Neutral Citation Number: [2023] EWHC 983 (KB)

Case No: QA-2021-BHM-000008

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ON APPEAL FROM BIRMINGHAM CIVIL JUSTICE CENTRE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/04/2023

Before :

MR JUSTICE FREEDMAN

- -

Between :

MR KENNETH THOMAS **Appellant**

- and –

MS DEBORAH PORTER **Respondent**

- -
- -

The Appellant appeared without legal representation
Annie Townley (instructed by **Rees Page Solicitors**) for the **Respondent**

Hearing dates: 17 January 2023

- -

Approved Judgment

This judgment was handed down remotely at 12noon on Friday 28 April 2003 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE FREEDMAN:

I Introduction

1. Following a judgment of HH Judge Shetty dated 24 August 2021, Mr Kenneth Thomas ("the Appellant") appealed against the rejection of his claim against his former partner Ms Deborah Porter ("the Respondent"), The claim in the Particulars of Claim was for a declaration that there was a trust in respect of a property [REDACTED] ("the Property") owned in law by the Respondent by reason of an agreement, arrangement, or common understanding between the parties. There was no alternative plea in the prayer for relief for the repayment of a loan or for subrogation. There was an alternative claim for repayment of a loan or for subrogation in para. 9c of the Reply, but the Judge decided not to allow such claim because it was not a part of the Particulars of Claim, it was not adequately particularised and its admission at this stage would cause prejudice to the Respondent.

II Summary of claim

2. The parties were involved in a relationship. It began in November 2015. In December 2016, the Respondent moved into the Property. In January 2017, the Respondent made an application to buy the Property with a right to buy discount. She applied for a mortgage from HSBC in her sole name. In October 2017, the Respondent purchased the Property in her sole name, using the mortgage in her own name. In May 2018, the Appellant sold his home at [REDACTED] for a sum of £57,000 and also received a sum in settlement of an insurance claim in a further sum of £17,000 in connection with an adverse coal mining search. Upon receiving these moneys, the Appellant transferred to HSBC the sum of £40,373.01 with reference to the Respondent's mortgage, as a result of which the Respondent's mortgage was paid off.

3. In about late April 2019, the relationship of the Appellant and the Respondent broke down and the Appellant left the Property. On 20 December 2019, a letter before action was sent by George Green LLP solicitors on behalf of the Appellant to the Respondent claiming that the advance was repayable on demand on the termination of the relationship. On 19 June 2020, a claim was issued on the basis of a claim that there had been an express or a constructive trust as a result of which the Appellant had a proprietary interest in the Property.

4. At trial, a preliminary issue was raised by counsel for the Respondent in her skeleton argument that the claim was restricted to a claim for a declaration of trust. The Reply had referred to an alternative claim for subrogation and repayment of monies paid by way of a loan. The Respondent's counsel submitted that:

   (i) This was an attempt to introduce claims against the Respondent by way of a reply and that that was not the correct vehicle: see CPR PD 16 para 9.2 which required such a claim to be in the Particulars of Claim in circumstances where they contradicted an earlier pleading;

   (ii) The claim for a loan in the Reply contradicted the claim for a declaration of trust in the Particulars of Claim.

5. In the judgment, the Judge accepted that submission. He also said that the plea of a loan in any event contained inadequate particularisation of the claim such as would make it very difficult for the Court to consider the validity of the claims. The Judge therefore ruled that he would only consider the claim for a constructive trust: see the judgment at paras. 8-9.

6. The application for permission was first considered by Mr Justice Cotter on 1 April 2022. He considered that a transcript of the proceedings should be filed, and then that the papers should be placed before a High Court Judge for consideration of permission. The Judge in his observations said that having considered the central dispute of fact, the Judge decided that the payment was a gift. He then considered the matters of complaint, namely (a) not allowing the Appellant to adduce a non-molestation order (not relevant to the pleaded issues), (b) not treating the Appellant as a victim of "financial abuse" (no case advanced of duress, undue influence or lack of capacity, and so mental impairment was not relevant, (c) lack of evidence from Mr Sheldon (the Judge was entitled to consider the matter on the evidence before him), (d) the relevance of the visit to the solicitors (this was relevant to the respective cases of the parties), (e) comments about costs (this had no impact on the parties' findings), (f) the Respondent's evidence said to be protracted, irrelevant, hurtful and aggressive (no arguable ground of appeal), and (g) a capricious change of mind on the part of the Judge in sending the parties out to consider settlement on the basis that the Appellant was going to get his money back and/or on the basis of comments that the mortgage redemption was not a gift (Mr Justice Cotter said that this was to be considered in the light of the transcript, to which this judgment will return). Mr Justice Cotter found that the first six points were not arguable, and that the seventh point could not be decided without the transcript. In the event, Mr Justice Cotter made no decision in respect of any of the points canvassed on permission, but simply expressed his views at that point in time.

7. The transcript was obtained. Mr Justice Ritchie considered permission. With his permission dated 23 July 2022, the Appellant has permission to appeal the judgment *"in relation to the decision to exclude the loan claim and repayment thereof and any evidence relating to that"*. In his reasons, Mr Justice Ritchie (at [11]) said as follows. *"I am troubled by excluding a litigant in person from running his alternative case just because it is in the wrong document when counsel (maybe instructed by solicitors or maybe on DPA) put it there in the first place not the litigant and as far as I can tell the point was only raised at trial. The defendant was aware of the alternative claim from the date of service of the reply.* [29 August 2020 almost a year prior to trial on 16 and 17 August 2021]*"*

8. Mr Justice Ritchie added at [12-13]:

> *"[12] Having refused to hear evidence relating to a loan the judge only heard evidence relating to the asserted express or constructive trust (the Claimant's case) or gift (the Defendant's case).*
>
> *[13] I am concerned that this was potentially procedurally unfair and despite the high threshold I grant permission to appeal on the basis of exclusion of the claim for the payment loan being potentially unfair."*

9. Although Mr Justice Ritchie believed that the decision on the ‘preliminary issue was made at the outset of the trial in the usual way, in fact, the decision not to permit the loan claim to proceed was made after the conclusion of the evidence. Although the point had been raised in the Respondent’s skeleton written argument, it was the subject of oral submission only after the evidence had been heard, and the ruling was in the final judgment at paras. 8-9. It follows that the Court did hear all the evidence and then only ruled thereafter to exclude the loan claim.

