa is a gift made by a living person in contemplation of impending death, subject to the condition that the donor dies. The condition may be precedent (the usual case), in which case ownership passes only on death, or subsequent, in which case it passes immediately (subject to formalities) but is divested if the donor ceases to contemplate impending death (*eg* by recovery from an illness, or escape from a dangerous situation). If the title of the donee is not complete, a constructive trust is imposed on the personal representative of the deceased donor to perfect the donee's title.

(2) The donatio mortis causa is revocable by the donor at any time until death, and is revoked automatically by insolvency, and may also be revoked by insanity.

(3) The donor must take a sufficient step to implement the gift by delivering to the donee the thing itself, or some means of accessing or controlling the thing (*eg* the key to a box in which it is contained, or a document – or *indicia* – of title, though this need not contain all the essential terms of any applicable contract). It is not necessary (at least in the case of a donatio mortis causa subject to a condition precedent) that this step be such as would pass ownership in the case of an *inter vivos* gift.

(4) In the case of choses in action and land, at least, there is an additional, though somewhat elusive, requirement that the donor part with "dominion" over the property to be given. In such cases it will be satisfied by handing over possession of documents of title (but there may be other ways of doing so). Whatever the concept means, however, it does not mean parting with ownership (for in most cases the property passes only on death) or possession (dealt with under (3) above). Nor does it mean ceasing to be able to deal with the property (because the gift is inherently revocable, under (2) above).

(5) The property which may be the subject of a donatio mortis causa includes chattels, choses in action and interests in land.

(6) Capacity to make a donatio mortis causa is the same as for an *inter vivos* gift.

(7) The donee of a donatio mortis causa takes *against* the estate and not *under* it, although property the subject of a valid donatio mortis causa is nonetheless liable to the debts of the administration of the estate.

The problem of registered land

143. One of the novel questions which arise in the present case is whether it is possible to create a donatio mortis causa of registered land. The point was expressly left open in the recent decision in *Davy v Bailey* [2021] EWHC 445 (Ch), because the claim failed for other reasons. I was shown two articles from learned journals on the subject. The first was a note in the *Law Quarterly Review* for January 1993 (volume 109, at 19), by HHJ Paul Baker QC, who was editor of the *Review* from 1971 to 1987. This note was one commenting on the decision in *Sen v Headley*, and was not specifically about registered land. The author pointed out that Nourse LJ, in reaching his conclusion, had relied on the existence of constructive trusts at the time of *Duffield v Elwes*, and their development since then. He then commented (at 21):

> "There is, it must be said, an obvious distinction between those cases of constructive trusts and this new development. In those cases the claimant had acted in some way to his detriment so that it would be inequitable for the legal owner to rely on the absence of proper formalities. In donatio mortis causa there is no payment or other detriment on the part of the donee."

144. In addition, the author made a specific comment about registered land. He said (at 20)

> "That leaves the interesting question whether registered land can be transferred in the same way. The Land Certificate is not the indicia of title in the way title deeds are, but is a record of the entries in the register which constitutes the title. Yet it is difficult to procure registration of a transfer without producing the certificate or giving some explanations of its absence."

This comment is perhaps more Delphic than one would like, but then the author was at the time a serving judge, and was bound to exercise caution in an extra-judicial comment. For myself, I see the author as having taken a rather catholic view of the matter, that is, that in principle both unregistered and registered land were covered by the decision, although in the case of the latter there was the important question of what document or documents may serve as the indicium of title.

145. The need for the production of the land certificate on dealings with the land arose from section 64 of the Land Registration Act 1925. Since the coming into

force of the Land Registration Act 2002, which (unlike the previous legislation) does not require the issue of a land certificate, no further land certificates have been issued by the land registry, and no further application may be made to the registry in respect of a lost or destroyed certificate. Indeed, the registrar is given authority to destroy any land certificate or charge certificate held in the registry or which comes into the possession of the registrar: Land Registration Act 2002 (Transitional Provisions) Order 2003, 24(3). The registry now issues only an official copy of the register showing the entries on the register at the time the application was completed (in some cases accompanied by an official copy of the title plan). Neither the land certificate (if one exists) or any official copy of the register need be produced on any application to register dealings with the lands. The title is the register, and that is that.

