



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

2018: No. 375

**BETWEEN:**

**RITA FURBERT**

**Plaintiff**

**- and -**

**(1) WILLISTON FURBERT**

**(2) DAWN FURBERT**

**Defendants**

## JUDGMENT

*Undue influence, Presumed undue influence, Relationship of trust and confidence,  
Transaction calling for an explanation, Rebutting the presumption,  
Breach of accommodation agreement, Life tenancy, Promissory estoppel, Constructive trust*

**Date of Hearing:** 23, 24 January, 15, 18 May 2023

**Date of Supplemental**

**Submissions:** 22 September 2023

**Date of Judgment:** 10 October 2023

**Appearances:**            **Dantae Williams, Marshall Diel & Myers Limited, for Plaintiff**  
   **Kyle Masters, Carey Olsen Bermuda Limited, for Defendants**

## **JUDGMENT of Mussenden J**

### **Introduction**

1. The Plaintiff, Rita Furbert (“**Rita**”), is the elderly mother of the First Defendant, Williston Furbert (“**Williston**”).
2. The Second Defendant Dawn Furbert (“**Dawn**”) is the wife of Williston and thus the daughter-in-law of Rita.

### **Background and Pleadings**

#### **The Amended Writ and Amended Statement of Claim (the “ASOC”)**

3. By an Amended Specially Indorsed Writ of Summons originally issued on 30 October 2018 Rita commenced the present action for: (a) Misappropriation of funds and undue influence; and (b) Breach of an accommodation agreement and promissory estoppel relating to Rita’s life tenancy in the mortgaged property.
4. Rita was 83 years old when she swore her Fourth Affidavit on 15 February 2022. The background to the matter is that Rita and her late husband owned and lived in the property located at 7 Grace Lane, Pembroke (the “**Homestead**”) for a period of over 30 years. Rita owned the Homestead with her husband free and clear, meaning there was no mortgage over the Homestead. They lived there with their granddaughter Tirsite Furbert (“**Tirsite**”) for over 30 years and Tirsite’s daughter, their great-granddaughter Kaelys Furbert (“**Kaelys**”) resided there from 2008 until it was sold on or about 15 June 2016.

5. In December 2012 Rita's husband died. According to Rita's claim, during 2013-2014 Williston contacted Rita to have a discussion about Rita selling the Homestead and then she, Tirsite and Kaelys moving in with him, Dawn and their children into Williston's and Dawn's home at their mortgaged property, Fairwinds, 19 Luke's Pond Drive, Southampton ("**Fairwinds**"). Fairwinds consisted of a main house (the "**Main House**") and a two bedroom two and a half bathroom apartment (the "**Apartment**"). There was a second apartment that plays no material part in these proceedings. There were further discussions, correspondence and meetings on the topic including a dinner at Henry VIII's Restaurant ("**Henry's**"), likely in or after September 2014. Rita claims that the Defendants assured her that if she sold the Homestead then: (a) Rita could live at Fairwinds for the remainder of her life, rent free; (b) Rita, Tirsite and Kaelys would share a one bedroom apartment at Fairwinds for a few years while the Defendants completed renovations to the Main House after which the three of them would move into the Main House; (c) Tirsite could reside at Fairwinds rent free for such time as necessary to allow Tirsite to purchase her own property, a condominium ("**Condo**") using a portion of the funds from the proceeds of the sale of the Homestead. Tirsite would only pay rent to the Defendants if she continued to live there after they moved into the Main House; and (d) In return for the accommodations as set out above, a portion of the proceeds of sale of the Homestead could be used as a balloon payment to assist with the Defendants' mortgage payments (collectively referred to as the "**Accommodation Agreement**").
  
6. Rita claims that in reliance of the Accommodation Agreement she moved into Fairwinds around April or May 2016, Tirsite and Kaelys moving in with her also. Then the Homestead was sold on or about 15 June 2016 and Rita received from the conveyance lawyers, a cheque of \$621,986.09 (the "**Proceeds of Sale**"). Rita and Dawn then attended the Bank of Butterfield & Sons Limited ("**BNTB**") where they met with a bank representative to deposit the Proceeds of Sale into Rita's account. Rita transferred a gift of \$20,000 to her step-daughter Cheryl Swan. Rita claims that Dawn influenced her to have \$500,000 transferred to an account of the Defendants' at HSBC Bank Bermuda Limited ("**HSBC**") which later, on Dawn's earlier instructions to HSBC, the whole amount of \$500,000 was

applied against the Defendants' mortgage (the "**Balloon Payment**") with HSBC. However, Rita claims that at Henry's, she communicated to the Defendants and it was agreed that the Proceeds of Sale would be divided (in amounts to be determined by the Plaintiff) between the Plaintiff, Williston, Cheryl Swan and Tirsite. Rita claims that she intended for the Proceeds of Sale to be allocated as follows:

- a. Rita would keep \$100,000 for her personal use in a joint account held with Tirsite;
- b. Cheryl would receive \$20,000;
- c. The \$500,000 deposited into the Defendants' HSBC account would be distributed as follows:
  - i. \$300,000 would be allocated to Tirsite to assist her with the purchase of a Condo;
  - ii. \$100,000 was to be allocated for Rita's continued use; and
  - iii. Rita would give the Defendants a portion of the Proceeds of Sale to be used as a Balloon Payment towards their mortgage (collectively referred to as the "**Allocation of Funds Plan**").

#### Misappropriation of funds and undue influence

7. In respect of the claim for misappropriation of funds and undue influence, Rita claims that she had trust and confidence in the Defendants in relation to her financial affairs and her general well-being. Rita claimed that she was unaware that the Defendants intended to use the \$500,000 as a Balloon Payment and she never agreed to such use. Her position was that she was depositing the \$500,000 into the Defendants' HSBC account for safekeeping and to hold on trust for her and Tirsite. The amount to be given to the Defendants was consideration for the Plaintiff to retain a life interest to reside at Fairwinds.
8. Rita became aware, in or around 2017, that the Defendants had put the entire \$500,000 towards the repayment of their mortgage. When she challenged Williston about this, he assured her that the Defendants would get a loan to help Tirsite to buy a Condo, such loan representing Tirsite's intended share of the Proceeds of Sale. However, they were turned down by HSBC for a loan.

9. Thus, Rita claims that the undue influence consisted of the following: (a) Rita was vulnerable after the loss of her husband of 57 years, thus trusting and relying on Williston and Tirsite; (b) She was in her mid-70s when she was first approached by the Defendants to sell the Homestead; (c) She placed a significant degree of trust and confidence in Williston as her only living child since Tirsite's mother died many years before. Rita also placed trust and confidence in Dawn who performed a number of tasks for her in relation to the Homestead, including attending BNTB with her to have a cheque drawn in the Defendants' favour; (d) Rita did not have the benefit of any legal advice in relation to the Accommodation Agreement nor the Allocation of Funds Plan; and (e) The Balloon Payment was solely for the Defendants' benefit and to Rita's detriment. It was unconscionable for the Defendants to induce her to sell the Homestead where she lived comfortably without debt to purchase a life tenancy in the Defendants' home for any money or for \$500,000.

Breach of the Accommodation Agreement and Promissory Estoppel relating to the Plaintiff's Life Tenancy in Fairwinds

10. In respect of this head of claim, Rita claimed that in exchange for selling the Homestead and giving the Defendants a portion of the Proceeds of Sale to be used in a Balloon Payment to assist with their mortgage payments, the Defendants agreed that Rita could reside at Fairwinds for the remainder of her life rent free. Thus, Rita was granted a life tenancy in Fairwinds by the express term of the agreement between the parties and Rita relied on the Defendants' expression in her decision to sell the Homestead. In accordance with the express terms, Rita, Tirsite and Kaelys moved into Fairwinds.
11. Rita is now in a position where both she and Tirsite have to pay monthly for rental accommodations. Rita now resides in Sandys and is responsible for rent in the sum of \$1,800 per month. Rita claims that the Defendants' actions and breach of the Accommodation Agreement has resulted in a loss to her, such that she sold her Homestead in reliance on the Defendants' promise that she would live with them for the remainder of her life, rent free.