10. The extent of permission was not entirely clear, given the decisions of Mr Justice Cotter and Mr Justice Ritchie. The latter decision did not refer to the former decision or to the transcript. Confirmation was sought promptly on 25 July 2022 by the Respondent’s solicitors as to how the two documents were to be treated. Having communicated with Mr Justice Ritchie, it was confirmed by the Court on 12 August 2022 that the operative document was the permission granted by him. It was at this point that the Respondent was able to consider the extent of the permission, and it has treated that date as the operative date for the 14 day period for service of a Respondent’s Notice. No point has been taken about that, and if it had been necessary to seek relief from sanctions for delay in the Respondent’s Notice, I should have held that there was no serious or significant breach and/or that there was a good excuse.

11. It is still not clear what was the extent of the permission granted. Permission was granted in respect of the exclusion of the loan claim. There was nothing wrong found about the encouragement of the Judge to the parties to settle at the late stage. The various grounds in the skeleton argument were held not to focus on the issues: they were confused and unclear: the vulnerable adult point had not much or any relevance. The complaint was that the Appellant wanted his money back. At [22], Mr Justice Ritchie said: *“I grant permission on the basis set out above in relation to the decision to exclude the loan claim and repayment thereof and any evidence relating to that”.*

12. That appears to be the full extent of the permission granted, and there does not appear to have been permission granted in respect of the decision to reject the proprietary claim.

III The pleadings

13. It is necessary to consider the pleadings in some detail. The Particulars of Claim contain various formulations giving rise to a proprietary interest in the appellant. They comprise an express trust (para. 18), an implied constructive trust (para. 19) and a proprietary or other estoppel (para 20). Although there was no express plea of an agreement of loan, para. 11 did plead the following:

> *“The agreement between the parties was that the mortgage would be paid off by the Claimant when his property was sold. Under the terms of the right to buy scheme, the Claimant would not be allowed to register his interest against the property at the Land Registry until the expiry of five years from the date of purchase. The Defendant therefore agreed that, following the expiry of five years the Claimant’s interest in the property would be officially noted on the title of the Property. If the couple split*

> *up, the amount paid by the Claimant towards the Defendant's mortgage would be repaid immediately. The Defendant would also put a will in place to ensure that, should she die within the 5 year period, that the Claimant would be repaid out of the funds in her estate."*

14. By way of background, in her Defence, the Respondent referred to the Appellant insisting to take out a mortgage despite the following (para. 12):

> *"The Claimant offered to provide the money to complete the purchase and it was made clear to him by the Solicitor acting for the Defendant on the purchase that if he did so it would be a gift. Despite the Claimant being insistent, the Defendant decided that her preference was to take out the mortgage and pay for the property herself as originally planned, and that is what she did."*

15. The response to para. 11 of the Particulars of Claim (quoted in full above) was in para. 14 of the Defence in the following terms:

> *"As to paragraph 11.*
>
> *a. It is denied that there was any agreement that the mortgage would be paid off by the Claimant when his property was sold.*
>
> *b. It is admitted that any "relevant disposition" of the Property within 5 years of completion would have led to the Defendant being required to repay to the Council a proportion of the Right to Buy discount, but denied that the Claimant "would not be able to register his interest against the property at the Land Registry until the expiry of five years from the date of purchase" or that the Claimant had any such interest to register.*
>
> *c. It is denied that there was an agreement that any amount paid by the Claimant towards the Defendant's mortgage would be repaid immediately if they split up. It is noted that such an alleged agreement would be inconsistent with the alleged agreement that the Claimant was to have a beneficial interest in the property.*
>
> *d. It is admitted that the Defendant told the Claimant that she would make a Will providing for the Property to be sold and the Claimant's gift to be returned to him out of the proceeds of sale but it is denied that this was to protect him for a 5 year period or that it gave rise to any legal obligation to make such a Will or to repay the gift."*

16. In respect of the payment of the mortgage by the Appellant, the Respondent stated at para. 15 of the Defence as follows:

> *"The Claimant chose to pay the Defendant's mortgage off as a gift to her. The Defendant did not ask him to do so and was content to continue making the repayments on the mortgage which he had taken out. The paying off of the mortgage was detrimental to the Defendant's financial position as it meant that she lost her entitlement to Tax Credits. There was no express or implied agreement that the money would be repayable in any circumstances or that by making the payment, the claimant would acquire any beneficial interest in the property."*

17. In respect of an SMS message that the Appellant was planning to re-mortgage the Property and to return the Mortgage Sum, the Defence stated at para. 18 as follows:

> *"The Defendant offered to reimburse the amount that the Claimant had gifted to her to pay off the mortgage. She was under no obligation to do so and the offer did not involve any acknowledgment that the money was repayable or that the Claimant had any interest in the Property."*

18. The Reply noted that the Respondent stated that she had declined the alleged gift. With regard to para. 15 of the Defence, the Reply at para. 8 stated:

> a. *"The burden of proof is on the Defendant to prove that the claimant gifted the Mortgage Sum to the Defendant.*
>
> b. *The Claimant denies that he offered to make, intended to make, or did make a gift of the Mortgage Sum to the Defendant in the sum of the purchase price or any similar such sum. Annexed to this Reply of at pages 3 – 4 is a text the Defendant sent to the Claimant on 7 May 2019, which states "I said later in life we would still have the house I wasn't bothered…"*
>
> c. *The Claimant notes that paragraph 17 of the Defence states that the Defendant has made a Will leaving a legacy to the Claimant of the Mortgage Sum".*
>
> d. *The Claimant avers that the agreed purpose of the will was to protect the Claimant by ensuring that the estate repaid the Mortgage Sum. Annexed to this Reply at pages 5 - 6 is a text the Defendant sent to the Claimant on 7 May 2019, which states "it was a way of getting your money back if I died…""*

19. At the end of the Reply are various alternative formulations 'in the premises', that is to say from what has been stated above. The first is a contribution to the Property in accordance with the agreement of the parties giving rise to an express trust in favour of the Appellant (para. 9a). The second is that the parties formed and acted in accordance with a common intention in substantively the same terms as the agreement, giving rise to a constructive trust in favour of the Appellant (para. 9b). The third (with four ways of putting it) is at para. 9c where the following appears:

