Neutral Citation Number: [2024] EWCA Civ 169

Case No: CA-2023-001596

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)
His Honour Judge Hodge KC (sitting as a Judge of the High Court)
[2023] EWHC 1901 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/02/2024

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE NEWEY
and
LORD JUSTICE ARNOLD

- -

Between:

RITA REA	**Claimant/ Appellant**
- and -	
(1) REMO REA **(2) NINO REA** **(3) DAVID REA**	**Defendants/ Respondents**

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Robert Deacon (instructed by **Britton and Time Solicitors**) for the **Appellant**
Graeme Wood (instructed by direct access) for the **Respondents**

Hearing date: 1 February 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 23 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Newey:

1. This appeal concerns the validity of the will ("the 2015 Will") which Mrs Anna Rea ("Anna") made on 7 December 2015. Anna died in the following year, on 26 July 2016, aged 85. Her four children survived her and are the parties to these proceedings. Anna's daughter Rita is the claimant and appellant. The defendants and respondents are Anna's sons: Remo, Nino and David.

2. In a judgment dated 26 July 2023 ("the Judgment"), His Honour Judge Hodge KC ("the Judge"), sitting as a Judge of the High Court, concluded that the 2015 Will was invalid by reason of undue influence exercised by Rita. Rita now challenges that decision in this Court.

3. For simplicity, I refer to the members of the Rea family by their first names in this judgment. No disrespect is intended.

Narrative

4. This section of this judgment is largely derived from the Judgment.

5. Anna grew up in Italy but came to this country at the age of 19 and later married the man who became the father of her children. She first made a will on 29 May 1986, soon after she was divorced. By that will ("the 1986 Will"), Anna appointed Remo as her executor and gave all her property to such of her children as should survive her in equal shares.

6. Anna came to suffer from a number of health conditions. The Judge explained in paragraph 5 of the Judgment:

> "She was deaf in one ear and had poor hearing in the other, necessitating the use of a hearing aid. Anna was affected by diabetes for about the last 20 years of her life. She had suffered a serious heart attack in 2009. She was afflicted by chronic kidney disease, and bilateral cataracts. From about 2014, she suffered from sciatica and was wheelchair bound."

7. By the time of her death, Anna had lived for many years in a house at 5 Brenda Road, Tooting Bec, London SW17 7DD ("5 Brenda Road"). In 2009, after her mother's heart attack, Rita went to live with her and became her principal carer. That remained the position until Anna's death. Paula Batson, a friend of Rita, also lived at 5 Brenda Road over this period.

8. Anna gave instructions for the preparation of the 2015 Will at a meeting with Mrs Savita Sukul of SJS Solicitors on 17 November 2015. Rita had made the appointment, apparently by telephone on the previous day, but she had had no previous involvement with the firm. At Anna's request, Rita was present during the meeting and Mrs Sukul's contemporaneous notes show that she intervened from time to time, but Mrs Sukul explained that she took her instructions from Anna alone.

9. Anna told Mrs Sukul that she wished to ensure that 5 Brenda Road went to Rita. Asked by Mrs Sukul whether she wanted her sons to inherit a share in 5 Brenda Road,

she said that she did not, explaining that they did not care for her and that she felt abandoned by them. Rita suggested that she consider leaving legacies to her grandchildren or Ms Batson, but she rejected those ideas.

10. That same day, Mrs Sukul wrote to Dr Sajid Qaiyum to ask him to carry out an assessment of Anna's mental capacity. Mrs Sukul explained in her oral evidence that she had requested this because "the statements that Anna's sons did not care for her or visit her had set professional alarm bells ringing": paragraph 57 of the Judgment.

11. Dr Qaiyum had been Anna's GP since 2010. He saw Anna on 24 November 2015 and completed the assessment form two days later after he had had a chance to go through her medical records. Dr Qaiyum concluded that Anna was mentally capable and said that he had no reason to believe that Anna was being coerced or was under any undue influence. In paragraph 75 of the Judgment, the Judge said this about answers which Dr Qaiyum gave to questions he had asked:

> "Dr Qaiyum confirmed that he has been carrying out the assessment for the purpose of making a will. Anna had been explicit in her decision-making. She said that she had decided to make a gift to her daughter. Dr Qaiyum asked about her other children. Anna said that she had other children but that she was giving her house to her daughter. She said that her daughter had nowhere else to go. She had looked after Anna for years, caring for everything. Dr Qaiyum asked Anna if she had any other children and she said that she had three sons. The doctor asked Anna whether she wanted to include any of them in her will and she said no."

Dr Qaiyum further gave evidence to the effect that he "had specifically asked whether Anna was under any pressure or influence" and "Anna had said no" and that it "was her house and she was doing it for her daughter": paragraph 76. As the Judge went on to explain in paragraph 76, Dr Qaiyum gave evidence along the following lines:

> "After she had answered all the doctor's questions, he did not believe that Anna was under any pressure or undue influence in writing the will but was doing so of her own volition. Anna had repeatedly said to Dr Qaiyum: This is my wish. This is my house. She has looked after me. My sons have their own homes and jobs. My daughter has nothing."

12. Mrs Sukul saw Anna again on 7 December 2015, this time without Rita present, and the 2015 Will was executed on that occasion with Mrs Sukul and Dr Qaiyum as the witnesses. In advance of the meeting, Mrs Sukul had prepared a draft will under which Anna would have left her car to David and each of her sons would have received a legacy of £1,000, with the residue going to Rita. However, the will had to be re-drafted when Anna changed her mind and specified that the residue should be divided equally between her four children because she was not sure that there would be enough money in the estate to satisfy the £1,000 legacies. Mrs Sukul sought to explain all the clauses in the 2015 Will in layman's terms, and she saw no reason to believe that Anna did not understand them. Anna signed all six pages of the 2015 Will and also a document "approving the draft will, stating that she had read and

understood its contents, which reflected her intentions and the manner in which she would like her estate to be distributed; and confirming that Anna was of sound mind, was suffering from no illnesses that affected her writing and executing the will, and that she was making the will with no undue pressures from anyone": paragraph 66 of the Judgment.