Relief Sought

12. Thus Rita sought the following:
  - a. Damages by way of a repayment of \$500,000 as the total amount of funds belonging to her that the Defendants applied to their mortgage;
  - b. A declaration that until such time as the damages are paid that Rita has a beneficial interest in Fairwinds and the proceeds of sale of Fairwinds to the extent of the sum owed to Rita; and
  - c. Compensation of rent already paid and going forward for monthly rent of \$1,800 per month until the sum of \$500,000 is paid in full to Rita.

### The Defence

13. The Defendants' case is as follows:
  - a. The \$500,000 transfer was voluntary;
  - b. Rita offered to sell the Homestead and gift \$500,000 to the Defendants; and
  - c. It is agreed that the Defendants had a relationship of trust and confidence with Rita.
14. Williston in his Defence stated that the Defendants discussed the idea that if Rita sold the Homestead they could help her manage Tirsite. He also stated that Rita wanted to assist him and Tirsite. She wanted to give a portion of the Proceeds of Sale to the Defendants, a portion to Tirsite and a portion to Cheryl Swan.
15. Dawn in her defence stated that: (a) In 2016 the Defendants' mortgage amounted to approximately \$1.2 million; (b) Rita raised the idea of putting a lump sum on their mortgage in 2014; (c) She made calculations that if the Defendants reduced their mortgage by \$500,000 the monthly mortgage amount would be approximately \$5,000 per month of which the Defendants would only pay \$2,000 per month; (d) She told Rita she would need \$500,000, otherwise the figures would not work; (e) Rita said she would gift some of the money from the Proceeds of Sale; and (f) Dawn told Stacy O'Brien about the intended \$500,000 payment.

## **The Trial - Evidence**

16. The trial took place with evidence given by witnesses for the parties. There was extensive documentary evidence also. For the Plaintiff's case, only Rita gave evidence. For the Defendants' case, Williston and Dawn gave evidence along with Stacy O'Brien.

### Evidence not in dispute

17. There was evidence that generally was not in dispute although finer points are in dispute. In brief, Rita, Tirsite and Kaelys lived at the Homestead. There were discussions between the parties about selling the Homestead and moving into Fairwinds, events which did take place over time. There is a dispute as to who initiated the idea of Rita selling the Homestead and moving into Fairwinds which I will turn to later. Once the Homestead was sold the Proceeds of Sale were dispersed after Rita and Dawn visited BNTB. The Defendants' evidence is that Dawn came up with a figure of \$500,000 which should be applied to their mortgage from the Proceeds of Sale that would allow everyone to move into Fairwinds and that Rita agreed to this. The sum of \$500,000 was transferred from BNTB to an account of the Defendants at HSBC and on Dawn's earlier instructions to HSBC the Balloon Payment was executed. A main issue in this case is whether Rita intended to gift the Balloon Payment which I will turn to later.
18. There is no dispute that there is no document that states: (a) that Rita agreed to gift the Balloon Payment; and (b) the terms of the agreement that Rita could live in Fairwinds with the Defendants for the rest of her life, rent free. On cross-examination, Dawn conceded that she did not think to get the agreement of the Balloon Payment in writing or to get a legal document giving effect to it.

19. At some point, Rita wanted to use some funds to assist in the purchase of a Condo for Tirsite who had found one that she liked. There is a dispute about what was to be the source and amount of those funds, with Rita expecting that some funds would come from the Proceeds of Sale. The Defendants, having already made the Balloon Payment, visited the banks for a loan but were unsuccessful. Later on in December 2017, there was an altercation at Fairwinds between Tirsite on the one part and Williston and one or more of his daughters on the other part which included Williston's demands that Tirsite move out of Fairwinds. There is no dispute that the Defendants ordered Tirsite to move out. However, there is a dispute about whether Rita and Kaelys were kicked out, an issue which I turn will to later. On leaving Fairwinds, Rita demanded that her \$500,000 be repaid to her, however it has not been repaid to her. Rita, Tirsite and Kaelys now live in other accommodations where Rita makes a financial contribution without any assistance of the Defendants.
20. There was documentary evidence which included material documents as set out below.
21. On 1 February 2016 there was a sole listing agreement of that date for Coldwell Banker to list the Homestead for sale.
22. On 30 March 2016, the Defendants wrote a letter to HSBC entitled "Principal Reduction Payment" (the "**Principal Reduction Letter**"). It instructed HSBC to debit \$500,000 from their HSBC savings account to be credited to their mortgage on 30 June 2016. They asked HSBC to recalculate their mortgage payments after the transaction and advise them of the new monthly payment. I should note here that Rita states that at no stage did she ever tell the Defendants that she was giving them \$500,000 of the Proceeds of Sale as a direct payment for their mortgage or for any other purpose. Also, on cross-examination, Dawn stated that when she wrote the Principal Reduction Letter she was sure that she would get the \$500,000 from the Proceeds of Sale as she had discussed it with Rita.
23. There is a series of email communications between Dawn and Amicus Law Chambers Ltd. ("**Amicus**") for the period 12 April 2016 to 22 June 2016 in relation to the sale of the Homestead.



24. There is a Coldwell Banker Sales and Purchase Agreement dated 13 April 2016 (the “**S&PA**”) for the sale of the Homestead for \$685,000 with the completion date to be on or before 16 May 2016.
25. There is an Addendum dated 20 May 2016 which refers to an agreement dated 20 May 2016<sup>1</sup> and which amends the agreed sales price to be \$675,000 with a completion date no later than 15 June 2016.
26. An HSBC composite statement for the Defendants dated 1 June 2016 showed various accounts. Their total deposits was approximately \$17,000. Their mortgage account had a balance of \$1,246,190.80. The 1 August 2016 composite statement showed total deposits of approximately \$11,000. The mortgage account balance was then \$744,698.77, the balance having been reduced by the Balloon Payment.
27. There were several documents dated 24 June 2016 in relation to the sale of the Homestead: (a) An Amicus invoice; (b) A Completion Statement; (c) An Amicus cheque issued to Rita for \$621,986.09.
28. On 29 June 2016 Rita signed a BNTB wire transfer/domestic payment document (the “**Wire Transfer Form**”). Various details were typed in which included Rita’s name as the ordering customer, the Defendants’ names as the beneficiary who will receive the funds and their HSBC account number, the amount to be transferred as \$500,000, the account to be debited which was in the names of Rita and Tirsite and Rita’s passport number. There were some handwritten entries which included Rita’s telephone number, the words “*Mortgage Proceeds*” written in the payment details section and Rita’s printed name, signature and date. There were some handwritten entries at the bottom of the form reserved for bank use only. I should add at this point that Rita denied that she wrote the words “*Mortgage Proceeds*” on the form and she did not remember seeing those words when she signed the form. Dawn in her evidence in chief stated that she believed the bank official

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<sup>1</sup> Hearing Bundle 2 page 142 Exhibit RF-4 – The Addendum recital clause (A) appears to have the incorrect date of 20 May 2016 for the original S&PA which is actually dated 13 April 2016.

wrote those words on the form once the bank official had asked Rita what the transfer was for and Rita had explained that it was for the Defendants to apply to their mortgage.