> *"Alternatively, if which is not admitted, the Claimant simply advanced the Mortgage Sum to the Defendant (or for her benefit) then:*
>
> *i. The Defendant holds the Mortgage Sum on resulting trust for the Claimant and the Claimant is entitled to trace it into the Property; alternatively.*
>
> *ii. The Defendant holds the Property on resulting trust for herself and the Claimant as tenants in common in shares proportionate to their contributions as aforesaid in paragraph 3; alternatively*
>
> *iii. The Claimant is subrogated to HSBC bank in accordance with its mortgage; alternatively*
>
> *iv. The Claimant's payment of the Mortgage Sum constituted a loan to the Defendant in the sum of £40,373.01, which sum was repayable upon demand and is hereby demanded."*

IV The Judgment

20. It is worth setting out at length parts of the Judgment in order to show the precise nature of the conclusion of the Judge and the evidence on which he placed particular emphasis. It is important because the Judge was only reaching his conclusions in respect of the proprietary claim. The central question is whether the Court should conclude that the findings in respect of the proprietary claim are also dispositive of a claim for a loan, such that it did not, and ought not to, have made any difference to the result of the case that the Judge excluded a claim in respect of the loan. In setting out relevant paragraphs of the Judgment, there will be added emphasis in bold, and there will also be underlined as well as emboldened the Judge's references to the promises of repayment being due to a moral obligation.

21. The Judgment read as follows:

> *"18.* ***I have come to the factual conclusion that the defendant was persuaded by the claimant to allow him to pay off the mortgage after he received the proceeds of sale of his flat at 11 Norbery Crescent. The note on the solicitor's attendance sheet which is vague mentions the word "gift". The***

same word crops up in the covert recording of the conversation between the claimant and the defendant in August 2019. On this occasion the claimant himself uses that word in the context of the meeting with the solicitor despite initially denying in his evidence that the word gift was ever used in the solicitor's meeting. *I found his evidence on this point extremely unsatisfactory and inconsistent. In cross examination he specifically said that he would argue that the word 'gift' does not appear on the attendance note. He further said there was no discussion about the money being a gift when he was at the solicitor's office, He was then asked why he used the word in a recorded conversation at P211 of the bundle where the exchange was as follows:*

> ***[defendant] That's what I'm saying and I just wanted to say that to your face and then, when they went on about this mortgage fraud and if it's a gift it's got to be a hundred percent gift, if it's proved to not be a gift it is then erm mortgage fraud and you can both get done for mortgage fraud.***
>
> ***[claimant] Well, when I paid the mortgage off there was no agreement and there was no mention of it being a gift, the only time it was mentioned as being a gift was when it was going through Thornes and it was a transfer from my flat to the house, and you*** *(interrupted and unable to finish sentence)...*

19. The claimant was extremely unconvincing when asked to explain this inconsistency. He said I must have got confused because there was no mention of a gift by me. He said "l don't deny there was a mention at the end of the meeting, just that there was no mention by myself". He was still adamant not to accept that the attendance note said the word 'gift'. This was a fairly desperate attempt for the claimant to backtrack on earlier evidence he had given.

20. ***Ultimately, the defendant's intention and the parties' intention can be gleaned objectively from this appointment at the solicitor's office as well as what appears on the attendance note.*** *It was unnecessary for her to take advice and take the claimant to the solicitor if it was just for the fact of Thornes doing the conveyancing of both parties. If there was a common intention between them that he would have a stake in the house and be an eventual beneficial or legal owner then I am sure there would be mention of this on the attendance note. It is notable that the claimant never said there was. If the paying off of the mortgage was a formality that was consistent with a joint intention between the parties, then either no legal advice would be needed or the legal advice would reflect the intention.* ***This attendance note referring to 'gift' is the closest thing to***

objective evidence as to the factual conflict lying between the claimant and defendant. My interpretation of it comes down in favour of the defendant as there would simply be no reason for the use of the word gift unless that was on the defendant's mind.

21. ***I have considered the provision of repayment of the sum in the will of the defendant. The fact that both parties agree that there was discussion about a provision in the defendant's will after the payment of the money to extinguish the mortgage reflects no common intention between the parties whether actual or inferred that the claimant would have a beneficial interest. In fact, the provision in the will is reflective in my judgment, of the defendant agreeing as a matter of morality and fairness, that the claimant's position should be ultimately protected. This provision in the will has now, albeit belatedly, been executed.***

22. ***I have considered the evidence in the text message exchanges between the parties after their break up. There is no mention of an intention for the claimant to have a share in the house. There is mention of the defendant 'carrying on' for the claimant's money or making a will but I accept as a matter of fact that this was the defendant's recognition that as a moral duty, she should return the money used to him.*** *She worked out a E300 per month repayment (see P 169). There is a further reference at PI78 which states "When I payed [paid] the mortgage you said you would make a will, and I trusted you...All I wanted was the security of my 40,000 that I put in." There is to be fair to the claimant, one mention at P 181 of him saying thought we were building a forever home for us". However, this is the only time in a number of texts that it is mentioned and is not reciprocated or suggested by the defendant. There is no mention of conversations in Feb or March of 2017 that they had talks and an agreement to go it together in respect of the property.*

23. I find that the defendant was keen to establish her financial independence from the claimant despite his resources…

…

26. There were some unsatisfactory parts of the defendant's evidence as well. She was slightly inconsistent about filling in the claimant's name and signature on a document within the papers that sought to extinguish any claim that the defendant's daughter had on the property. However, this was not a significant document or point in the context of the case as a whole. Perhaps however, the most powerful evidence in her favour was that it was obvious from the evolution of the relationship that the defendant was getting increasingly

concerned about the claimant's change of lifestyle when he quit his job in late 2017 and moved in with her. Suddenly he was staying at home, refusing to go back to work and claiming he was too sick to work. It was obvious that the defendant was dismayed at that time as to the claimant's apparent lifestyle choice whilst she worked. ***I accept her evidence that the claimant was domineering in respect on insisting that he pay off the mortgage. Her evidence was on the balance of probability truthful that the claimant justified not needing his flat as security because he understood that the family house was his security. As I have alluded to, her recollection and evidence of why she and the claimant went to Thornes solicitors did match the documentation. She said that "the reason I took him there [the claimant] was because he was adamant he was going to be getting money for the house. I didn't want to accept it. I took him there purposely so that whatever transaction towards my property was actually logged so a solicitor knew what Ken wanted me to do [namely] accept money I didn't want. Ken was adamant that he owned Spring Road, that was it. I took him to Stephen. Stephen Sheldon [the solicitor] said to Ken that you can do whatever you want with your property and your money. He also said that Miss Porter is in a right to buy, she is a single tenant, the property would be non transferable, any money transferred to her property will be a gift. I wanted Ken to acknowledge he had no right to the property."***