13. Mrs Sukul made detailed attendance notes. The Judge said this about those relating to the meeting on 17 November 2015 in paragraphs 63 and 64 of the Judgment:

> "63. Mrs Sukul's notes make it clear that Mrs Sukul was alive to the risk of pressure or undue influence on the part of Rita and had sought to exclude her from the meeting at which instructions were to be given for the will but that Anna had insisted upon Rita being present. Even before the meeting formally started with Rita present, Anna had made it clear that she 'wants her daughter to have her house' …. Anna attended the appointment with Mrs Sukul in a wheelchair …. At the meeting, Mrs Sukul requested Rita not to interrupt. Rita did not do so, but only offered support to her mother and explained if her mother did not understand. Anna 'was firm with her instructions' …. Anna said that she was getting old and wanted to write a will. Rita confirmed that Anna could read English …. Rita was asked not to answer but to let her mother answer …. [Anna] was leaving her property and the contents of 5 Brenda Road to her daughter, Rita, absolutely as she had taken care of Anna all those years. Anna's sons did not help out with her care. There had been numerous calls for help, etc but they were not engaging with any help. The other children had 'abandoned' Anna. Rita said – and her mother confirmed – that from 2009, when Anna had her heart attack, her daughter had been looking after her …. Anna proposed making gifts of £1,000 to each of her three sons from the moneys in her bank account and giving her car to David because he was taking care of it. 'None of my children have not [sic] taken care of me except my daughter. In the last five months David and Nino started to assist with my care and then abandoned my care' …. When Anna proposed to give her residue to Rita absolutely, Rita asked her to consider her grandchildren but Anna said: No – they did not see or care for her. Anna insisted: No …. Anna left her funeral wishes to her daughter, Rita, to decide ….
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> 64. [Anna] was able to identify her four children. She was hardly in touch with Remo, who was in the USA. Anna said that she 'hardly sees' David and Nino 'and

> they do not care for her'. Anna was making her will 'to ensure that her assets are distributed in the manner of which she wants' …. There was discussion about the executors. Initially Anna suggested Rita as her executrix. Rita said no and suggested Anna's niece and [Paula] Batson (whom Rita described as the 'social services carer') but Anna said not the carer because she was not a relative. Initially it was agreed that both Rita and the niece, Angela Contucci, should be the executors, with Anna saying that 'Angela can bring family together' …. There was discussion about the extent of Anna's property and her insistence that Rita should have her property at 5 Brenda Road since she lived there and cared for Anna whilst her sons 'do not care for her' and she felt abandoned by them …. There was discussion about pecuniary legacies of £1,000 to all three sons and a gift of Anna's car to David …. There was discussion about the residue. Anna wanted this to go to Rita, who appeared not to want this and suggested that it should go to the grandchildren; but Anna was insistent that it should go to Rita …. Rita suggested a gift to Paula Batson but Anna was quite clear that she did not want this because Paula did not need it …. Mrs Sukul explained about the effect of inheritance tax but Anna told her that 'she knows Rita says they do not want to discuss' inheritance tax …. There was discussion about the lack of any financial dependents (with no reference to Rita) and the fact that Anna would leave it to Rita to decide about burial and cremation because 'they' could not make a decision. In the discussion about capacity and illness, Anna said that she was 'fit and well' but she agreed to Mrs Sukul obtaining a medical report 'bearing in mind we do not know her/her daughter being present, her age, etc' …."

14. Mrs Sukul said in her evidence that Anna had been "quite firm" and "very clear" about what she intended and, in particular, "clear and consistent" about her wish to leave 5 Brenda Road to Rita. Mrs Sukul also said that she had no reason to believe that Rita or anyone else had coerced or influenced Anna to dispose of her estate in the way for which the 2015 Will provided.

15. As executed, the 2015 Will provided for Rita and Angela Contucci, Anna's niece, to be appointed as executors, for Rita to be given 5 Brenda Road ("as she has taken care of me for all these years") and for the residue of Anna's estate to be shared equally between her four children (with substitutionary gifts to issue). Finally, clause 11, headed "Declaration", stated:

> "I DECLARE that my sons do not help with my care and there has been numerous calls for help from me but they are not engaging with any help or assistance. My sons have not taken

> care of me and my daughter Rita Rea has been my sole carer for many years. Hence should any of my sons challenge my estate I wish my executors to defend any such claim as they are not dependent on me and I do not wish for them to share in my estate save what 1 have stated in this Will."

16. Remo, Nino and David were not told of the 2015 Will during Anna's lifetime. The Judge explained in paragraph 78 of the Judgment:

> "The first any of them knew anything about it was after Anna's death; and David, in particular, was very angry when he discovered about the new will."

17. The present proceedings were issued on 5 July 2017. By them, Rita asked that the Court decree probate of the 2015 Will in solemn form and that probate be issued to her as the remaining named executor, Ms Contucci having renounced probate. In a defence and counterclaim dated 14 August 2017, Remo, Nino and David disputed the validity of the 2015 Will, alleging that Anna lacked testamentary capacity when the 2015 Will was made, that she did not know and approve the contents of the 2015 Will, that Rita exerted undue influence over her mother and that the 2015 Will was invalid by reason of fraudulent calumny. Remo, Nino and David sought orders pronouncing against the 2015 Will and in favour of the 1986 Will.

18. There has been an unfortunate procedural history. Following a three-day trial, Deputy Master Arkush concluded in a judgment dated 13 September 2019 ([2019] EWHC 2434 (Ch)) that the 2015 Will should be admitted to probate and that the counterclaim should be dismissed. Adam Johnson J dismissed an appeal from that decision ([2021] EWHC 893 (Ch)), but a further appeal to this Court was successful: see [2022] EWCA Civ 195. Snowden LJ, with whom I agreed, explained that the Deputy Master had made a mistake in restricting cross-examination of Rita on certain issues and that that error had "caused serious prejudice … which was not remedied by anything else which occurred at the trial" and that the matter therefore had to be remitted for a retrial, though he "strongly urge[d] the parties … to do everything possible to reach a consensual settlement of their differences rather than fight out a retrial". In his concurring judgment, Lewison LJ noted that the Deputy Master had been "conscientiously trying to be fair to all parties" and that the outcome was "a tragedy for the whole family".

19. The retrial took place before the Judge over four days in July 2023. In the Judgment, the Judge explained that he was "entirely satisfied that Rita has demonstrated that her mother had the required testamentary capacity at the time she gave instructions for, and executed, the 2015 Will" (paragraph 117), that he was "also satisfied … that Anna was suffering from no disorder of the mind which had poisoned her affections, perverted her sense of right and wrong, or prevented the proper exercise of her natural faculties" (paragraph 118), that he had "no doubt that Rita has demonstrated that Anna both knew, and approved, of the terms of the 2015 Will" (paragraph 120) and that this is "not … a case of fraudulent calumny" (paragraph 135). However, the Judge considered the case as to undue influence to have been made out. On that basis, he pronounced against the 2015 Will and in favour of the 1986 Will.