29. There was an undated BNTB bank account application form signed by Rita, for a savings account in the name of Rita and/or Williston with an initial deposit of \$100,000 sourced from an internal account with a note that the funds were proceeds received from the sale of a house. I should note here that: (a) Rita states that the handwriting on the form is not her handwriting although it is her handwritten signature, noting that the handwriting looked like Dawn's; and (b) Dawn clarified that Williston never completed the form and thus the account was never opened.
30. There was an email from Tirsite to Dawn dated 31 August 2016 with the subject "Condo – Is this possible?" with some pictures of a Condo that she was interested in purchasing. There was a reply about half an hour later of the same date from Dawn to Tirsite stating "*K – work out the payments using the mortgage calculator. Two calculations using \$75,000 deposit for 10 & 15 years*".
31. There was a BNTB mortgage and loan application form dated 29 September 2016 signed by Tirsite ("**Tirsite's BNTB Mortgage Application**") which indicated assets at BNTB of \$147,200 and liabilities of \$88,300. The form showed no other assets owned by Tirsite. There were some emails dated 19 and 20 October 2016 between Tirsite and a BNTB Officer where Tirsite was informed that her application had been approved in the amount of \$195,000 subject to some conditions.
32. There were some emails dated 15 November 2016 between Tirsite and a real estate agent, subject "*Poinciana Offer*" where Tirsite informed the agent that she would not be able to proceed with the purchase of the Condo at that time.
33. On 9 November 2016, Dawn sent an email to Tirsite, Daliesha and Dateja informing them that effective 1 January 2017 they would each be required to pay \$400 per month for contribution to monthly maintenance and expenses at Fairwinds.

34. On 6 February 2017 Dawn wrote Rita a letter (“**Dawn’s Letter**”) which set out Dawn’s feelings about Tirsite and Dawn’s relationship with Rita, noting that Rita had provided them with significant help.

#### Evidence in dispute

35. There were various main areas of evidence that were in dispute as set out below which I will deal with in turn.

Who initiated the discussion about Rita selling the Homestead and moving into Fairwinds

What were the terms of the agreement to sell the Homestead and move into Fairwinds

What were the terms of the agreement for the distribution of the Proceeds of Sale

36. Upon my observations of Rita giving evidence, I found that she was a credible witness who gave her evidence in a forthright and honest manner. Her evidence about deeply caring for Tirsite and providing funding for Tirsite to purchase a Condo had sound reasoning to it and a resounding ring of truth to it as she had cared for Tirsite from the age of one years old since her daughter (Tirsite’s mother) had died. I found her to be credible and straightforward in her evidence about the material matters such that I preferred her evidence over the Defendants’ evidence.
37. I have considered the evidence of the Defendants and my observations of them are that they both seemed to deflect responsibility from themselves individually and then point to their spouse for responsibility. To that point, Williston’s position was that Dawn comes up with the plans and does the finances whilst he does the work. Dawn stated that she is the administrator but Williston makes the final decisions. Stacy O’Brien’s evidence was that Dawn was a strategic planner. Thus, whilst Williston’s and Dawn’s positions do not seem inconsistent on the face of it, I found the Defendants to be defensive if not evasive when giving their evidence and thus I found them to not be credible witnesses. An example of

this is when they both stated in their witness statements in very similar words that at no point did they ask Tirsite or Rita to move out but then on cross-examination Williston conceded that he did tell Tirsite to leave. Another thread that ran through their evidence is that Dawn was doing quite a lot in respect of Rita, including decision making, which on the evidence did not involve decision making by Williston, for example in handling the listing and sale of the Homestead.

38. In respect of who initiated the discussion for Rita to sell the Homestead and move into Fairwinds, in Rita's witness statement and thus her evidence in chief, she stated that she did not remember when the dinner at Henry's took place but it was a few years after her husband passed away in 2012. She stated that it was at Henry's when for the first time the Defendants raised the plan and request that Rita sell the Homestead and move in with them. She was reluctant but thought about it. Thereafter, the Defendants repeated their request and there were discussions over time about the terms of Rita moving to Fairwinds and finally an agreement was reached.
39. The Defendants' position was that in 2014 Rita first raised the idea of selling the Homestead and moving into Fairwinds with the Defendants when Rita was having some challenges with Tirsite as a result of her health issue. They continued to talk about the idea for some time. Later in September 2014 they had dinner at Henry's when they discussed the idea more fully and Dawn explained that in order to move into the Main House, the Fairwinds mortgage would need to be reduced by \$500,000. It was then that Rita asked them to consider agreeing for Rita to come live at Fairwinds if she provided \$500,000 towards their mortgage. The Defendants took about a week or so to think about the plan when they decided that they would proceed with the plan. In January 2015 the Homestead was listed for sale on Emoo but did not sell and then on 1 February 2016 Rita entered into a Sole Listing Agreement with Coldwell Banker to sell the Homestead.
40. In my view, I am satisfied that the plan for Rita to sell the Homestead and move in with the Defendants commenced in 2014 which is a few years after her husband passed away. I take this view because the Sole Listing Agreement was dated 1 February 2016 and working backwards, I accept the evidence that the property was listed on Emoo for long time in

2015. Further all parties state that there were discussions over time before they reached an agreement. Thus, I find that the initial discussion, the dinner at Henry's and reaching an agreement took place in 2014. As stated above, I found Rita to be a credible witness such that I preferred her evidence over the Defendants' evidence. I accept Rita's evidence and find as a fact that it was the Defendants who initiated the discussion about Rita selling the Homestead and moving in with them at Fairwinds. I preferred her evidence because it had a solid ring of truth to it. Rita was living in the Homestead which had three bedrooms, it carried no debt, she had the income from the apartment and the Homestead had been her home for over 30 years. She also had Tirsite and Kaelys living with her in the comfort of the Homestead, no doubt with their own bedrooms. In my view, it was clear why she would be reluctant to move from that set of circumstances to a position where she would live in a two bedroom apartment for a few years before moving in to the Main House, to share a bedroom with two others and share the Apartment with up to six to seven adults. Thus, I accept that it was the Defendants who initiated and continued the discussions for Rita to sell the Homestead and move to Fairwinds.

41. In respect of the terms of the agreement to sell the Homestead and move into Fairwinds, I find as a fact that once there was an agreement to sell the Homestead: (a) Rita would live rent free at Fairwinds for the remainder of her life, firstly in the Apartment and then in the Main House once the tenants there vacated it. The claim that renovations were necessary to complete the Main House is not supported by the evidence as there were tenants in occupation of the Main House at the material times. I find support for this view in that Rita would make a Balloon Payment at some point in an amount to be determined thus assisting the Defendants with their mortgage thus earning the opportunity to live at Fairwinds rent free for the remainder of her life; and (b) Tirsite and Kaelys would also move to Fairwinds firstly in the Apartment but would move to Tirsite's Condo once she purchased it. I find support for this view in that soon after Tirsite moved into Fairwinds, she made efforts, with Dawn's assistance, to purchase a Condo.
42. In my view, I find as a fact that Rita's position of how the Proceeds of Sale were to be used was as Rita stated, namely that: (a) She would keep \$100,000 for herself; (b) She would

gift \$20,000 to Cheryl Swan; (c) The remaining \$500,000 would be used as follows: (i) a portion, to be determined, would be used to help Tirsite purchase a Condo; and (ii) a portion, to be determined, would be used to make a Balloon Payment to the Defendants' mortgage. I find support in this view on the basis that Rita was primarily concerned with keeping some funds for herself and then assisting Tirsite to purchase a Condo. It is clear to me that she did not intend to provide \$500,000 to go towards the Defendants' mortgage as that would leave practically no funds to assist Tirsite at all for a downpayment or in any other meaningful way. In other words, out of the Proceeds of Sale of \$620,000, once Rita kept \$100,000 for herself, gave \$20,000 to Cheryl Swan and then \$500,000 to the Defendants, then Tirsite, her main priority, would be out in the cold. In my view, this allocation of funds ran totally counter to the desires and wishes of Rita to provide for Tirsite and Kaelys. Further, if a downpayment was to come out of Rita's reserve of \$100,000, then Rita would have very little money left for her own personal use, when she was clear that she wanted \$100,000 for her personal use.