27. ***I accept what the defendant said about the moment of the mortgage being repaid when she said in evidence that "after Ken said he was going to transfer, I said I am only going to accept it if I could pay it back in the will. He never wanted security on my home and I never wanted his money. It would make me feel more at ease. said I would only accept if can leave it to you on my will. That is where the will came from". This evidence was repeated a number of times in the defendant's testimony. I have concluded, on the balance of probabilities, that it is the true position. The defendant never had in mind having the claimant as a part owner of the house. She went to see her solicitors with the claimant because she wanted to be clear about the legal position. Her agreement to repay and do right by the claimant was driven by morality and fairness rather than by a common intention that would be needed for the claimant to succeed.”***

V Text messages

22. As is apparent from the judgment, there was consideration of text messages in the course of the case, particularly after the relationship of the parties came to an end. I do not intend to set out the entirety of the relevant messages but shall set out some

messages at that point in time. I shall try to be faithful to the text messages, but instead of having numerous typographical errors, I have inserted some obvious errors and inserted punctuation for intelligibility.

- 3 May 2018: *"Sorry it didn't work out today. I can give you 300 a month till. I can sort it I think things have gone too far for us I feel stuck in a situation I didn't want to happen…"* [R to A, TB 169 (the initials meaning Respondent to Appellant, Trial Bundle)]

- 4 May 2018: *"…I'd prefers to give you your money back. I'm sorry your plans for the future didn't work out for you. I kept saying keep your flat and I will sort my house out but you wouldn't listen. I will make sure I replay (sic) your kindness but will have to give you monthly as I have no option. I hope the money I give you monthly helps to sort you back out. Just wished I'd done it how I was in the first place. I hope we can sort it out and you get everything back. If anything happened to me, the kids know they have to give you the remainder. Speak soon."* [R to A, TB 170-171]

- 7 May 2018: *".. But you must realise that I would like to have my money back in full, otherwise I am tied to you and I cannot move in (sic) with my life and do as I wish. I feel that I have been there for you and helped you with your family difficulties, but now I want time for my dad. You are pushing me away.xx"* [A to R TB 173]

- 7 May 2018: *"I can't give it in full. As you know, there is nothing I can do about it. Mortgage was set. I told you I will sort it, but you wouldn't let me. Now we in this situation that I didn't want to be in…."* [R to A TB 174]

- 7 May 2018: *"If you didn't want me to pay the mortgage off, why did you get the price? Why didn't you refuse then…"* [A to R TB 175]

- 7 May 2018: *"No, you said to me. You didn't need security as you had dads house and you and Dad have an understanding you won't be short. You wanted to pay for house for me and kids, then later you was gonna move in Dad's as it was where you was born and Grandad died. I understood that I said later in life we will still have the house. I wasn't bothered. I just wanted a home for my kids and I said later in life I would sort you for your kindness. Now things have changed for you. You want your security on house, something you never wanted. If that was the case, I would have sort my house myself. I tried to make it work but feel I cannot go back now."* [R to A TB 176-177]

- 7 May 2018: *"When I payed [paid] the mortgage you said you would make a will, and I trusted you, I never pressured you. All I wanted was the security of my 40,000 that I put in. I have never wanted to take anything away or profit from you and the kids, and I still don't. I'll send another text explaining. xx"* [A to R TB 178]

- 7 May 2018: *"And I said I'd make a will half, half which you said no, as you would have to sell house. And I said I was only buying for my kids future something. I would doing before I met you. And you, you now want it in yours, so later in life you will leave it. Kids. Sorry, as you said you wouldn't need it for your security As you had dads, it was a way of getting your money back if I died. Land give me peace of mind. I was not in debt and you had a place to live. I told you, don't sell flat. Let me pay for house. But you said you couldn't live there with me unless you contributed to it. So I couldn't win, could I?"[*R to A TB 179-180]

VI The issues

23. The issues which the Court must consider are as follows:

    (i) Was the Judge wrong or was there a serious procedural irregularity by the Judge deciding that the Appellant could not proceed with a claim based on a loan or subrogation of the mortgagee;

    (ii) If so, what injustice or prejudice did the Appellant suffer, and what order, if any, should be made? If an order should be made, (a) should the Court make a different order, or (b) should the Court remit the matter to the County Court?

VII Should the Judge not have acceded to the preliminary issue and tried the loan claim?

(a) The Respondent's case

24. The Respondent's submissions to support the Judge's exclusion of the loan claim can be summarised as follows:

    (i) It was the wrong procedure to plead the loan in the Reply.

    (ii) The loan claim contradicted the claim in the Particulars of Claim of an express or constructive trust in the Property, and therefore should not have been allowed to be a part of the Reply: see CPR PD 16 para 9.2 and see also *Martlett Homes Ltd v Mulalley & Co.* [2021] EWHC 296 (TCC) *("Martlett")* at paras. 20-21;

    (iii) Without a claim based on a loan, there was not a pleaded defence to a loan.

    (iv) Whilst the Reply did refer to a loan, it was not done with any particularity such that the Respondent knew what case, if any, she had to meet.

    (v) There should not be any allowances to the Appellant as a litigant in person. First, the pleadings were drafted by lawyers who ought to have known the consequences of what they were doing and to have advised accordingly.

The same rules apply to litigants in person as well as to represented persons, and the Judge took into account a degree of latitude against the prejudice that was or would be caused to the Respondent.

(vi) This was a case management decision which was open to the Judge. It was made in the exercise of a discretion. The Judge was in the best position as trial judge to reach conclusions as to the effect on the trial if such a plea were allowed to stand. The Court should not interfere with case management decisions of a judge who had applied the correct principles unless satisfied that the decision was so plainly wrong that it must regarded as outside the generous ambit of the discretion entrusted to the judge.