Undue influence: principles

20. As Lord Penzance pointed out in *Parfitt v Lawless* (1869-72) LR 2 P&D 462, at 469, "the influence which is undue in the cases of gifts inter vivos is very different from that which is required to set aside a will". In the context of wills, as Lord Penzance went on to say at 471, "undue influence … raises the question of coercion, and that only".

21. As Sir J. P. Wilde, the future Lord Penzance had summarised the relevant law as follows in *Hall v Hall* (1865-69) LR 1 P&D 481 when directing a jury on a question of undue influence:

> "To make a good will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like, — these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes, is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led but not driven; and his will must be the offspring of his own volition, and not the record of some one else's."

22. Lord Penzance returned to the distinction between persuasion and coercion in *Parfitt v Lawless*. He said at 469-470:

> "The natural influence of the parent or guardian over the child, or the husband over the wife, or the attorney over the client, may lawfully be exerted to obtain a will or legacy, so long as the testator thoroughly understands what he is doing, and is a free agent. There is nothing illegal in the parent or husband pressing his claims on a child or wife, and obtaining a recognition of those claims in a legacy, provided that that persuasion stop short of coercion, and that the volition of the testator, though biassed and impressed by the relation in which he stands to the legatee, is not overborne and subjected to the domination of another."

23. In a similar vein, Sir James Hannen P explained to a jury in *Wingrove v Wingrove* (1885) 11 PD 81, at 82, that "if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate in the sense of its being legal". "It is only when the will of the person who becomes a

testator is coerced into doing that which he or she does not desire to do," Sir James Hannen P said at 82-83, "that it is undue influence": "even very immoral considerations either on the part of the testator, or of some one else offering them, do not amount to undue influence unless the testator is in such a condition, that if he could speak his wishes to the last, he would say, 'this is not my wish, but I must do it'". As, however, Sir James Hannen P said at 82-83, coercion may be "of different kinds":

> "it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be, that the mere talking to him at that stage of illness and pressing something upon him may so fatigue the brain, that the sick person may be induced, for quietness' sake, to do anything".

24. Another point made in *Wingrove v Wingrove*, and subsequently echoed in *Baudains v Richardson* [1906] AC 169 (at 185) and *Craig v Lamoureux* [1919] AC 349 (at 357), is that "it is not sufficient to establish that a person has the power unduly to overbear the will of the testator": see 83. As Sir James Hannen P observed:

> "It is necessary also to prove that in the particular case that power was exercised, and that it was by means of the exercise of that power, that the will such as it is, has been produced."

25. The burden is on a person alleging undue influence to prove it to the civil standard. Lord Hoffmann said this about that standard in *Home Secretary v Rehman* [2001] UKHL 47, [2003] 1 AC 153, at paragraph 55:

> "The civil standard of proof always means more likely than not. The only higher degree of probability required by the law is the criminal standard. But ... some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. On this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not."

26. In *In re B (Children)* [2008] UKHL 35, [2009] 1 AC 11, Baroness Hale pointed out that seriousness and probability need not be related. She said in paragraph 72:

> "… there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not

> at all improbable. Nor are serious allegations made in a vacuum. Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog."

In a similar vein, Lord Hoffmann said in paragraph 15:

> "There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities. If a child alleges sexual abuse by a parent, it is common sense to start with the assumption that most parents do not abuse their children. But this assumption may be swiftly dispelled by other compelling evidence of the relationship between parent and child or parent and other children. It would be absurd to suggest that the tribunal must in all cases assume that serious conduct is unlikely to have occurred. In many cases, the other evidence will show that it was all too likely."

27. The extent, if any, to which it is appropriate to have regard to inherent probabilities will thus be affected by the particular facts. Even so, it seems to me that it will commonly be appropriate to proceed on the basis that undue influence is inherently improbable. As I have said, "undue influence" signifies coercion in this context, and potential beneficiaries are surely less likely to resort to coercion than to rely on affection, gratitude or even persuasion.

28. Undue influence can be established without direct evidence of it. In this connection, Mann J said in *Schrader v Schrader* [2013] EWHC 466 (Ch), [2013] WTLR 701, at paragraph 96:

> "It will be a common feature of a large number of undue influence cases that there is no direct evidence of the application of influence. It is of the nature of undue influence that it goes on when no-one is looking. That does not stop its being proved. The proof has to come, if at all, from more circumstantial evidence."

See too *Re Good* [2002] EWHC 640 (Ch), at paragraph 126.

29. In *Boyse v Rossborough* (1857) 6 HL Cas 2, 10 ER 1192, Lord Cranworth LC said at 51:

> "in order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been

> obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis."

That remark was endorsed by the Privy Council, in a judgment delivered by Viscount Haldane, in *Craig v Lamoureux*, at 357.

30. In *Cowderoy v Cranfield* [2011] EWHC, Morgan J, having mentioned the reference in *Craig v Lamoureux* to the circumstances needing to be "inconsistent with a contrary hypothesis", said in paragraph 141:

> "In the present case, where I have considerable evidence as to the circumstances in which the disputed will was prepared and executed, I think that it is more appropriate for me simply to ask whether the party asserting undue influence has satisfied me to the requisite standard that the will was executed as a result of undue influence."

31. *Theobald on Wills*, 19th ed., says this in paragraph 4-060:

> "It has often been said that it must be shown that the circumstances attending the execution must be inconsistent with any hypothesis other than its having been procured by undue influence, but this is overstating the position; the standard of proof is the balance of probabilities. Certainly, it is not enough to show merely that the facts are consistent with undue influence, or that there was an opportunity to exercise undue influence; but the true test is whether undue influence is the most likely hypothesis, having regard to the inherent unlikelihood of someone practising undue influence on a testator."

32. I agree. I would accept that undue influence can be proved without demonstrating that the circumstances are necessarily inconsistent with any alternative hypothesis. On the other hand, the circumstances must be such that undue influence is more probable than any other hypothesis. If another possibility is just as likely, undue influence will not have been established. When making that assessment, moreover, it may well be appropriate to proceed on the basis that undue influence is inherently improbable.