Was Rita kicked out of Fairwinds or did she move out

43. The parties disagree on whether Rita was kicked out of Fairwinds. Rita claims Williston kicked her out when he kicked out Tirsite. The Defendants are both clear in their evidence in chief that at no point did they ask Tirsite or Rita to move out of the Apartment but that Rita left the next day when Tirsite left. On the evidence, the events of the night of 11 December 2017 were most unfortunate. What started as a disagreement about the washing of dishes escalated into an incident between Tirsite and the Defendants and two of their daughters resulting in Tirsite making a police complaint against them for assault. Rita asserts that Williston shouted to Tirsite to "*get off his property now*" and demanded that she, Tirsite and Kaelys leave saying "*All of you get the fuck out tonight*". On cross-examination, Williston admitted that he told Tirsite to get out but insisted that he would never tell Rita and Kaelys to get out and he would never swear at his mother. On cross-examination Dawn admitted that that night she did say to Rita "*As far as I'm concerned, you're all dead to me*" explaining that she said it because of the hurt caused to Williston. In my view, Williston kicked out Tirsite as his evidence on cross-examination states and which directly contradicts the Defendants' evidence in chief. Further, I am satisfied that

Williston did tell them all to get out, meaning Rita and Kaelys also. He maintained that he told Rita and Kaelys to stay but on cross-examination he conceded that he never put in his witness statement that he told them to stay. He asserted that he did ask Rita where was she going. In light of these circumstances, it is compelling to me that Williston kicked Rita, Tirsite and Kaelys out of Fairwinds with the approval and support of Dawn.

## **The Issues**

44. There are several main issues in this case as set out below which I will deal with in turn:
- a. Undue Influence;
  - b. Breach of the Accommodation Agreement and Promissory Estoppel relating to Rita's Life Tenancy in Fairwinds; and
  - c. Whether there is a constructive trust and whether Rita is entitled to a declaration of a beneficial interest in Fairwinds.

## **Issue 1 – Undue Influence**

### **The Law**

45. The modern application of the equitable principle of undue influence is found in *Royal Bank of Scotland Plc v Etridge (No. 2)* [2002] 2 A.C. 773 HL. *Etridge* has been cited with approval by this Court in several judgments (*Lawrence v HSBC* 2020 BDA LR 36 and *Wong ,Wen- Young v Grand View Private Trust Company Limited et al* [2022] SC (Bda) 44 Com (22 June 2022).
46. In *Etridge*, Lord Clyde distilled the primary question for the Court in any undue influence claim at paragraph 93 as follows:

*“[at] the end of the day, after trial, there will either be proof of undue influence or that proof will fail and it will be found that there was no undue influence. In the former case, whatever the relationship of the parties and however the influence was exerted, there will be found to have been an actual case of undue influence.”*

### **The Legal Burden**

47. In *Thompson v Foy* [2009] EWHC 1076 Ch at [101] (cited with approval by this Court in *Pedro et al v Pedro and HSBC Bank Bermuda Limited* [2019] Bda LR 66), the discussion shows that legal burden to prove undue influence falls on Rita, where the Court stated "*The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case*".

#### Actual vs Presumed Undue Influence

48. The authors of *Snell's Equity 34 Ed.* at 8-017, in respect of both actual and presumed undue influence, stated:

*"The decision of the House of Lords in Etridge, as noted above, contains important warnings against placing too much store on categories and sub-categories of undue influence. Lord Nicholls nonetheless noted that: "[e]quity identified broadly two forms of unacceptable conduct". The first "comprises overt acts of improper pressure or coercion such as unlawful threats". Such a case can be described as involving "actual" undue influence, as B may well be able to point to such coercion to show that he or she acted under an undue weight of influence. The second form "arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage". In such cases, the existence of such a relationship of influence, if coupled with a transaction calling for explanation, may give B the benefit of an evidential presumption of undue influence, and thus assist B in discharging the onus of proving undue influence. Where B seeks to rely on such a presumption, the case may be seen as involving "presumed" undue influence. [emphasis added]"*

49. The Court in *Wong Wen-Young*, put the two limbed test for the engagement of the evidential assistance of a presumption of undue influence as follows:

*"450. Undue influence would be a very powerful and popular equitable remedy indeed if all that was required to trigger the operation of the presumption of undue influence was (a) a relationship of trust and confidence, and (b) a transaction which calls for an explanation merely because a substantial voluntary disposition is involved. It is clear beyond serious argument that the presumption will typically only arise when a claimant can establish a prima facie case of undue influence because of:*

*(a) the existence of a relationship of trust and confidence; and*



*(b) an impugned transaction which is (absent a satisfactory explanation) otherwise indicative of a risk of undue influence being exercised by the 'dominant' party over the vulnerable putative 'victim'.*

50. *Thompson* also stated that "it is highly unlikely on the facts that the court would ever be justified in finding that undue influence consisted both of coercion and abuse of trust and confidence. People do not usually trust those who coerce them."

#### Relationship of Trust and Confidence

51. The Court identified in *Etridge* certain kinds of relationships over which it will be particularly protective. Lord Nicholls stated:

*"18. The law has adopted a sternly protective attitude towards certain types of relationship in which one party acquires influence over another who is vulnerable and dependent and where, moreover, substantial gifts by the influenced or vulnerable person are not normally to be expected. Examples of relationships within this special class are parent and child, guardian and ward, trustee and beneficiary, solicitor and client, and medical adviser and patient. In these cases the law presumes, irrebuttably, that one party had influence over the other."*

52. *Snell's Equity* stated as follows:

*"8-031 – A relationship of influence can be established by proof that B "placed trust and confidence in the other party in relation to the management of [B's] financial affairs", but it would be a mistake to think that B must prove such trust and confidence existed specifically in relation to financial affairs, or that the only relevant relationships are ones of trust and confidence. The question is one of influence, and a relationship of influence may be proved by, for example, evidence of B's dependence or vulnerability. Conversely, closeness or mutual trust between the parties will not, by itself, suffice;*

...

*It is therefore clear that, in a family or marital relationship, there must be some additional factor, such as circumstances of illness leading to dependency, or background of trust and confidence in relation to the family's financial affairs, if a relationship of influence is to be found." [emphasis added]*

#### The Test is Sequential

53. The relationship of trust and confidence must be proved before the Court can go on to consider whether a transaction calls for an explanation. The Court must find that the relationship of trust and confidence was a pre-existing element of the interactions between

the parties and that, it is because of this relationship, the claimant became open to the influence complained of. In *Perwaz v Perwaz* [2018] UKT 325 (TCC) the Court stated as follows:

*“71. ...The requirements are sequential; there must be a relationship of influence, whether described as one of trust and confidence or one of vulnerability, and then a transaction. The reason for that is that the pre-existing relationship lays the claimant open to influence, so that all that is required for the evidential presumption to arise is a transaction that calls for explanation.*

*72. By contrast, a claimant who can show that she entered into a transaction that calls for explanation, and that in the course of the transaction (but not beforehand) she reposed trust and confidence in the defendant, does not get the benefit of the presumption. Where the only problematic elements arise in the transaction itself (and by that I mean during a period long enough to encompass anything described as a troubling feature of the transaction – see my paragraph 51 above) the claimant can only succeed in a plea of undue influence if she proves that activities or pressure amounting to undue influence actually happened. To allow the presumption to be raised purely as a result of what happened in the transaction itself would simply lower the bar for the proof of actual undue influence. The evidential presumption arises only where something that was already established prior to the transaction makes the claimant vulnerable at its outset. Only then does the fact that the transaction calls for explanation – which is relatively easy to prove – enable her to take the benefit of the evidential presumption.” [emphasis added]*

#### Transaction Calling for an Explanation

54. *Thompson* confirms that the question of whether a transaction calls for an explanation cannot be answered by an objective view of the transaction in isolation, when the Court stated:

*“101. Fifth, in order to determine whether a transaction is explicable in terms other than undue influence, it is necessary to look at it in its context and to see what its general nature was and what it was trying to achieve for the parties.”*

55. *Snell's Equity* states as follows at 8-032:

*“8-032 - The conclusion that the transaction calls for explanation is not based simply on the objective, general features of the transaction: it can be reached only once the specific facts of the case have been considered, and no explanation can be found as to why B should have chosen to enter into the transaction, except that his or her intention was procured by undue influence.” [emphasis added]*