146. The other article was called "*Donationes Mortis Causa* in a dematerialised world", by Dr Nicholas Roberts, published in March 2013 in *The Conveyancer and Property Lawyer*. I have already referred to it in connection with choses in action. In this article, Dr Roberts also referred to the possibility of making a donatio mortis causa of registered land after 1991 by handing over the land certificate. However, he noted that, although many owners would still have one, there was now no longer a role for the land certificate under the 2002 Act system. He wrote this (at 116-17):

> "Although perhaps only 10% of titles are still unregistered, it is not unreasonable to assume that a substantial proportion of these all represent the homes of older people who have lived in their present homes for the past two decades or more: based on the case law, it seems fair to surmise that these would be the very people who are most likely to attempt a DMC.
>
> The question arises of whether the courts can or should give any recognition to an attempted DMC of registered land where the donor still has a Land Certificate in his or her possession, and gives it to a beneficiary with the appropriate intentions. Since the LRA 2002, this document does not have to be surrendered to the Land Registry on any dealing with the land, so it would seem wrong still to treat it as an indicium of title."

147. In relation to registered land, Dr Roberts' conclusion (at 128) was:

> "It would seem inevitable that the law relating to DMCs of land will be left in an anomalous position. On the basis of established principles, it seems impossible to permit a DMC of registered land; if that is so, then the argument in Sen v Headley that not allowing a donatio mortis causa of land perpetuated an unnecessary anomaly appears rather thin."

148. However, I take a different view of what are now the "established principles". In my judgment, the decision in *Sen v Headley* makes clear that the donatio mortis causa is a well-established institution in English law, applying in principle to all types of property, but subject to compliance with the rules summarised above. It was submitted by the defendants before me that (1) *Sen v Headley* extended the law of donatio mortis causa to unregistered land, but that (2) there could be no donatio mortis causa of registered land, and that (3) the court should not extend the concept of the donatio mortis causa to cover it. I

reject that submission. The argument in *Sen v Headley* was about *land*, not about *unregistered* land. The objection was made that there could be no donatio mortis causa of *land* on principle, and the Court of Appeal rejected it. As that court said, in a passage already quoted above (at [112]),

> "A donatio mortis causa of land is neither more nor less anomalous than any other. Every such gift is a circumvention of the Wills Act 1837."

149. So far as I can tell, nowhere in that decision does the court suggest that registered and unregistered land are being distinguished, and that a donatio mortis causa may extend to one but not the other. The transfer of interests in registered and unregistered land at law is subject to special formalities which differ from each other, as also is the transfer of company shares, insurance policies, bills of exchange, bank accounts, bonds and debts generally. Yet all are capable of being the subject of a constructive trust without writing. There is no conceptual reason to distinguish between them for these purposes. To do so would be to create a further anomaly. I therefore hold that *in principle* there can be a donatio mortis causa of registered land, as of unregistered.

150. I note that in Singapore it has been held that, where a transfer of registered land is executed in favour of the donee to take effect on the donor's death, but is registered at the Registry of Titles (the land register in Singapore), that can constitute a valid donatio mortis causa: *Koh Cheong Heng v Ho Yee Fong* [2011] 3 SLR 125. That is the registered land equivalent, for company shares, of *Staniland v Willott* and *Re Craven's Estate*. Here, the question is what happens short of that. Two developments of the law, in particular, are relevant to this question. The first is the early imposition in the cases of a constructive trust to deal with, first, choses in action, and, second, land, where the donor did not comply with the relevant formalities for the transfer of the gift at law to the donee. The second follows from the first, and is the recognition (as by the Court of Appeal in *Woodard*) that the function of the handing over of some document or thing to the donee is *evidential* rather than transitive.

APPLICATION OF LAW TO FACTS

Inter vivos gifts

151. Mrs Al Mahmood made *inter vivos* gifts of clothing and jewellery to the claimant's wife. Mr Al Mahmood made *inter vivos* gifts of money to the claimant, including the sale price for his wife's car after her death,. I see nothing to impugn the validity of any of those. After the death of Mrs Al Mahmood, Mr Al Mahmood offered his wife's personal effects (now his property in law) to the claimant's wife. To the extent that she took any of these, they became hers by gift.

Instructions for a will

152. In my judgment, after his wife's death, and until very shortly before his own death, Mr Al Mahmood's intention was to make a new will in favour of the claimant, whereby the claimant would inherit all the testator's UK situated property, the defendants receiving nothing. He gave instructions for this purpose

to Mr Amponsah, the will-writer at the meeting on 15 October 2020. On the same day Mr Al Mahmood asked the claimant to bring down the bags of documents from his office upstairs, and took the claimant through the documents contained in them. However, at that stage he was not attempting to make a gift of anything to the claimant. Instead, he intended to make a will which would have that effect. He was simply instructing the claimant as to what he would receive under the new will.