The Judgment

33. The Judge explained his reasons for finding there to have been undue influence in paragraphs 124-136 of the Judgment. Given their importance, I should set these out in full:

> "124. On the basis of the evidence before me, in my judgment, the defendants have established undue influence to the required standard in the present case. I recognise that, at first sight, that may seem a surprising conclusion, given the involvement of Mrs Sukul and Dr Qaiyum. Nevertheless, I am satisfied that the facts are consistent only with Rita having procured the

making and execution of the 2015 Will by the exercise of undue influence over her mother, which overpowered Anna's volition without convincing her judgment. The following key factors lead me to this conclusion:

125. First, there is Anna's frailty and vulnerability. Wheelchair-bound, hard of hearing, and requiring constant care and attention, Anna's quality of life was limited. She seemed to spend much of her life colouring in children's books. This is to be contrasted with what I find to be Rita's argumentative and forceful personality, and her forceful physical presence.

126. Second, there is Anna's dependency upon Rita. Apart from the assistance rendered by [Ms Batson], Anna was entirely dependent upon Rita. Anna's predominant expressed state of mind was a sense of total abandonment by her three sons. The degree of Anna's dependency upon Rita is evidenced by Anna's refusal to accept her solicitor's explanation that Rita should not be present at the meeting on 17 November 2015 since Mrs Sukul needed to take instructions from Anna alone, and despite her further warning that that if the will were to be challenged, Rita's presence at the instructions meeting might be seen as 'forcing' Anna. Anna's reported reply is instructive: 'She said her daughter really looks after her and she wants her daughter to know exactly what she is doing.' I detect in that a sense that Anna was in thrall to her only daughter, and carer.

127. Third, there is Rita's evidence about how Anna communicated her wish to change her 1986 Will. I have already indicated, when reviewing Rita's evidence, at paragraphs 48 and 49 above, that I cannot accept Rita's evidence as to the circumstances in which Anna came to ask Rita to make the arrangements for the 2015 Will to be drawn up and executed. Rita's expressed reason for Anna's wish to change her will is not consistent with her failure to give any directions for her remains to be cremated, and her express abdication of all responsibility for her funeral arrangements to Rita. I accept Mr Wood's submission that Rita's evidence that she was unaware of the other changes that her mother, and best friend, was proposing to make to her will until the meeting with Mrs Sukul on 17 November is lacking in all credibility; and that it is inconceivable that Anna and

Rita would not have discussed the proposed changes to Anna's previous will in the two or three week interval after Rita claims that this was first raised at the beginning of November. This is supported by Mrs Sukul's note which records Anna 'says she knows Rita says they do not want to discuss' the inheritance tax that will have to be paid on the estate. How did Anna know that unless they had previously been discussing the new will?

128. Fourth, there is the timing of the making of the new will, a matter of days after first David, and then Nino, withdraw their assistance to Rita in caring for their mother, and following almost 30 years during which the 1986 Will had stood unaltered.

129. Fifth, there is the fact that Rita made the arrangements for Anna to make the 2015 Will, albeit with a solicitor previously unconnected with Rita; and Anna insisted that Rita should be present at the meeting at which the instructions for the 2015 Will were given.

130. Sixth, there are the terms of the 2015 Will. This effected a major change in Anna's testamentary wishes from her previous will, which had stood for nearly 30 years, by substantially disinheriting all of Anna's three sons, leaving the only substantial asset in Anna's estate to her daughter. There is also the language of clause 11 of the 2015 Will. The final sentence, purporting to express Anna's wish that, should her sons advance any challenge to the distribution of Anna's estate, her executors were to defend any such claim 'as they are not dependent on me and I do not wish for them to share in my estate', is not language that I consider that Anna would ever have used: rather it is Rita speaking through Anna. I recognise that Mrs Sukul's notes record that Rita made some suggested changes to Anna's expressed testamentary wishes that Anna peremptorily rejected. However, these show, first, that Rita was prepared to make suggestions to her mother concerning the disposition of her estate, despite having been told to keep quiet by Mrs Sukul; and, second, none of these changes impacted upon the gift of Anna's principal asset, the house, to Rita.

131. Seventh, I have serious concerns about the motivations underlying the specific devise of 5 Brenda Road to Rita. First, as regards Anna, at the end of his oral evidence, in answer to questions in re-examination from Mr Deacon, Dr Qaiyum stated that Anna had

repeatedly said to him that this was Anna's wish. It was her house. Rita had looked after her. Anna's sons had their own homes and jobs. Her daughter had nothing. Yet, in fact, Rita still owned a flat in East Ham which, even after repaying the debt to the Department for Work and Pensions, had equity worth some £186,000. I note that Mrs Sukul's notes … record that Anna instructed her solicitor that Rita 'used to live in East Ham and moved to live with' Anna, although she could not recall when. There is no reference to Rita having retained her flat, and let it out. This suggests that Anna may not have appreciated that Rita actually retained a property asset of some value; and there is no suggestion that Rita ever intervened to point this out, either to Mrs Sukul or to her mother. Second, as regards Rita, she told the court that at about this time she had been advised by David to sell her own flat in East Ham in order to repay some £33,000 in overpaid housing benefit, although Rita said that she had not told her mother about this. In the event, Rita proceeded to sell the flat in April 2016 and was left with some £186,000. So, in November 2015, Rita had good reason to wish to secure the ownership of 5 Brenda Road to ensure that she would retain a roof over her head.

132. Eighth, there is the failure of both Anna (as testatrix) and Rita (as the only named executrix who knew anything about the 2015 Will) to disclose its existence to anyone before Anna's death, not even to [Ms Batson], who said that she had known nothing about it. I have already expressed (at paragraph 52 above) my deep concern about Rita's motives in failing to suggest to her mother that she should communicate the changes she had made to her will to Nino or to David, particularly since they both spent time with Anna at Christmas 2015. During the course of Rita's cross-examination, I specifically asked her whether Anna had ever said that she was concerned that it might cause a row or an upset if she were to tell her sons about the new will, and Rita answered in the negative. The only conceivable explanation for the omission to disclose the changes to the 1986 Will is that Rita wished to ensure that those changes should only become known to her brothers after Anna's death because that would make it more difficult for them to challenge the 2015 Will. Rita stated that this had not been in her mind; but she then added: 'Since the day my mother told me, I just carried on. I probably just forgot about it … We just went home and continued

with our lives.' I find that answer does not ring true; and I cannot accept Rita's evidence. Why should she lie about it? Nor can I ignore the shock and the surprise expressed by David and Nino, and Anna's other relations, when, after her death, they first discovered the changes that Anna had made to the 1986 Will, which they considered to be totally out of character.