56. In *Etridge* Lord Nichols stated as follows:

*“[22] Lindley LJ summarised this second prerequisite in the leading authority of Allcard v Skinner (1887) 36 Ch D 145, [1886–90] All ER Rep 90, where the donor parted with almost all her property. Lindley LJ pointed out that where a gift of a small amount is made to a person standing in a confidential relationship to the donor, some proof of the exercise of the influence of the donee must be given. The mere existence of the influence is not enough. He continued:*

*But if the gift is so large as not to be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act, the burden is upon the donee to support the gift.’ (See (1887) 36 Ch D 145 at 185, [1886–90] All ER Rep 90 at 100–101.)*

*In Bank of Montreal v Stuart [1911] AC 120 at 137 Lord Macnaghten used the phrase ‘immoderate and irrational’ to describe this concept.*

*[25] This was the approach adopted by Lord Scarman in Morgan’s case [1985] 1 All ER 821 at 826–829, [1985] AC 686 at 703–707. He cited Lindley LJ’s observations in Allcard v Skinner (1887) 36 Ch D 145 at 185, [1886–90] All ER Rep 90 at 100, which I have set out above. He noted that whatever the legal character of the transaction, it must constitute a disadvantage sufficiently serious to require evidence to rebut the presumption that in the circumstances of the parties’ relationship, it was procured by the exercise of undue influence.”*

### Rebutting the Presumption

57. The question of whether the presumption of undue influence has been rebutted is a question of fact. In circumstances where a plaintiff manages to raise the presumption of undue influence, the question of whether the transaction should be set aside on that basis remains live. In *Pedro* the Court confirmed the Bermuda law position in this regard.

*“191. That is why it is necessary to show that the gift was made after full, free and informed consideration. A gift which is made without informed consideration by a person vulnerable to influence, and which he could not have been expected to make if he had been acting in accordance with the ordinary motives which lead men's actions, needs to be justified on the basis that the donor knew and understood what he was doing.” [emphasis added]*

58. The Courts have long accepted that the receipt (or not) of legal advice is not dispositive of the question of undue influence when the presumption has been successfully raised. The Privy Council considered this question in *R v HM Attorney - General for England and Wales* [2003] UKPC 22:

*“The absence of independent legal advice may or may not be a relevant matter according to the circumstances. It is not necessarily an unfair exploitation of a*

*relationship for one party to enter into a transaction with the other without ensuring that he has obtained independent legal advice. On the other hand, the transaction may be such as to give rise to an inference of undue influence even if the induced party was advised by an independent lawyer and understood the legal implications of what he was doing."*

59. Lewison J accepted a similar proposition in *Wollenberg v Casinos Austria International Holding GMBH* [2011] EWHC 103 (Ch) at [207] agreeing that "*...even where a presumption of influence is raised, that influence does not necessarily turn into undue influence merely because the person with the influence does not advise his counter-party to take independent legal advice.*"

60. In *Enonchong, Nelson, Duress, Undue Influence and Unconscionable Dealing* 3<sup>rd</sup> Ed. it stated as follows:

*"12-013 Although the presumption of undue influence may easily be rebutted by evidence that the complainant received competent independent advice, it does not follow that the only way to rebut the presumption is by proving independent advice. The presumption is not so powerful that it can only be rebutted by evidence of independent advice, regardless of the other circumstances of the case. Each case has to be assessed in the light of its own circumstances. Since the test is whether the complainant entered into the transaction after free and informed thought about it, if evidence is provided which shows such informed and free exercise of their will it will be enough to rebut the presumption even though the complainant did not receive independent legal advice. A wide range of circumstances may show such informed and free thought about the transaction, including the education of the complainant, his general sophistication, his business experience or commercial knowledge, any previous dealings in the type of transaction in question, just to list a few. In *Johnson v EBS Pensioner Trustees Ltd* it was held that the presumption was rebutted notwithstanding the fact that the complainant did not receive independent advice. In that case, the complainant was an experienced businessman who had entered into similar transactions in the past. Patten J held that he was "at all times fully aware of what he was entering into" and did so independently.*

*12-014 However, in many cases where the complainant did not receive any advice at all before entering into the transaction, it will ordinarily be difficult to rebut the presumption of undue influence. In *Hammond v Osborn*, for example, the donee was aware that the gift constituted over 90 per cent of the donor's liquid assets and exposed him to tax liabilities that would have consumed the residue of his free cash and would have left him in debt. Yet the donor was given no advice whatsoever about this. He was not even advised to seek advice before making the gift. The Court of Appeal held that the presumption of undue influence which had arisen had not been rebutted in the circumstances of that case. Evidence that the impetus for making the gift came from*

*the donor and not from the donee and that the gift was not a response to any suggestion, solicitation or encouragement by the donee was not enough to rebut the presumption. It was said that such evidence did no more than show that the donee knew what he was doing. It was not enough to show that he acted freely. (without footnotes)”*

### Plaintiff's Submissions

61. Mr. Williams made a number of submissions in support of the Plaintiff's case as follows:
  - a. That the pleadings show that Rita's claim falls within actual undue influence, described in the case authorities as Class 1, or alternatively presumed undue influence, described in the case authorities as Class 2B.
  - b. That both Rita's evidence and the evidence of the Defendants show that Rita's free will was impaired by the unconscionable conduct of the Defendants which resulted in her depositing \$500,000 into the Defendants' mortgage account.

### Defendants' Submissions

62. Mr. Masters made a number of submissions in support of the Defendants' case as follows:
  - a. Rita's case was undermined by both the documentary evidence and the evidence of Rita.
  - b. Rita had agreed to the plan to sell the Homestead, gift the \$500,000 to the Defendants, move into Fairwinds and live there rent free for the remainder of her life.
  - c. As Tirsite had to move out of Fairwinds, then Rita chose to move out also. Thus, she wanted a refund of the \$500,000.
  - d. Rita's case fails on the law as there was no relationship of trust and confidence.

### Analysis

63. In my view, I am satisfied that the Defendants exercised undue influence over Rita as claimed for several reasons.

### Relationship of trust and confidence

64. First, in my view, this case does not fall under the class of actual undue influence on the basis that I am not satisfied that there were overt acts of improper pressure or coercion such as unlawful threats by the Defendants upon Rita.
65. Second, in my view, this is a case of presumed undue influence. The starting point is that in the Amended Defence paragraph 21, the Defendants averred that the relationship between them and Rita had always been one of trust between them both before and after the death of Rita's husband. On cross-examination Dawn agreed that Rita placed trust and confidence in her, that they had a mutual relationship of trust. However, in applying *Etridge*, I recognise that the evidence must show that there is more than just the familial relationship to establish the relationship of trust and confidence. In my view there was such a relationship of trust and confidence between Williston and Dawn on the one hand and Rita on the other hand for several reasons.
- a. I accept Rita's evidence that she was saddened and vulnerable as a result of her husband's death. She was elderly, had been married to her husband for fifty-seven (57) years, built the Homestead together, lived there for over thirty (30) years, raised and provided for her family together, and upon the death of her daughter Sharon in 1981, raised Tirsite as their own child. I reject the Defendants' arguments that her husband had died in 2012 and she had moved on with another romantic interest, thus she was no longer vulnerable in 2016. In my view, the gloss of a recent romantic interest would not wash away more than half a century of a marriage and a settled home.
  - b. Although Rita did not want to sell the Homestead, as stated above the Defendants encouraged Rita to sell her main asset the Homestead and move into Fairwinds. In the same discussion, the Defendants persuaded Rita to move from her home of 30 years to move in with them at Fairwinds, for the remainder of her life.
  - c. Dawn was involved in Rita's financial affairs as it related to the sale of the Homestead. Dawn was very involved in the affairs of selling the Homestead including listing it first on Emoo and then relisting it at a lower price and then with

Coldwell Banker, staging it, arranging documentation and corresponding with the lawyers.