Donatio mortis causa

153. However, by 20 October 2020, matters had changed. By then, Mr Al Mahmood was concerned not to have received the will for execution, because he thought he would die soon. The claimant told him that Mr Amponsah the will writer was not due until 22 October 2020, and this made Mr Al Mahmood sufficiently agitated to ask the claimant to bring the bags from the office to him once more, this time into his bedroom. On this occasion, however, Mr Al Mahmood gave to the claimant all the security devices, logins and passwords that were needed for accessing his bank and similar financial accounts, telling him that everything was his. He similarly handed over to the claimant the land certificate for the house and all the documents relating to the flats in Sutton, telling him that they were for him. At the end of this, he said that it did not matter if the will writer came or not. I am in no doubt that what Mr Al Mahmood did on that occasion, unlike on the previous occasion, was intended by him to be a gift to the claimant of the contents of the bank and other accounts and of the house and flats, conditional on his death. It was not an attempt by Mr Al Mahmood to make a nuncupative will.

154. In my judgment, the gifts on 20 October 2020 satisfy the requirements for a donatio mortis causa of the contents of the bank accounts and the properties themselves, but not their furniture or contents. Mr Al Mahmood contemplated his impending death, and made the gifts on condition that he died, which then happened within three days. Mr Al Mahmood did nothing to revoke the gifts before he died. He implemented the gifts by (1) handing to the claimant the land certificate for the house and the leases for the rented flats, when they already had the house keys, (2) informing the claimant of the login details and passwords for the online bank and other accounts, together with handing to the claimant (in those cases where he had them) the security devices and bank cards associated with the accounts. In so far as it was necessary for Mr Al Mahmood to "part with dominion" (for the purposes of a donatio mortis causa) of these assets, I hold that he did so. There was evidence that Mr Al Mahmood had capacity to act as he did, and no evidence to suggest a lack of such capacity. I therefore hold that he had capacity for the purposes of any donatio mortis causa.

Furniture and other contents

155. I must explain some aspects of my decision in more detail. I deal first with the question of the furniture and other contents of the house (and, indeed of the flats, if they were let furnished). Mr Al Mahmood had told the claimant that the contents were to belong to him after his death: see above at [41]. They would be chattels, rather than interests in land. The gift of a legal estate in land would not automatically carry with it any chattels that happened to be inside the

property. But on the evidence before me there was no attempt by Mr Al Mahmood to deliver the chattels to the claimant. The claimant and his wife were not the owners of the house, but simply guests or licensees there. Accordingly, they did not have "possession" of the house during Mr Al Mahmood's life, and consequently did not acquire possession of the contents from his mere words of gift, just as Fly's servant Mosely did not acquire it from Fly's words of gift in *Ward v Turner* (1752) 2 Ves Sen 431, 438. In my judgment therefore, however much Mr Al Mahmood intended to give the contents, those contents are not the subject of a valid donatio mortis causa.

The land certificate and the leases

156. I deal next with the question of the land certificate and the leases. In my judgment, after *Sen v Headley*, and at least until the coming into force of the Land Registration Act 2002, it would have been possible for Mr Al Mahmood to make a donatio mortis causa of registered land using the land certificate, if only because production of this in the registry was ordinarily required for any dealing with the registered land. Although the register itself (in the custody of the registrar) *was* the title, the land certificate (in the possession of Mr Al Mahmood) was properly to be regarded as an *indicium* of title, at least for the purposes of making a donatio mortis causa.

157. I do not see why that certificate in the hands of Mr Al Mahmood should have ceased to be such an indicium of title for him after the coming into force of the Land Registration Act 2002. I accept that the title could thereafter have been changed without the production of the certificate, so that it might have become inaccurate. But that might have happened anyway, if the certificate had been mislaid and application had successfully been made for a transaction to be registered without production of the certificate. And, if a would-be donor handed over an out of date land certificate in respect of land of which the donor was by then no longer the proprietor, it would not produce a valid donatio mortis causa anyway. In any event, at the end of the day, and as the Court of Appeal said in the *Woodard* case, the question is really one of evidence: with what intention was the document handed over? In my judgment, Mr Al Mahmood meant to give the house to the claimant.