133. When viewed in combination, in my judgment these factors all point inexorably to the conclusion that Rita had pressured Anna into making a new will, leaving the house to Rita, not by convincing her mother that this was the right thing to do, but by applying some form of improper influence over her to procure the testamentary gift of the house in her favour, cutting out the sons who had stood to share equally in the estate for almost 30 years. Why else did Rita feel it appropriate to lie about the circumstances in which the 2015 Will had come to be made? Why else should Rita have kept quiet about it, even to her friend Paula, who shared the house with Rita and Anna, until after Anna's death?

134. In my judgment, these factors all provide solid, and reliable, evidence that the effect of Rita's coercion was that Anna made a will that did not reflect her true testamentary intentions, which Rita had overborne.

135. In my judgment, this is a case of undue influence exercised by coercion, in the sense that the Anna's true will was overborne by Rita, but not by fraud. The essence of a case of 'fraudulent calumny' is that the person who is alleged to have been poisoning the testator's mind must either know that the aspersions are false, or must not care whether they are true or false. If a person believes that they are telling the truth about a potential beneficiary, then, even if what they tell the testator is objectively untrue, the will is not liable to be set aside on that ground alone. In the present case, I am left in no doubt that Rita genuinely believed that after 7 and 14 November 2015, her brothers, David and Nino respectively, had 'abandoned' the care of their mother, something Remo had done many years before. This is not, in my judgment, a case of fraudulent calumny.

136. In my judgment, the involvement of Mrs Sukul did nothing to counteract, or dispel, the undue influence exercised by Rita over her mother. Neither Mrs Sukul

> nor Dr Qaiyum took any effective steps to ensure that Anna had been subjected to no undue pressure from Rita. Mrs Sukul was not even aware that Rita still retained her flat in East Ham. Effectively, Anna was left to self-certify that she was making the 2015 Will 'with no undue pressures from anyone'."

34. As is apparent from these paragraphs, the Judge did not accept some of Rita's evidence. He said in paragraph 47 of the Judgment that he found that "Rita was an unsatisfactory, and an unreliable, witness, whose evidence I cannot safely accept unless it is corroborated by other reliable evidence, or is contrary to her own interests" and that "there was a complete lack of candour about Rita's evidence". Rita, whom the Judge considered to have "an argumentative and forceful personality and a forceful physical presence", had, the Judge said, "a clear tendency to exaggerate, to the extent of giving false evidence, to her own advantage, as is apparent from contrasting paragraph 27 of her witness statement, according to which, during the last year of her mother's life, Anna only saw Nino twice (on her 85th birthday - 27 September 2015 - and at Christmas that year), with paragraph 36, explaining that the rota, whereby both David and Nino had been assisting with Anna's care, but this had only lasted six weeks before they had stopped adhering to it, and it had broken down (in November 2015)". The Judge further said that he was "entirely satisfied that I cannot accept Rita's evidence as to the circumstances in which the 2015 Will came to be made". He went on in paragraphs 48 and 49:

> "48. … At paragraphs 40 to 42 of her witness statement, Rita said that:
>
> > At the start of November 2015, my mother told me that she wanted to change her will. This came about because my mother had read an article which said you should renew your will every five years. My mother then started talking to me about how she wanted to make a new will.
> >
> > She told me that she wanted to be cremated. She did not provide any further details so I did not know what her intentions were and what changes she would make at first.
> >
> > My mother asked me to find a solicitor and told me again that she wanted to write a new will.
>
> Rita reiterated this evidence in cross-examination, stating that her mother told her that she wanted to be cremated; she did not want to go under the ground. That was their only discussion about the new will. Anna did not provide Rita with any further details, and Rita suggested that that was why Anna had wanted Rita to be present at her meeting with the solicitor. Rita confirmed that the only communicated change to the 1986 Will was that Anna wanted to be cremated.

> 49. However, when Anna came to instruct Mrs Sukul about the contents of the new will, Mrs Sukul recorded … that Anna left her funeral wishes to her daughter Rita to decide; and this was given effect in clause 4 of the 2015 Will. So, on Rita's evidence, her mother's only expressed reason for changing her will was never given effect in the 2015 Will. Moreover, Rita was adamant that nothing else had been discussed about Anna's estate; but according to Mrs Sukul's notes of the meeting on 17 November 2015 … , Anna '*says she knows Rita says they do not want to discuss*' inheritance tax. How did Anna know this if there had been no prior discussion about this with Rita? I have considered whether the reason for Rita's failure to give a true explanation as to the circumstances in which the 2015 Will came to be made is because: (1) Rita had been putting undue pressure upon her mother to change her 1986 Will so as to leave 5 Brenda Road to Rita, or (2) Rita is simply seeking to bolster her case by providing a false explanation for a change in her mother's testamentary intentions that Anna voluntarily chose to make when acting as a free agent, and of her own free will. I fear that, in the light of all the evidence in the case, I am driven to the conclusion that the former is the case."

35. The Judge also said this, in paragraph 52:

> "I am also deeply concerned about Rita's motives in failing to suggest to her mother that she should communicate the changes she had made to her will to Nino or David, particularly since they spent time with Anna at Christmas 2015. Mrs Sukul had raised with Anna the possibility of a challenge to the 2015 Will yet, according to Rita, there had been no discussions about letting her brothers know about the changes, despite her assertions (at paragraph 69 of her witness statement) that David was 'obsessed' about his inheritance to the point that he was talking about the will on the day that Anna died. During her cross-examination, I asked Rita whether Anna had ever said that she was concerned that it might cause a row or an upset if she told her sons about the new will and Rita answered in the negative. Mr Wood suggested that Rita had wished to ensure that the changes were only known to her brothers after Anna's death because it would be more difficult at that time for them to challenge the 2015 Will. Rita's answer was that this had not been in her mind. Curiously, she then added: '*Since the day my mother told me, I just carried on. I probably just forgot about it … We just went home and continued with our lives.*' I cannot accept the truth of that answer."

36. In contrast, the Judge considered Mrs Sukul, Dr Qaiyum and Ms Batson to be reliable witnesses. He said of Mrs Sukul in paragraph 53:

> "I find Mrs Sukul to be a confident, firm, brusque, fast-talking, and assertive individual. She is an experienced will writer who, in 2015, had been a member of the Society of Trust and Estate Practitioners for some 17 years, and a member of the Association of Contentious Trust and Probate Specialists for some seven years. Perhaps unsurprisingly, there was no direct challenge in cross-examination to the accuracy of either Mrs Sukul's witness statement (which dates back to 10 May 2017) or her detailed, contemporaneous, handwritten notes of her meetings with Anna and Rita on 17 November and 7 December 2015 and their related documents, many of which bear Anna's signature, and which extend from pages 558 to 585 of the trial bundle. Nor was there any challenge to Mrs Sukul's honesty or probity. I find Mrs Sukul to be a competent solicitor in the field of wills, probate, and the administration of estates and a reliable, honest, and satisfactory witness who, in cross-examination, declined to speculate about matters of which she had no personal knowledge. I accept her evidence entirely, as far as it goes."