- d. In my view, the Defendants were aware of Rita's love and affection for Tirsite. The evidence shows that the Defendants each held critical views of how Rita had raised Tirsite, essentially that she had spoiled Tirsite and that Tirsite needed to stand on her own two feet. The import of this to the relationship of trust and confidence is that despite their dim views of how Rita cared for and favoured Tirsite, when Rita was concerned about what would happen to Tirsite and Kaelys if the Homestead was sold, the Defendants still offered to Rita, that if she moved into Fairwinds, Tirsite and Kaelys could move in with her also. The Defendants were also aware of Rita's concerns about Tirsite's health and wellbeing. Thus, the Defendants were supporting Rita in her quest, as she stated, to do everything in her power to protect Tirsite. I find that these circumstances further fortify the relationship of trust and confidence that Rita had in the Defendants.
66. Third, I have given careful consideration to the points put forward by the Defendants that the evidence shows that Rita took care of her own finances, drove her taxi as she wanted and that she was in charge of her affairs and that no-one could tell her what to do. I am not satisfied that these circumstances undermine my finding that there was a relationship of trust and confidence between Rita and Dawn and Williston. In my view, the reasons that I set out above carry more significance and weight and far outweigh the position put forward by the Defendants which essentially highlight that Rita got on with some basics of everyday life. Thus, in my view, in following the extract in *Snell's Equity*, I am satisfied that the Defendants acquired over Rita, a measure of influence or ascendancy of which they then took unfair advantage.
67. Fourth, in following *Perwaz and Perwaz*, I find that it is proved that the relationship of trust and confidence was established before the transaction of the transfer of \$500,000 to Dawn's account and then to the mortgage. Thus, the evidential presumption arises.

Whether the transaction calls for an explanation

68. Fifth, I turn to the transaction of the transfer of the \$500,000 from Rita's account to the Defendants' HSBC account which was later applied to the Defendants' mortgage. In my view, I prefer Rita's evidence that she transferred the \$500,000 to the Defendants' HSBC account because at BNTB, Dawn had urged her to do so for safe keeping for later disposition to assist Tirsite to purchase a Condo and to assist the Defendants with a Balloon Payment, amounts to be determined. On cross-examination, Rita maintained that she and the Defendants were on good terms at that point and she saw nothing wrong with putting the money into the Defendants' HSBC bank account, as Dawn had all the paperwork in relation to the Homestead in any event. She denied that she gave the \$500,000 to them. She stated that she trusted them and had told them not to screw her over. Once she discovered that the \$500,000 was not in the HSBC account she did not ask them about it right away but she did raise it with them at a later stage at the Apartment once she realised the Defendants could not qualify for financing to help Tirsite. Rita's evidence had a resounding ring of truth and logic to it, whilst to my mind, Dawn's evidence was overwhelmingly self-serving in that she seemed determined to reduce the Fairwinds' mortgage whilst maximizing income from the occupants at Fairwinds and continuing to enjoy her quality of life. This included delaying moving into the Main House with the result that six to seven adults would continue to live in a two bedroom two and a half bathroom apartment. In my view, Dawn indeed was the strategic planner, driver and the administrator, who had devised a plan to reduce their not so insignificant mortgage, reduce their monthly payments and continue to enjoy her quality of life.

69. I must consider the question whether the transaction calls for an explanation, per *Snell's Equity* by way of considering the specific facts of the case and per *Thompson* looking at it in its context and to see what its general nature was and what it was trying to achieve for the parties. Rita's evidence was that the transfer of the \$500,000 was at Dawn's insistence for Dawn to hold for safekeeping and a later disposition, some to help Tirsite to purchase a Condo and an as yet undetermined amount to help with a Balloon Payment to the Defendants' mortgage. The Defendants state that the transfer of the \$500,000 was, with Rita's full knowledge and agreement, for the purpose of applying it to their mortgage with



a view that it would lower the monthly mortgage payments and it was the sum that would make the plan work of all of them moving into the Main House.

70. The amount of \$500,000 represented approximately 80% of the Proceeds of Sale of Rita's main asset the Homestead. In my view, this clearly was not a small gift by any means which Lindley LJ had in mind in the leading authority of *Allcard v Skinner*. In my view, the purported gift cannot be reasonably accounted for on the ground of their relationship or other ordinary motives on which ordinary men act. Looking at the evidence objectively, a reasonable person might very well conclude that an elderly mother of an ordinary son could come to live with him and his family without any financial contribution whatsoever or if a financial contribution was necessary, then a minimal monthly contribution to cover some basic expenses.
71. However, the gift of 80% of the Proceeds of Sale was so large that it constituted, similar to Lord Scarman's view in *Morgan's* case, a disadvantage to Rita sufficiently serious to require evidence to rebut the presumption that it was procured by the exercise of undue influence. That is, Rita was left with no funds to help Tirsite. Further, the Defendants were always aware that Rita wanted to give some funds to Tirsite to enable her to purchase a Condo. Despite that knowledge, once Tirsite had interest in a Condo, Dawn instructed her to work on the basis of having \$75,000 for a downpayment and a 10 to 15 year mortgage. However, the Defendants at that stage did not have access to \$75,000. Later, when Tirsite had an interest in another Condo, the Defendants applications to the banks for funding for Tirsite were rejected as they did not qualify for funding. To make matters worse, if the \$75,000 was to come out of the \$100,000 that Rita reserved for her own personal use, then Rita would have been at an even more serious disadvantage of having only approximately \$25,000 to \$30,000 for her own use out of the Proceeds of Sale. In my view, the transaction calls for an explanation and thus the presumption of undue influence arises on the facts of this case and it is for the Defendants to rebut it.

#### Rebutting the presumption

72. Sixth, in deciding whether the presumption has been rebutted, I must give the evidence as a whole balanced consideration bearing in mind all the circumstances of the case. Per *Pedro*, it is necessary to show that the gift was made after full, free and informed consideration.
73. It is not in dispute that Rita did not have independent legal advice. In *R v HM Attorney General for England and Wales*, the Privy Council stated that the receipt or not of legal advice is not dispositive of the question of undue influence. In the extract from *Duress, Undue Influence and Unconscionable Dealing* it gives support to the position that where Rita did not receive any advice at all before entering into the transaction, it will ordinarily be difficult to rebut the presumption of undue influence. In my view, there are myriad legal issues which arose in the plan espoused by the Defendants, to which they say Rita agreed, involving selling Rita's main asset the Homestead, gifting \$500,000 to the Defendants, having no funds left to support her main priority, that is Tirsite and Kaelys, the Defendants' agreement to support Tirsite in purchasing a Condo and finally, that in return for such gift, Rita would have a right to live at Fairwinds for the remainder of her life rent free. In my view, there is no evidence to show that Rita was a person with legal experience or previous dealings in these types of transactions. Further, Dawn was fully aware of the details of the sale of the Homestead and the Proceeds of Sale and even if Rita had agreed to the gift of \$500,000, there would simply be no funds left to assist Tirsite - and if Tirsite used \$75,000 of Rita's reserved funds then there would be minimal funds left for Rita for the remainder of her life. Yet, Rita was given no advice whatsoever about this and she was not even advised to seek advice before making the gift. In my view, the absence of legal advice supports the position that Rita was not acting after full, free and informed consideration.
74. I turn now to a balanced consideration of the evidence in determining whether Rita made the transaction after full, free and informed consideration. I refer to the findings of fact that I have made about who initiated the plan and how Rita wanted to use the Proceeds of Sale. As stated, in my view, Rita wanted to have some funds for herself, then make some funds available to assist Tirsite in purchasing a Condo and then finally some funds would go to the Defendants to make a Balloon Payment on their mortgage.