25. The last of the above submissions are an application of law as summarised in *Royal and Sun v T & N* [2002] EWCA Civ 1964 per Chadwick LJ at [37-38] who said:

> *"37….these are appeals from case management decisions made in the exercise of his discretion by a judge who, because of his involvement in the case over time, had an accumulated knowledge of the background and the issues which this Court would be unable to match. The judge was in the best position to reach conclusions as to the future course of the proceedings. An appellate court should respect the judge's decisions. It should not yield to the temptation to "second guess" the judge in a matter peculiarly within his province.*
>
> *38 I accept, without reservation, that this Court should not interfere with case management decisions made by a judge who has applied the correct principles, and who has taken into account the matters which should be taken into account and left out of account matters which are irrelevant, unless satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge…."*

26. The principles applied on appeal from the exercise of discretion were stated by Saini J in *Azam v University Hospital Birmingham NHS Foundation Trust* [2020] EWHC 3384 (QB) as follows:

> *"50. An appellate court will only interfere with a discretionary evaluation where an appellant can identify one or more of the follows errors:*
>
> *(i) a misdirection in law;*
>
> *(ii) some procedural unfairness or irregularity;*
>
> *(iii) that the Judge took into account irrelevant matters;*

(iv) that the Judge failed to take account of relevant matters; or

(v) that the Judge made a decision which was "plainly wrong"".

27. This summary (together with paras. 51-52, amplifying the fifth of the above matters) was referred to by Birss LJ in *ABP Technology Ltd v Voyetra Turtle Beach Inc and another* [2022] EWCA Civ 594 as a *"useful recent summary"* of the principles.

(b) Discussion

28. I take into account the high threshold required in order to overturn a decision on a case management decision. I confine myself at this stage to the question as to whether the Judge should have admitted the plea that it was a loan and leave for later consideration whether there was any consequent injustice by not doing so.

29. I understand how the Judge reached the conclusion which he did, but I consider that he failed to take into account adequately or at all relevant considerations. By the end of the case when the Judge made his decision on the 'preliminary issue' to exclude the loan claim, it would have become apparent that the defences to the proprietary and personal claims were closely related, namely that the moneys were advanced as a gift, and that any promise of a repayment was no more than a moral obligation. This appeared throughout the Defence even without the loan being pleaded in the Particulars of Claim. It was a determination about these points that led at least in large part to the dismissal of the proprietary claim. It is this closeness of defences which has led to the Respondent being able to contend, by way of a Respondent's Notice, that it would not have made any difference if the claim based on a loan had been admitted at the trial.

30. In these circumstances, there would have been no substantial prejudice to the Respondent in the event that a claim based on a loan had been considered and adjudicated upon in the Judgment.

31. In my judgment, the Judge did err in his decision to exclude the case of a loan in failing to consider adequately or at all the relative prejudice to the Appellant of excluding the loan claim against the prejudice to the Respondent of permitting the loan claim to proceed. There was considerable potential prejudice to the Appellant about its exclusion. There was little, if any, prejudice to the Respondent about its inclusion for the following reasons, namely:

(i) The pleaded defence to the claim for a proprietary interest in the Property was in large part that the moneys advanced to the mortgagee by the Appellant were advanced by way of gift to the Respondent. If it was a gift, then this was the answer not only to the proprietary claim, but also to a personal claim for a loan.

(ii) As noted above, the evidence of the Respondent had covered the areas in question, asserting that there was no agreement for repayment and on the contrary that there was discussion about a gift. Indeed, it is the same

closeness of the issues in the trust and the loan claims that has given rise to the Respondent's Notice. Given that this works for the Respondent in the Respondent's Notice, so too it works the other way to provide a reason why the loan claim could have been heard without causing any or any substantial prejudice to the Respondent.

(iii) The procedural concerns were diminished in their practical effect by the fact that the Respondent had known about the claim based on a loan from the time of the Reply [29 August 2020]. The Respondent had engaged in the defence of a gift and in the notion that any promise of repayment was in the nature of a moral obligation only both in the pleadings and in the evidence.

(iv) There was therefore no substantial prejudice to the Respondent in the Court acceding to the Court treating para. 9c. of the Reply as if it was a part of the Particulars of Claim or in giving permission to amend the Particulars of Claim to include the same as part of the claim. This is not to ignore a decision like *Martlett*, where a claimant was not allowed to rely on a reply where the cause of action should have been in the Particulars of Claim. That case was different because there was a limitation issue and there was a specific strike out application (that is not a point taken at trial). In the instant case, there is no limitation issue and no application had been made in advance of trial.

(v) Alternatively, the burden to the Respondent in doing this was far less than the burden to the Appellant in allowing the 'preliminary issue'. It would not have necessitated an adjournment for the Respondent to have to face a case of subrogation or a personal loan.

(vi) The Judge was not addressed about the law to the effect that absent a presumption of advancement, prima facie there was an obligation to repay on the part of the payee of money. Chitty on Contracts 34th Ed.at para. 41-268 puts the matter as follows:

> *"If money is proved, or admitted, to have been paid by A to B, then in the absence of any circumstances suggesting a presumption of advancement, there is prima facie an obligation to repay the money; accordingly if B claims that the money was intended as a gift, the onus is on him to prove this fact"*: see *Seldon v Davidson* [1968] 1 WLR 1083.

(vii) Following oral argument and after I sought further assistance, I have been referred to the case of *Chapman v Jaume* [2012] 2 FLR 830 which confirms that (a) the relationship of unmarried cohabitants does not give rise to a presumption of advancement, following *Stack v Dowden* [2007] UKHL 17 at [112], and (b) once payment of money is proved there was prima facie an obligation to repay in the absence of a presumption of advancement: following *Seldon v Davidson* above. In that case, it was not an answer to the claim for repayment that there had not been found to be a contract with specific terms agreed regarding repayment: in the absence of an express term, an obligation to pay within a reasonable time would be inferred.

(vii) If there was no trust established, money was advanced by the Appellant to the Respondent without a presumption of advancement. The highest that it can be put is that they were cohabitants, but they were not married. They had not been cohabitants for long: it did not equate to a marriage and at all material times, it was not a very long term relationship.

(viii) The effect of the foregoing was to relegate in importance matters such as whether the contract had been adequately pleaded. It was for the payee in such circumstances to make the running. That is what the Respondent had done in the Defence and in her evidence, and therefore there was no or no substantial prejudice. There might have been difficulties in establishing when it was repayable as to which particulars should have been provided, but this is not something which could not have been the subject of argument at trial in the event that the Court had not accepted that the moneys advanced were by way of gift.

32. For these reasons, the Judge erred in failing to consider and rule on the loan claim in his judgment. This was wrong and/or it was a serious procedural irregularity. This is by reference to CPR 52.21(3) which states:

> *"The appeal court will allow an appeal where the decision of the lower court was—*
> *(a) wrong; or*
> *(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court."*

VIII What should be the consequence of the failure to adjudicate upon the loan in the Judgment?