With regard to Dr Qaiyum, the Judge said in paragraph 77:

> "There was no direct challenge to the accuracy or the probity of Dr Qaiyum's evidence. I accept him as a reliable and a truthful witness who was doing his best to assist the court."

As for Ms Batson, the Judge said in paragraph 67 that he "regard[ed] [her] as an honest and truthful witness who was doing her best to assist the court" and that he "accept[ed] her evidence". The Judge went on to say this about evidence which Ms Batson had given:

> "68. In paragraph 8 of her witness statement, [Ms Batson] describes Anna as 'strong-minded and stubborn at times … She was not a push-over and feisty at times, using colourful language if irritated. However, she had a lovely and sweet personality'. [Ms Batson] stated to the court that she could count on the fingers of one hand the occasions when the brothers had done any work to the property. She confirmed that Anna had loved David the most of her three sons; but she related that after David had disclosed, on 7 November 2015 that he could no longer return to complete the rota because he, and his partner, Elaine, were fully engaged on a new job, Anna had been upset and unhappy and had said: 'Let him go', using 'colourful language'. [Ms Batson] criticised Nino for having given up on the rota when, unlike David, he had no real reason for doing

> so. [Ms Batson] said that Anna had not been confused about her sons' lack of care; she had been referring to the whole period from 2009 to 2015. [Ms Batson] accepted that Anna had been a kind, loving, and nice person; but she said that she had reacted badly to Nino and David deciding to give up on her care. [Ms Batson] said that she had not been surprised by the terms of clause 11 of the 2015 Will. [Ms Batson] told the court that Anna had never mentioned her wish to be cremated at the time when the rota had broken down in 2015.
>
> 69. … [Ms Batson] told the court that Rita had never abused her mother at all, whether physically or verbally. Rita would have done anything to make her mother feel comfortable."

37. The Judge did not think the evidence given by other witnesses was of much help. He said that he derived "no real assistance from Remo's evidence" (paragraph 87) and "little real assistance from Nino's evidence" (paragraph 88). He did "not find David to be a particularly satisfactory, or a helpful, witness" (paragraph 83), could not accept evidence given by Remo's daughter Larissa (paragraph 79), derived no assistance from evidence given by Anna's nephew Phillip (paragraph 80) and could not regard Nino's son Marco as a reliable witness (paragraph 81). In any event, as the Judge observed in paragraph 78, "none of the defendants or their witnesses are able to give any evidence about the circumstances surrounding the making of the 2015 Will".

38. One of the matters debated before the Judge was the extent to which Remo, Nino and David had visited and cared for Anna. I have already quoted what the Judge said about the evidence which Ms Batson gave relating to this. In paragraph 84, the Judge explained that David gave evidence to the effect that he visited his mother 18 times between 5 April and 7 November 2015, but that there was a falling-out on 7 November when he made it clear that he was "postponing looking after my mother at weekends". David said that he "visited Anna at Christmas 2015, and again in February 2016, … and every day during the two weeks that she was in hospital in 2016". In paragraph 86, however, the Judge said:

> "On the evidence, I find that both David and Nino had effectively left Rita to care for Anna on her own by the time she came to give her instructions for her new will on 17 November 2015. David may well have viewed this as 'postponing' his weekends spent helping to look after his mother until April 2016; but I find that that was not how this was viewed by Rita at the time."

Further, after referring to clause 11 of the Will, the Judge said this in paragraph 119:

> "that declaration must be viewed in the context of what Mrs Sukul recorded, and Anna signed, when noting Anna's instructions in relation to the gifts from Anna's bank account … : 'None of my children have [not] taken care of me except

> my daughter. In the last 5 months David and Nino started to assist with my care and then abandon[ed] my care.' That is how Anna is recorded as having expressed her views as to the recent conduct of David and Nino; and however harsh they may regard that view, I find that it was an assessment that was open to Anna as a matter of historical fact."

The appeal

39. Mr Robert Deacon, who appeared for Rita, challenged the Judge's decision on essentially two bases. In the *first* place, he argued that the terms of the defence and counterclaim were not such as to allow the Judge to find undue influence. The Judge, Mr Deacon said, should have confined his conclusions as regards undue influence to the particulars which had been given in paragraph 13 of the defence and counterclaim, and those particulars were not such as to sustain an inference of undue influence ("the Pleadings Issue"). *Secondly*, Mr Deacon submitted that, on the evidence, the Judge was anyway wrong to find undue influence ("the Substantive Issue").

40. I find it convenient to take the Substantive Issue first.

The Substantive Issue

41. There are of course only limited circumstances in which an appellate Court should interfere with a finding of fact made by a trial judge. Thus in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600, Lord Reed (with whom Lords Kerr, Sumption, Carnwath and Toulson agreed) said at paragraph 67:

> "in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

42. The position is similar with evaluative assessments. An appellate Court will not interfere merely because it might have arrived at a different conclusion. It will do so only if it considers the decision under appeal to have been an unreasonable one or wrong as a result of some identifiable flaw in reasoning, "such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion" (see e.g. *R (R) v Chief Constable of Greater Manchester* [2018] 1 WLR 4079, paragraph 64, and also *In re Sprintroom Ltd* [2019] 2 BCLC 617, paragraphs 76 and 77).

43. In the present case, the Judge explained that he was "satisfied that the facts are consistent only with Rita having procured the making and execution of the 2015 Will by the exercise of undue influence over her mother, which overpowered Anna's volition without convincing her judgment" (paragraph 124 of the Judgment), that the factors he identified "[w]hen viewed in combination … all point inexorably to the conclusion that Rita had pressured Anna into making a new will, leaving the house to

Rita, not by convincing her mother that this was the right thing to do, but by applying some form of improper influence over her to procure the testamentary gift of the house in her favour, cutting out the sons who had stood to share equally in the estate for almost 30 years" (paragraph 133) and that the factors "all provide solid, and reliable, evidence that the effect of Rita's coercion was that Anna made a will that did not reflect her true testamentary intentions, which Rita had overborne" (paragraph 134). Mr Deacon, however, argued that the finding of undue influence lacked an evidential foundation and cannot reasonably be justified.