75. In my view, the Defendants have not rebutted the presumption for several reasons. Their position is that Rita fully understood the nature of the gift of the \$500,000 before entering into it. They rely on various pieces of evidence to support this contention, namely: (a) It was Rita's idea; (b) Dawn made various calculations and settled on the figure of \$500,000 to make the plan work. This required a significant reduction in the mortgage and consequently the monthly mortgage payments in order for the family to move into the Main House; (c) The plan was explained to Rita at Henry's and thereafter Rita agreed to the plan; (d) The documentary evidence shows this; and (e) After the altercation when Rita, Tirsite and Kaelys were moving out, Rita stated "*I want my money back*".
76. Rita stated that she did not write "mortgage proceeds" on the Wire Transfer Form and had not seen the words on it in any event when she signed it. Dawn recalled that the bank official may have written in the words after hearing a reply from Rita. After careful consideration of this evidence, I found Rita to be credible on this point and I preferred her evidence. Thus, I am not satisfied that the words were written as a result of anything Rita stated or that the words were written in Rita's presence. Thus, this contention that the words "mortgage proceeds" shows that Rita knew and fully understood what she was doing fails to rebut the presumption.
77. I turn now to Dawn's role. The evidence showed that Dawn had calculated the amount of \$500,000 as the figure that would make the plan work as she said for everyone. The question that is raised in my mind is for whom has the plan worked? In my view, Dawn was focused on reducing the mortgage thus reducing the monthly mortgage payment. Thus, she was concerned to ensure that the Defendants had only to make minimum financial contributions after the rental income of the Main House was taken into consideration. The evidence also shows that Dawn was focused on maintaining a certain quality of lifestyle that she enjoyed for herself and her family. However, as already stated, the calculation left no funds to achieve Rita's goal of funding Tirsite's purchase of a Condo, which was a priority over any Balloon Payment for the Defendants. The situation became more muddled after the \$500,000 was applied to the mortgage because Tirsite wanted to purchase a

Condo. Faced with having no funds whatsoever out of the Proceeds of Sale to support Tirsite, the Defendants were in the wholly embarrassing and unfortunate position of having to be rejected by the banks for any funds to support Tirsite. To my mind, their applications to the banks showed that they knew they had an obligation to secure funds for Tirsite's potential purchases. The question then begs, if they knew of their obligation, then why would they not keep funds aside and available to assist Tirsite. Surely, it would be far easier to have ready funds to assist Tirsite and as all of it would not be used for Tirsite, then some would be left for Rita to make a decision about the amount to be gifted to the Defendants as a Balloon Payment. Having given consideration to those points, I am not satisfied that Rita knew and understood that the transfer of the \$500,000 was going to be applied to the mortgage and thus I am not satisfied that the gift was made after Rita's full, free and informed consideration.

78. I now turn to Dawn's Letter dated 6 February 2017 to Rita. In that letter, Dawn recognised that Rita had not been speaking to her for some time which she surmised was because of an email that Dawn had sent to Tirsite. Dawn expressed that Rita had taken Tirsite's side. Also, Dawn acknowledge that Rita had helped the Defendants significantly such that they would look out for Tirsite and Kaelys. For that they were very appreciative and grateful, and they will ensure that Rita does not regret it in the long run. Rita's evidence was that the Defendants had done everything but look out for her, Tirsite and Kaelys. Thus, the Defendants' position is that this part of Dawn's Letter shows that Rita fully understood that she was transferring the \$500,000 to the Defendants to apply to their mortgage to make the plan work of all of them living in the Main House.

79. On cross-examination that the \$500,000 was the significant help, Rita maintained that Dawn was not thanking her for the \$500,000 because she had not given them \$500,000 as a gift. However, she had purchased groceries and water for the Defendants. However, it is clear to me that there is no mention of the Balloon Payment in Dawn's letter. In my view, Dawn may very well have been talking about the Balloon Payment as the significant help because by that time Dawn did know that it had been applied to the mortgage and the monthly payments had been reduced. However, that does not mean that Rita accepted that

the Balloon Payment was the significant help being referred to in Dawn's Letter – as Rita stated throughout her evidence, she had helped the Defendants in various ways throughout their marriage, including the recent buying of groceries and water at Fairwinds. Thus, I am unable to attach any weight to Dawn's statement about Rita's significant help as supporting the position that Rita fully understood that the \$500,000 was paid to the Defendants' mortgage.

80. I now turn to Rita's demand to Williston on the night of the altercation that she wanted her money back. This occurred when Williston had told her to leave Fairwinds. Rita's evidence is that Dawn said that she could give her the money the next day. Dawn denied that she said that. However no funds were ever forthcoming. The Defendants rely on Rita's demand to show that Rita fully understood that she had gifted the Defendants the Balloon Payment but wanted it back as she felt she had been kicked out of Fairwinds. On cross-examination Rita maintained that she wanted her money back because she knew she had not given the Defendants the \$500,000 although she was going to give them something as a Balloon Payment for their mortgage but she never got the chance to give them anything because she got kicked out of Fairwinds in December 2017, over a year later. In my view, Rita's demand made sense in all the circumstances that she provided, namely that as she had never given the Defendants the Balloon Payment then she wanted that money back. Further, her priority was to ensure that Tirsite secured a Condo and then she would think about what money she would give to the Defendants for them to make a Balloon Payment. Thus, I reject the Defendants position that Rita demanded the funds back because she knew that she had given it to them but was sore about Tirsite having to move out of Fairwinds, she moving out also. Thus, I find no reliance on this point to support the Defendants' position that Rita made the transfer after full, free and informed consideration.

81. I now turn to the Defendants' conduct after Rita, Tirsite and Kaelys moved out of Fairwinds. In my view, the Defendants have paid scant attention and concern to them. Rita had moved from her Homestead with practically no financial issues to a position where, after leaving Fairwinds, she was living with some else and paying rent or making a financial contribution. Meanwhile the Defendants have benefitted from the reduction in their

mortgage at Fairwinds, have moved into the Main House, have continued with their lifestyle including travel, cruises and a luxurious 25<sup>th</sup> anniversary celebration. Further they have made no attempts to assist Tirsite which was a priority for Rita. Tellingly, they have tried to secure funding to pay back the Balloon Payment amount to Rita without success, the explanation being that once Rita made her claim that they wanted to pay her back. To that point, I am inclined to accept Rita's position that she never agreed to transfer \$500,000 to the Defendants to be applied to their mortgage which is the reason why the Defendants made some effort to try to fund a repayment. In my view, the combination and totality of these events and circumstances that benefit the Defendants to the detriment of Rita and Tirsite lead me to question the credibility and veracity of the Defendants' evidence such that I attach little weight to it. Thus, I find that their conduct does not show that Rita made the transfer after full, free and informed consideration.

82. Having given the relevant evidence as a whole a balanced consideration bearing in mind all the circumstances of the case, in my view, the presumption of undue influence has not been rebutted.
83. In light of all the reasons stated above, I am satisfied that Rita made the transfer of \$500,000 under undue influence by the Defendants. On that basis, I am satisfied that I should grant the relief sought in respect of that claim.

**Issue 2 – Breach of the Accommodation Agreement and claim for promissory estoppel relating to Rita's "life tenancy" in Fairwinds**

The Law

84. The general formulation of promissory estoppel is provided in *Snell's* where it stated as follows:

*"12-018. Where, by his words or conduct one party to a transaction, (A) freely makes to the other (B) a clear and unequivocal promise or assurance that he or she will not enforce his or her strict legal rights, and that promise or assurance is intended to affect the legal relations between them (whether contractual or otherwise) or was reasonably*

*understood by B to have that effect, and, before it is withdrawn, B acts upon it, altering his or her position so that it would be inequitable to permit the first party to withdraw the promise, the party making the promise or assurance will not be permitted to act inconsistently with it. B must also show that the promise was intended to be binding in the sense that (judged on an objective basis) it was intended to affect the legal relationship between the parties and A either knew or could have reasonably foreseen that B would act on it.”*

...