33. It does not follow from the above that the Court should quash the orders made and/or order a trial on the issue of whether there was a loan. In *Tanfern Ltd v Cameron-Macdonald* [2000] 1 WLR 1311, Brooke LJ at para. 33 said the following about what is now CPR 52.21(3)(b):

> *"So far as the second ground for interference is concerned, it must be noted that the appeal court only has power to interfere if the procedural or other irregularity which it has detected in the procedure in the lower court was a serious one, and that this irregularity caused the decision of the lower court to be an unjust decision."*

34. In *Hayes v Transco* [2003] EWCA Civ 1261, Clarke LJ stated at para. 14:

> *"It follows that the question in this part of the case is whether the decision of the judge was unjust because of a serious procedural or other irregularity in the proceedings. It is not, however, sufficient that a serious irregularity should be shown or even that some collateral injustice should be established. The decision must be unjust. As I see it, whether the decision is unjust or not will depend upon all the circumstances of the case."*

35. In the circumstances of this case, it is still necessary to show that in the event that the Court had proceeded to hear the loan claim, there is at least a real prospect that the result might have been different, in other words, that the Appellant may have obtained judgment for repayment of the moneys advanced. Otherwise, there would not be an injustice consequent upon the irregularity.

36. The argument that there has been or may have been an injustice such that the Court should interfere can be gleaned in part from the submissions of the Appellant, in part from the order of Mr Justice Ritchie and in part from the analysis of the law about loans set out above. There are the following arguments:

    (i) By refusing to hear a case about a loan, the Judge failed properly to consider the claim for a loan or any defences to the loan. The prism for consideration was restricted to an agreement or arrangement to have a proprietary interest in the Property.

    (ii) The Judge referred to the fact that the onus of proof was on the Appellant to prove the constructive or express trust: see the Judgment at paras. 11, 12 and 14 in the following terms:

    > *"[11] the law is that in a domestic consumer context, the presumption is that the sole legal owner is presumed to be the sole beneficial owner. The burden is on the party seeking to displace this presumption to show why.*
    >
    > *[13] the standard to which the claimant must prove his claim is on the balance of probabilities. In other words, he has to prove the above proposition so that it is more likely than not.*
    >
    > *[14] I find that the claim it has not proved so that it is more likely than not that there was a common intention that the claimant would have a beneficial interest in the property, either by way of actual agreement, arrangement or understanding between the parties, or from inferring the same from the parties' conduct.*
    >
    > …
    >
    > *[28] In all the circumstances, there is, in my judgement, simply no evidence that persuades me on the balance of*

> *probabilities, with the burden being on the claimant, that there was an agreement, arrangement or common understanding between the parties for a constructive trust to be imposed by the court."*

(iii) The Judge does not appear to have been addressed on the law referred to above, namely that absent a presumption of advancement, there was prima facie an obligation on the payee to repay moneys paid to them. If the Judge had been adjudicating upon the loan in his judgment, he ought to have contrasted the onus of proof in a trust claim and a loan claim. In the trust claim, it was on the party alleging the trust, which is to say the Appellant. In the loan claim, absent the presumption of advancement, it was on the payee to show that the money received was not repayable. The Judge has not dealt with this in his judgment because he has in effect excluded a case about a loan.

(iv) The Court's characterisation of offers to repay in WhatsApp messages and through a will as being moral obligations does not sit well with the moneys being prima facie repayable absent a presumption of advancement. If there had been gift, there would not have been any question of repayment. On the contrary, these offers were consistent with a legal obligation to repay.

(v) There is an underlying concern expressed by Mr Justice Ritchie and the Appellant that a sum of over £40,000 was a large sum, especially for these parties, such that it ought not to have been concluded lightly that there was no legal obligation to pay.

IX Respondent's Notice

37. In respect of the loan claim, the Respondent served a Respondent's Notice containing three grounds to the effect that even if the appeal is allowed, namely that the loan claim ought to have been admitted, the decision of the Judge ought to be upheld for the following reasons or any of them:

(i) There was no contract between the parties – any obligation to repay the moneys was a moral one at best;

(ii) There was no intention to be legally bound – the parties were in a relationship;

(iii) At most, the agreement was that the respondent would provide for the repayment to the appellant in the will. The respondent made such provision in her will and was therefore not in breach.

38. The essence of the Respondent's Notice is on the basis of the findings of the Judge in respect of the trust claim, the loan claim would have failed based on the same findings. I shall now examine that, but first it is necessary to consider a matter referred to above. It follows from the law set out above that the moneys provided were prima facie repayable, and the burden was on the Respondent to show that they were not repayable. Was this burden discharged in the instant case? The onus, being on the Respondent, was expressly mentioned in the Reply at para.8a. The Defence at para. 14d expressly asserted the existence of a gift and that there was no legal obligation to make a will or to repay the gift. This has been quoted in full above.

39. The Judgment addressed these matters in the emphasised parts of the judgment referred to above as follows:

    (i) The money was essentially thrust into the account of the Respondent against her wishes: see Judgment paras. 18 and 26-27;

    (ii) The reference to a gift in the attendance note of the solicitors was to reflect an intention of the parties that the money was to be treated as a gift: see Judgment paras. 20 and 26;

    (iii) The provision of a will and references to repayment were not about a legal obligation to repay but were a recognition of a moral obligation about repayment: see Judgment paras.21-22 and 27.

40. Against this, there is a question as to whether the findings of the Judge are dispositive of the case on the basis of a claim for a loan and not simply of the claim for a proprietary claim.

41. The following features are to be borne in mind. First, the Judge did analyse that on any view of the case, the defence was that there was a gift and so contrary to a case of a proprietary interest or an obligation of repayment. Whilst being addressed about the 'preliminary issue' at the end of the case after hearing the evidence, the Judge said in argument [T2/186/18-27] the following:

> *"the defence…has defended on really one essential proposition, which is regardless of how you come at it, in other words, whether it is a constructive trust, whether it is a subrogation, whether it is a loan, all of that is wrong because it was a gift, pure and simple…"*

42. Against that background, the acceptance of the case about a gift was dispositive not only of the claim in the Particulars of Claim, but also of a putative claim to a loan. The acceptance of the case about a gift was derived among other things from (a) the evidence about the solicitor's attendance note and of a recorded conversation where the word "gift" was used, (b) reading the WhatsApp messages and hearing the evidence from the Appellant and the Respondent respectively about the meaning and intent of them, (c) preferring the evidence of the Respondent to that of the Appellant, especially

on the subject of whether the money was advanced as a gift, (d) the finding that the money had been paid not at the request of the Respondent and against her wishes.