44. As is clear from the Judgment, the Judge saw the matters to which he referred in paragraphs 125-132 of the Judgment as *together* leading to the conclusion that there was undue influence. It is nonetheless appropriate to consider them individually.

45. The first matter which the Judge cited, in paragraph 125 of the Judgment, was Anna's "frailty and vulnerability". Plainly, he was correct that Anna was physically infirm and in need of support. As the Judge noted, she was "[w]heelchair-bound, hard of hearing, and requiring constant care and attention". However, I do not read the reference to "vulnerability" as implying suggestibility or that Anna was unable to think for herself, and the evidence was to the contrary. Dr Qaiyum confirmed that Anna had mental capacity, the Judge was "entirely satisfied that Rita has demonstrated that her mother had testamentary capacity", Anna rejected suggestions which Rita made at the meeting with Mrs Sukul on 17 November 2015 and, at the meeting with Mrs Sukul on 7 December, without Rita present, Anna made significant changes to her draft will. It is noteworthy in this connection that, when completing the mental capacity assessment in respect of Anna, Dr Qaiyum entered "not applicable" in the box headed "comments on undue influence/vulnerability".

46. The Judge also mentioned in paragraph 125 of the Judgment "Rita's argumentative and forceful personality, and her forceful physical presence". A person with a character of that kind may be thought more likely to exercise coercion, but there is obviously no question of Rita's personality being consistent only with her having coerced her mother. People with forceful personalities do not routinely, let alone invariably, exercise undue influence.

47. The Judge next referred, in paragraph 126 of the Judgment, to Anna's "dependency upon Rita". Perhaps this might have put Rita in a better position to exert undue influence, but, on its own at least, I do not see how it could afford any evidence of undue influence having been exercised. In fact, the care which Anna had received from Rita in the six years since she had come to live at 5 Brenda Road after the heart attack, and which Rita was still providing, could very plausibly have led her to wish to make particular provision for Rita without being subject to any undue influence, especially when her perception was that her sons had abandoned her.

48. The Judge noted that, when Mrs Sukul said that she needed to take instructions from Anna alone, Anna "said her daughter really looks after her and she wants her daughter to know exactly what she is doing". The Judge detected in that "a sense that Anna was in thrall to her only daughter, and carer". The Judge presumably had in mind that Anna's remark indicated that she saw herself as in Rita's power. Surely, though, it might have indicated, say, that she wished Rita to know that she was grateful for

Rita's help. Mrs Sukul, who was there, saw no reason to believe that Rita had coerced Anna.

49. The Judge's third factor, in paragraph 127 of the Judgment, was "Rita's evidence about how Anna communicated her wish to change her 1986 Will", as to which the Judge reiterated that he could not accept Rita's evidence as to the circumstances in which Anna came to ask Rita to make the arrangements for the 2015 Will to be drawn up and executed. Earlier in the Judgment, in paragraph 49, the Judge had attributed "Rita's failure to give a true explanation as to the circumstances in which the 2015 Will came to be made" to Rita having put "undue pressure upon her mother to change her 1986 Will so as to leave 5 Brenda Road to Rita", but I cannot see that this follows. Would not the failure be just as consistent with Rita having been reluctant to reveal, for example, that she had *encouraged* (without coercing) her mother to make a new will?

50. Fourthly, the Judge relied in paragraph 128 of the Judgment on "the timing of the making of the new will, a matter of days after first David, and then Nino, withdraw their assistance to Rita in caring for their mother, and following almost 30 years during which the 1986 Will had stood unaltered". However, the fact that Anna's existing will was 30 years' old might be said to have provided a good reason to review its provisions, and Anna's perception that, while Rita had been caring for her for six years, David and Nino had abandoned her care provides a rational basis for Anna wishing to make the 2015 Will without any undue influence having been exercised.

51. Fifthly, the Judge referred in paragraph 129 of the Judgment to "the fact that Rita made the arrangements for Anna to make the 2015 Will, albeit with a solicitor previously unconnected with Rita; and Anna insisted that Rita should be present at the meeting at which the instructions for the 2015 Will were given". This, however, seems to me to take matters no further. It must be commonplace for elderly people to ask their children to make appointments for them and, as for Anna's insistence that Rita be present at the meeting in 17 November, (a) Anna might, say, have wished Rita to know that she was recognising the care that Rita had given, and was continuing to give, or simply thought that it could be helpful to have the daughter on whom she relied at hand and (b) Rita was not present at the meeting on 7 December at which the 2015 Will was not only executed but revised.

52. The Judge's sixth factor, in paragraph 130 of the Judgment, was "the terms of the 2015 Will". He noted in this connection the "major change" from the will which had "stood for nearly 30 years", but the very fact that the 1986 Will was so old potentially warranted a new one. The Judge also referred to "the language of clause 11 of the 2015 Will", observing:

> "The final sentence, purporting to express Anna's wish that, should her sons advance any challenge to the distribution of Anna's estate, her executors were to defend any such claim '*as they are not dependent on me and I do not wish for them to share in my estate*', is not language that I consider that Anna would ever have used: rather it is Rita speaking through Anna."

However, notwithstanding the "general rule in civil cases … that a party is required to challenge by cross-examination the evidence of any witness of the opposing party on a material point which he or she wishes to submit to the court should not be accepted" (see *Griffiths v TUI (UK) Ltd* [2023] UKSC 48, [2023] 3 WLR 1204, at paragraph 70(i), per Lord Hodge) and the (overlapping) obligation on a party to put his case to a witness with relevant knowledge, Rita was not asked about clause 11 in cross-examination. Clause 11 *was* raised with Mrs Sukul, who drafted it, but what she was asked was why the clause did not use the word "abandon", to which she replied that she felt that the wording she had adopted explained what she understood Anna to want her to explain. She was not invited to comment on the reference to the executors "defend[ing] any claim", and, as I understand it, there is no indication in Mrs Sukul's detailed notes that Rita bore any responsibility for those words.