158. It is not necessary for me to decide what would have happened to the gift of the house if Mr Al Mahmood had not had the land certificate. But I may say that, as at present advised, I would have held that the handing over of an office copy entry of the register with the relevant donative intent would have sufficed. As I have already said, the purpose of the handing over of an object is to demonstrate the intention to make the gift (see *Woodard*). The fact that there is a particular statutory means of transferring the legal estate in the land is neither here nor there. The constructive trust imposed by the law in the case of a donatio mortis causa means that non-compliance with the relevant method of legal transfer is no bar to the validity of the gift. In this respect, as I have also said, there is no difference between unregistered and registered land.

159. Turning to the two Sutton flats. there were no land certificates in relation to the long leases of them. But Mr Al Mahmood did have the leases themselves, as well as other supporting documents, including the official copies of the register

showing the titles to them. If the leases had been unregistered land, handing over the leases themselves would have been the obvious way to implement a donatio mortis causa. I can see no good reason why, merely because the leases are registered, they should not be indicia of title, and have a similar evidential value. In my judgment, they are, and do. Mr Al Mahmood meant to give the leases of the flats to the claimant, and for the purposes of the doctrine of donatio mortis causa, that is a sufficient delivery.

Bank and other accounts

160. Turning to the bank and other financial accounts, I begin by repeating what I said above about online accounts. The login and password identify the user as the account holder. They are the indicia of title in the computer age. I also repeat what I said about the *Woodard* case. I do not accept that, just because one person could make known to another the login details and password for access to an online account for the limited purpose of (say) effecting a single transaction at the direction of the account holder, that means that taking such a step could not, in a case where it was intended to do so, amount to providing an indicium of title to the entire contents of the account. A person with a locked deposit box might confide the single key to another person either for the former purpose, or for the latter. *Woodard* makes clear that it does not matter how many keys there are. The question is one of evidence of intention. In the present case, I am entirely satisfied as to Mr Al Mahmood's intention in doing what he did. He wanted the claimant to have the contents of the accounts.

161. But I also must consider the question of parting with dominion. Earlier, I referred to *Re Craven's Estate*, (at [95] above, where Farwell J referred to the need to "put it out of [the donor's] power between the date of the donation and the date of the death to alter the subject-matter of the gift and substitute other chattels or property for it." In the present case, Mr Al Mahmood had given possession of the papers containing details of the logins and passwords to the claimant. Mr Al Mahmood was an elderly, sick man. He had many accounts with financial institutions. He could not possibly have memorised all these details. Accordingly, by handing over the papers to the claimant, he had put it out of his power to deal further with the accounts. On any view, this is parting with dominion. This includes the account with Hargreaves Lansdown.

162. Indeed, the question may be asked, what more could he have done in the circumstances in which he found himself? He was ill, believed he was dying, and had given instructions to a professional will-writer for a new will. Unfortunately, this was during the Covid pandemic, and he became agitated because he had not received the new will. Understandably, he wanted to ensure that his donative intentions were effective. So he resorted to a gift to take effect on death. The whole point about the doctrine of donatio mortis causa is to provide a legal solution to a human need, when other legal institutions do not. If he had wanted to revoke the gifts he could have done so. He did not. I do not say that the donationes mortis causa succeed in this case as to the land and the online accounts because the claimant's case is a deserving one. Instead, in my judgment, they succeed because they meet the legal requirements. I do not seek to fill any lacunas in the law. In my judgment, there are none in this case for me to fill.

CONCLUSIONS

163. I answer the questions which I posed at [53] above as follows:

(1) Was Mr Al Mahmood attempting to make a nuncupative will or a gift of his assets? On 20 October 2020 he was attempting to make a gift rather than a nuncupative will: see [153] above.

(2) If a gift, was it made in contemplation of his impending death? Yes; see [154] above.

(3) If a gift, was it made conditionally on his death? Yes; see [154] above.

(4) If a gift, did Mr Al Mahmood deliver and "part with dominion" of the subject matter or some equivalent? Yes, except for the furniture and contents of the house; see [154]-[162] above.

(5) Was there any legal bar to the subject matter being subject to a donatio mortis causa? No; see [148]-[149] above.

(6) Did Mr Al Mahmood have capacity to make the gift? Yes; see [154] above.

164. In my judgment the claim succeeds, except in relation to the furniture and other contents of the house and the flats. There must be an account to the claimant for the rents of flats received by the first and second defendants as personal executors of the will of Mr Al Mahmood. There will also have to be an account by the claimant as to what he has done with the furniture and contents of the house at 98 Streatham Road.