43. Second, the repeated references to moral obligation were in the context of the evidence as a whole and detailed consideration in the final speeches to the significance or otherwise of the offers of repayment. In context, it meant not that there was no gift, rather that the Respondent would receive the money as a gift but temper it by a limited moral obligation about repayment. The offer to provide for payment in a will was, in any event, even as a moral obligation, very limited, in that this was a case between people of a similar age who were not particularly old. A will was by reference to a time in the future which might not be for many years by which time the Appellant might have predeceased the Respondent. The references to making repayments in the text messages were also limited, and were fully considered by the Judge in his findings about moral obligations. The Judge asked the question how there could be at the same time a provision for repayment in the Respondent's will and a gift. Ms Townley on behalf of the Respondent replied that it was still a gift: it was just that in the event that she predeceased him, she would have no use for the gift and so the money would go back to him: see [Day 2/83/4-27].

44. Third, although the decision of the Judge to exclude the claim for a loan was made, the case had proceeded at the evidence stage as if the claim was still there, subject to a ruling on the 'preliminary issue'. In her final speech, Ms Townley for the Respondent said that *"the claimant's case appears to be far more that it is a loan"* [Day 2/77/15-16]. She then referred to the claim for a loan saying that at highest the agreement was that the money would be returned in a will. She said that the reference in text messages to make repayments is typical *"of the defendant's character and her good nature that she simply wanted to get him his money back as soon as possible. And have him out of her life. There was no legal obligation for her to do so. It is simply it is one of conscience."* [Day 2/92/8-23]. To which the Judge responded in argument saying *"it was ex post facto, look, I know we have split up, I do not want there to be any loss to you and I will make sure you are taken care of by me doing this gratuitous act, in effect"* [Day 2/92/24-26].

45. The Judge drew attention to para. 41 of the witness statement of the Respondent, namely that there was no agreement between the parties about repayment. The Judge characterised this as an informal undertaking. Ms Townley's response was to refer to the Respondent's evidence that they went *"... round to the solicitor. She said she wasn't worried after that meeting because she knew, legally, everyone knew where they stood in that anything that he gave to her would be a gift."* [Day 2/93/7-16]. I mention the submissions and the Judge's reaction to the submissions because they form the context in which the Judgment was given. The Judge in effect accepted and developed those submissions in his findings in his Judgment.

46. This shows the following matters, namely:

(i) There was consideration in the evidence and in the submission at the trial about the claim for a loan;

(ii) The Judge considered that there was no contradiction between the evidence about the will and repayment on the one hand and a gift on the other hand.

X The law about the approach of an appellate court and its application

47. It is necessary for the Court to remind itself about the approach of an appellate court to the evaluation of evidence by a first instance judge, and to the oft cited *Fage (UK) v Charbani* [2014] EWCA Civ 4 at 114 where Lewison LJ stated:

> *"Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: Biogen Inc v Medeva plc [1977] RPC1; Piglowska v Piglowski [1999] 1 WLR 1360; Datec Electronics Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23 [2007] 1 WLR 1325; Re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33 [2013] 1 WLR 1911 and most recently and comprehensively McGraddie v McGraddie [2013] UKSC 58 [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include*
>
> *i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.*
>
> *ii) The trial is not a dress rehearsal. It is the first and last night of the show.*
>
> *iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.*
>
> *iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.*
>
> *v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).*
>
> *vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."*

48. It might be possible to depart from this in the event that there were real appeal points e.g. an error of law which had somehow rendered unsound the findings of fact. In this case, I have been concerned that the refusal to admit the case of a loan has undermined the findings. In my judgment, this is not such a case on its own unusual facts, namely that:

(i) a defence of gift was equally a defence to a case about an express/constructive trust and to a case of a loan, as the Judge recognised in argument;

(ii) the defence of gift was not nullified by the repeated references to repayment in WhatsApp messages and by the will, but were, as the Judge found, simply a recognition of a moral duty of the Respondent to return the money used. It is to be noted that such moral duties were far more limited than would have been the case if there had been an agreement of a loan repayable on demand.

49. In another case, it could have been the case that the determination of the 'preliminary issue' against the Appellant would have required the Court to remit the case for retrial on at least the issue of whether there was a loan, and in some case a retrial of the whole case. However, in the instant case, where the defence to a loan/subrogation was so intimately connected with the defence to the proprietary claim, and where the Judge had given such detailed consideration as is revealed by the interchanges in the transcripts which preceded his judgment, the findings of the Judge must be accorded full respect.

50. I have considered in particular whether a claim on the loan should be ordered to be the subject of a retrial on the basis of the failure to adjudicate upon it. I have had particular regard to the failure of the proprietary claim on the basis that the Appellant had not satisfied the claim on the balance of probabilities, the onus of proof being on him. Particular regard has been given to the fact that the onus of proof was on the Respondent as payee to show that there was a gift and/or that there was no legal obligation to repay. This point was taken expressly, as noted above, in para. 8a of the Reply. The question has been if the Judge had considered the loan claim and had applied the different onus of proof in respect of the loan claim, whether there is a real prospect that the Court might have reached a different result.

51. Although the Judge did emphasise the onus of proof in respect of the proprietary claim and did not apparently consider the different burden in the loan claim (having ruled as he did on the 'preliminary issue'), there is no reason to believe that there would be a different result. It is a defence to a loan that there was a gift. It is an answer to an alleged obligation to repay that there was only a moral obligation. It is apparent from the judgment that both these matters were considered at length, and it is also apparent from the context of the argument how they arose. They arose as the same issue whether the Judge was considering a trust claim or a loan claim, as the Judge himself had observed. I am satisfied on the basis of the above that the decision would have been the same if the Court had not accepted the 'preliminary issue' raised by the Respondent, had adjudicated upon the loan claim, and had been addressed on and accepted that the onus was on Respondent to prove the gift. Likewise, I am satisfied that the Court would have considered the question as to whether any obligations about repayment were legally binding obligations and would have reached the same conclusions which he did that they were moral obligations and that they did not cancel out the fact that the original payment was in the nature of a gift.