53. Seventhly, in paragraph 131 of the Judgment, the Judge expressed "serious concerns about the motivations underlying the specific devise of 5 Brenda Road to Rita". In that regard, the Judge noted that "Anna may not have appreciated that Rita actually retained a property asset of some value; and there is no suggestion that Rita ever intervened to point this out, either to Mrs Sukul or to her mother" and that "Rita had good reason to wish to secure the ownership of 5 Brenda Road to ensure that she would retain a roof over her head". However, I cannot see how the fact, if it be one, that Anna did not appreciate that Rita still owned a flat lends support to the allegation of undue influence; such a misunderstanding would surely, if anything, have made it more likely that Anna would wish to give Rita 5 Brenda Road, without any coercion having been exercised. As for the desirability of securing 5 Brenda Road as a home, this could doubtless provide a motive for either coercion or persuasion, and the latter was permissible.

54. Finally, in paragraph 132 of the Judgment, the Judge referred to the failure of Anna and Rita to disclose the existence of the 2015 Will to anyone before Anna's death. The Judge said that "[t]he only conceivable explanation for the omission to disclose the changes to the 1986 Will is that Rita wished to ensure that those changes should only become known to her brothers after Anna's death because that would make it more difficult for them to challenge the 2015 Will". However, I cannot accept this. In cross-examination, Rita was insistent that it was up to her mother, and not her, to decide what to tell her brothers about the 2015 Will. Even if that explanation is discounted (and the Judge, of course, had the advantage of seeing Rita give evidence), it is surely possible to suppose that Rita and her mother did not mention the 2015 Will to Remo, Nino or David out of embarrassment or concern that there would be a row (albeit that Rita told the Judge that she could not recall her mother saying that she did not want to inform her sons because it might upset them or cause a row if they were told). In any event, a wish to ensure that the changes in the 2015 Will "only become known to [Remo, Nino and David] after Anna's death because that would make it more difficult for them to challenge the 2015 Will" would be entirely consistent with Rita having *persuaded* her mother to leave 5 Brenda Road to her, without any *coercion*.

55. A further, and important, problem with the reasons which the Judge gave for finding undue influence to have been established is that it is not apparent that he took sufficient account of the evidence of Mrs Sukul, Dr Qaiyum and Ms Batson, all of whom the Judge accepted to be reliable witnesses. As I have mentioned:

i) Mrs Sukul, whom the Judge found to be a "competent solicitor in the field of wills, probate, and the administration of estates" as well as "a reliable, honest, and satisfactory witness", gave evidence to the effect that she had seen no reason to believe that there had been coercion and that Anna had been clear and consistent about giving 5 Brenda Road to Rita. Anna had explained that Rita lived there and had been looking after her since 2009 while her sons did not help with her care and she felt abandoned by them. It also emerged from Mrs Sukul's evidence that, at the 17 November 2015 meeting, Anna had rejected suggestions which Rita had made and that, at the 7 December meeting, which Rita had not attended, Anna had both revised her instructions and confirmed that the 2015 Will reflected her intentions;

ii) Dr Qaiyum said that he had no reason to believe that Anna was being coerced or under influence and that Anna had repeatedly told him when Rita was not present that she wished to give 5 Brenda Road to Rita, who had "looked after [her] for years, caring for everything" and had "nowhere else to go" whereas her sons had "their own homes and jobs";

iii) Ms Batson, who lived in the same house as both Anna and Rita, described Anna as "strong-minded", "stubborn" and "not a push-over" and said that Anna had "reacted badly to Nino and David deciding to give up on her care" and that Rita "had never abused her mother at all, whether physically or verbally".

56. Standing back, while Rita may have an "argumentative and forceful personality" and a "forceful physical presence" and have had reason to seek to secure 5 Brenda Road for herself, (a) Anna had testamentary capacity, (b) Anna also knew and approved of the terms of the 2015 Will, (c) there is no direct evidence of coercion, (d) Ms Batson, who shared a house with Anna and Rita, said that Rita had never abused Anna, (e) Mrs Sukul and Dr Qaiyum, experienced professionals with relevant expertise, saw no reason to believe that there had been coercion and confirmed that Anna had consistently expressed her wish to leave 5 Brenda Road to Rita, including on occasions when Rita was not present, (f) Ms Batson thought Anna "strong-willed" and "not a push-over", (g) consistently with that, Mrs Sukul's evidence shows that Anna was capable of rejecting suggestions from Rita and of revising her instructions in Rita's absence and (h) there was a perfectly rational basis for giving Rita 5 Brenda Road. Rita had both lived there and looked after Anna for six years while, as the evidence of Mrs Sukul and Dr Qaiyum confirms, it was Anna's perception that Rita needed 5 Brenda Road as a home and that her sons did not care for her, had abandoned her and had "their own homes and jobs".

57. In all the circumstances, it seems to me, with respect, that the Judge was mistaken in finding there to have been undue influence. I do not think the evidence entitled him to arrive at that conclusion. Undue influence in this context connotes coercion such as to "overpower the volition without convincing the judgment", where the testator's volition is "overborne and subjected to the domination of another" and the testator would say if he could speak his wishes, "this is not my wish, but I must do it". This, to my mind, is a case in which it is appropriate to proceed on the basis that such conduct is inherently unlikely. Further, there was in the present case no direct evidence of coercion and, in my view, it could not reasonably be found, in the light of

the matters mentioned in the previous paragraph, that the circumstances justified such an inference. For coercion to be proved, it had to be shown to be more probable than any other possibility. I do not think there is any question of coercion having been the most probable possibility here. As was pointed out by Mr Robert Deacon, who appeared for Rita, the Judge needed to consider whether the circumstances were as consistent with Anna deciding to make a new will either entirely of her own accord or after being encouraged to do so by Rita. Undue influence was, to my mind, clearly no more likely than at least the latter of these hypotheses.

58. I have not forgotten that the Judge had the advantage of seeing the witnesses and found Rita an unreliable witness who had given untruthful evidence about both the circumstances in which the 2015 Will came to be made and the fact that the 2015 Will was not disclosed to anyone until after Anna's death. It appears to me that, even taken in combination with all the other factors on which the Judge relied, these matters are not such as to allow the finding of undue influence to be sustained. Apart from anything else, the aspects of Rita's evidence to which the Judge drew attention were consistent with the (inherently more probable) possibility of Rita having merely sought to *persuade* her mother to make the 2015 Will.

59. In short, I do not consider that the evidence before the Judge was capable of supporting a finding of undue influence. That being so, the appropriate course is, I think, to confirm the validity of the 2015 Will.

The Pleadings Issue

60. My conclusions on the Substantive Issue make it unnecessary for me to address the Pleadings Issue.

Conclusion

61. I would allow the appeal, admit the 2015 Will to probate in solemn form and dismiss the counterclaim.

Lord Justice Arnold:

62. I agree.

Lord Justice Moylan:

63. I also agree.