52. The result is that the Judge has made important findings of facts relevant both to the proprietary and the personal claims. The claim to an express or constructive trust was

considered fully on the material before the Court. It was rejected among other things because of (a) no evidence of any agreement or arrangement between the parties for a proprietary share, (b) no record in any written document of such an interest in the Property, (c) references in a solicitor's attendance note and in a recording to a gift and none to a proprietary interest, (d) unimpressive evidence of the Appellant to there being no question of a gift, and evidence of the Respondent to opposite effect which was accepted. This reasoning is unassailable and was available to the Judge as the first instance finder of facts.

53. The Judge had the whole sea of evidence presented to him. He alone saw and was able to appraise the oral evidence of the Appellant and the Respondent. There is no way of duplicating the role of the trial Judge. These findings were entirely relevant to the loan claim in that it was an answer to the loan claim that the moneys advanced were by way of gift and/or that any promises of repayment were moral and not legal obligations. The failure to consider the loan claim and the different incidence of the onus of proof were not material and would not have affected the outcome because the findings on the proprietary claim were a complete answer to the loan claim.

54. A point arises from a judgment cited by Ms Townley to the Court after the close of oral argument with the permission of the Court, namely *Lynch v Shipston* [2015] EWCA Civ 344. This case would not normally be referred to because it is a decision on a permission application on the representation of the appellant alone: see *Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001. However, that was a case where there was an arguable error in respect of the burden of proof in the case of a loan in failing to apply the starting point that money paid was prima facie repayable. The submission was made that there ought to be a retrial, and it was wrong in principle to speculate what the Judge would have done if he had not erred on the burden of proof. The answer to that point of Underhill LJ was that if that had occurred, the appellant was entitled to the benefit of the doubt. On the primary findings of the Judge, he rejected the notion that it was a loan, and on the basis of positive findings of fact, the case went beyond merely finding that the appellant had failed to satisfy the burden of proof. Reading the facts as a whole, there was a positive finding of a gift, and that finding was not tainted by any error about the burden of proof: see paras. 6-12.

55. This has resonance to the instant case. Although there is a similarity between the facts of the two cases, the facts of each case will be different. The primary point to glean is that having identified an error in the judgment of the Court, the Court generally must not speculate as to what findings would have been made if the error had not been made. In this case, the positive findings made, albeit in respect of the proprietary claim, are a complete answer to the loan claim, and it matters not that in the instant case the burden is on the Respondent as payee to show that the moneys were not repayable.

56. In these circumstances, the findings on the proprietary claim are a complete answer to the loan claim. Accordingly, there is no reason to remit the case. This would in the circumstances of this case be a retrial of matters and findings which have already been considered and determined. There is also no injustice caused by the procedural error because (a) all the relevant evidence on the loan claim/subrogation was before the Court, and (b) the positive findings made on such evidence are a complete answer to the loan claim.

XI Procedural concerns

57. I have dealt with the part of the claim in respect of which Mr Justice Ritchie gave permission. It is not necessary to say anything about the matters where permission was not given. Nevertheless, since the Appellant is a litigant in person, I wish to add to what Mr Justice Cotter and Mr Justice Ritchie have said in respect of various procedural concerns of the Appellant. Mr Justice Cotter was concerned, when the case was before him prior to the transcripts being obtained, as to whether there was an irregularity about the circumstances in which the Judge sent the parties to negotiate with each other. The concern of Mr Justice Cotter was whether the Judge had led the Appellant to believe that he should negotiate on the ground that he was getting his money back and/or that there was no gift, yet then went on to find against the Appellant on the basis that it was a gift. Mr Justice Ritchie, who had the transcript containing the relevant discussion at Day 2/77-81, saw nothing wrong in what had occurred: see para. 18 of his reasons. The Judge did not give any indication as to the result, but on the contrary said that since the Respondent said that she did not wish to benefit from the Appellant, he wished the parties to be given a further opportunity to see if they could agree matters. Those efforts came to nothing, and so the trial proceeded to final submissions and a judgment.

58. Mr Justice Cotter also said that it would be worse still if the Judge was alerted to the Appellant being a vulnerable litigant. As Mr Justice Ritchie rightly observed, the consideration about the Appellant being vulnerable did not feature highly in the trial. On the appeal, the Appellant maintained that on the basis that the Respondent believed him to be a person with a severe mental illness ("SMI"), the Judge should have considered whether he was abused by her. It should be emphasised that this did not mean that the Appellant accepted that he had a SMI: no medical evidence was called. It was also the case that the Appellant returned to work 6 months after the break- up of his relationship and making allowances for his absence of a legal training, he presented his submissions in a measured and clear way.

59. Before Mr Justice Cotter and Mr Justice Ritchie, there were numerous complaints which were rejected. This is evident from the clear indications of Mr Justice Cotter and from the subsequent decision on permission of Mr Justice Ritchie. They do not arise before me, but there is nothing in these matters which advance the case of the Appellant.

60. The conclusions of the Judge were made in the context of the proprietary claim, but have direct application to the loan claim. They were not lightly drawn but were the result of very careful examination of the contemporaneous documents and an assessment of the oral evidence. The Appellant is evidently upset about the determinations of fact because on his case the Judge ought to have found for him. The real complaint is that the Judge made findings of fact which were available to him on the evidence and with which, on the facts of this case, this Court cannot interfere. There are no circumstances which entitle this Court to set aside the findings of fact or to remit the matter for a further trial of all or part of the dispute between the parties.

XII Disposal

61. For all these reasons, I dismiss the appeal on the basis that although the determination of the 'preliminary issue' was wrong or was a procedural irregularity, this had no ultimate effect on the substance of the matter. I am satisfied on the basis of the Judge's findings on the proprietary claim, the loan or other claims referred to for the first time in the Reply, if they had been admitted, would have failed. I therefore take into account the Respondent's Notice and conclude that in respect of Ground 1 that the Judge was entitled to conclude that the moneys were advanced as a gift and there was no legal obligation requiring re-payment and/or there was no contract between the parties. Any obligation about repayment, such as there was, was at highest a moral obligation. A different legal label under which the findings of moral obligations can be expressed is that this negatived any legal obligation to repay and/or if there was any agreement, there was no intention to create legal relations as stated in Ground 2.

62. The findings in respect of the proprietary claim operate as a defence to the loan/subrogation claim. It follows that there is no reason for this appellate court to make a different finding or to remit the matter to a different court. It therefore follows that the decision to dismiss the claims was not wrong. The fact that it would have made no difference in the event that the loan claim had not been excluded has as its effect that either there was no serious procedural or other irregularity, or if there was one, it did not cause an injustice.

63. For all these reasons, the appeal is dismissed.