*12-031. As the effect of a promissory estoppel is to prevent A's assertion of a right it does not, in itself, constitute a free-standing means by which B can acquire a right against A.”*

85. In *Baird Textile Holdings Limited v Marks & Spencer PLC* [2001] EWCA Civ 274 the claimant argued that Marks & Spencer was precluded on the basis of contract and estoppel from exercising a right to terminate its long-standing supply contract with Baird without reasonable notice. The claim in contract was struck out at first instance. On appeal, the claim on the ground of estoppel suffered the same fate. The Vice Chancellor in *Baird* agreed at [34] that the established position in English Law is that "*common law or promissory estoppel cannot create a cause of action*" stating as follows:

*“38. In my view English law, as presently understood, does not enable the creation or recognition by estoppel of an enforceable right of the type and in the circumstances relied on in this case. First it would be necessary for such an obligation to be sufficiently certain to enable the court to give effect to it.[...] Second, in my view, the decisions in the three Court of Appeal decisions on which M&S rely do establish that such an enforceable obligation cannot be established by estoppel in the circumstances relied on in this case. ...”*

### Plaintiff's Submissions

86. Mr. Williams submitted that Rita's claim for promissory estoppel concerned the Defendants' promise that Rita could reside in Fairwinds for the remainder of her life, rent free. Thus, Rita's case is that her estoppel claim solely pertains to her interest in Fairwinds which was to be way of the creation of a life tenancy. Mr. Williams pointed to the Defence to highlight that it was to be accepted that Rita was to be granted certain rights in relation to her continued residence at Fairwinds but it was by way of a "non-exclusive irrevocable license", which diverged from Rita's assertion that she was to be granted a life tenancy.

87. Mr. Williams accepted the Defendants' submissions and case authorities of *Snell, Baird Textile Holdings Limited v Marks & Spencer PLC* and *Pedro*. Accordingly, he argued that the proper application of the law would result in the Court concluding that Rita's claim in promissory estoppel is not bad in law. He argued that the Defendants, having accepted that the Plaintiff has a right to reside in Fairwinds, means the Court does not have to determine whether the promissory estoppel claim succeeds because the point is no longer in dispute.
88. Mr. Williams made some submissions about a life tenancy versus a license to occupy. The essence was that if the Court decided that the license was contractual and Rita was forced out of Fairwinds, it could award Rita damages for breach of the license. Alternatively, the Court could find that the license was coupled with equity, to which, estoppel rights and rights under equitable licenses give rise, the result being that Rita has certain rights.
89. Mr. Williams submitted that Rita asserts that she was to be granted a life tenancy in Fairwinds and would be entitled to use of Fairwinds for the duration of her lifetime and would be entitled to proceeds of rent if she chose not to live there. Thus, as she was evicted she was entitled to rental income or she could demand to be bought out. However, he also submitted that the Court could conclude that because Rita was robbed of the opportunity to allocate funds to the Defendants as she determined appropriate, the consideration/purchase of a life interest/grant of a life interest fails and that the appropriate order would be to award damages to Rita in the sum of the monies misappropriated, that is \$500,000.

#### Defendants Submissions

90. Mr. Masters submitted that Rita's claim in promissory estoppel is bad in law relying on *Baird*. He argued that Rita's claim that she is entitled to have an equitable interest in Fairwinds based on promissory estoppel cannot succeed because it is not a free-standing cause of action.



91. Mr. Masters argued that by claiming promissory estoppel, Rita is not seeking to prevent the Defendants from enforcing their legal right in respect of Fairwinds, but is instead relying on the doctrine to establish an equitable interest. This application ran counter to the principle that the purpose of promissory estoppel is not to create legal rights but instead to prevent a party (in this case the Defendants) from enforcing a legal right. In any event, Mr. Masters submitted that: (a) Rita had not prayed for any relief in accordance with promissory estoppel; and (b) she had failed to establish that the Defendants now seek to rescind a promise and enforce a legal right which is in contrast to any promise or assurance previously made, that is, that Rita could reside in the Fairwinds for the remainder of her life.
  
92. Mr. Masters reminded the Court that Rita's case was that she was unduly influenced by the Defendants to sell the Homestead and provide \$500,000 to them. He submitted that under the promissory estoppel claim, Rita seeks to establish that she relied on a promise made to her by the Defendants. However, to make out this claim, she would have to abandon her undue influence claim entirely and accept that there was a binding agreement between the parties whereby she provided consideration of \$500,000 in exchange for an equitable interest in Fairwinds. Thus, the question becomes how a person can rely on a promise that is part of an overarching agreement they purportedly never had the free will to enter? He surmised that the question need only to be stated for the absurdity of the concept to be understood.
  
93. Mr. Masters submitted thus that *Baird* should be followed and Rita's freestanding claim for promissory estoppel should be dismissed as Rita cannot both be the victim of undue influence and the beneficiary of any rights arising out of that arrangement.

#### Analysis on breach of the Accommodation Agreement and Promissory Estoppel

94. Rita claims for breach of the Accommodation Agreement and that she has suffered loss as a result of having to pay rent elsewhere since she, Tirsite and Kaelys were evicted from Fairwinds. Rita also claims that the Accommodation Agreement was breached in that

Tirsite was not supposed to pay any expenses until they all had moved into the Main House, but that Dawn had demanded that Tirsite pay \$500 per month for electricity.

95. I refer to my findings on the facts and in the section of undue influence above. In my view, there are several significant points to consider as follows: (a) I have found that there was undue influence by the Defendants on Rita; (b) Rita had not yet determined what amount of the Proceeds of Sale she was going to give to the Defendants as a Balloon Payment for their mortgage; and (c) Rita was evicted before she made the decision of what amount to gift the Defendants for their Balloon Payment. In these peculiar circumstances, I am of the view, that Rita had not cemented or perfected the Accommodation Agreement with the Defendants by voluntarily providing them with any Balloon Payment for their mortgage. It is as if the agreement has been held in abeyance until she had firstly assisted Tirsite with purchasing her Condo and then secondly, and more importantly, determined the amount of a Balloon Payment to the Defendants and executed the same. To my mind, the agreement would be enforceable once Rita had provided the funds, of whatever amount she had chosen, to the Defendants as a Balloon Payment for their mortgage, subject to Tirsite having received her financial assistance from the Proceeds of Sale. On that basis, I am of the view, that the Accommodation Agreement has not been breached.
96. Further, I am of the view that, having accepted Rita's case of undue influence, it is not open to her now to pursue the case of promissory estoppel or breach of the Accommodation Agreement. Further, I accept Mr. Master's argument that the promissory estoppel argument is without merit because: (a) per *Baird*, promissory estoppel cannot be used to create a cause of action. I refer to *Combe v Combe* [1951] 2 KB 215 where Denning LJ stated that promissory estoppel is "*a shield, not a sword.*"; and (b) on the Defendants' case, they have maintained generally that Rita has a right to live in Fairwinds as a result of the proper application of the Balloon Payment, and they have not offered any alternative suggestion to that position. In light of these reasons, I deny the application that promissory estoppel applies to this case.

**Issue 3 – Whether there is a constructive trust and whether Rita is entitled to a declaration of a beneficial interest in Fairwinds**

Rita’s Submissions

97. Mr. Williams relied on *Pedro*, where the Court considered the requisite intention to create a trust as established by the learned authors of *Lewin on Trusts (19th Ed)* at paragraph 56:

“ ...

General Principle

“4-002 *Wherever a person having a power of disposition over property manifests any intention that it be held upon trust for another, the Court, where any necessary formal requirements (such as that of writing) have been complied with, will execute that intention, however informal the language in which it happens to be expressed, so long as the three particulars mentioned in the next paragraph can be gathered from the language used.*”

*The “three certainties”*

4-003 *Lord Langdale M.R. declared three essentials for the creation of a trust:*

*As a general rule it has been laid down, that when property is given absolutely to any person, and the same person is by the giver who has power to command, recommend, or entreated or wished, to dispose of that property, in favour of another, the recommendation, entreaty or wish shall be held to create a trust:*

*First, if the words are so used, that upon the whole, they ought to be construed as imperative,*

*Secondly, if the subject of the recommendation or which be certain; and,*

*Thirdly, if the object or persons intended to have the benefit of the recommendations or wish be also certain.*

*The “three certainties” which must be found in a declaration of trust are therefore certainty of words, certainty of subject-matter and certainty of objects.*”

98. In respect of a creation of a trust, Mr. Williams submitted that the Trustee Act 1975 is clear in its interpretation as to the definition of a trust being ‘*the expressions “trust” and “trustee” extend to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incident to the office of an estate representative, and “trustee” includes as estate representative, and “new trustee” includes an additional trustee*’.

99. Mr. Williams submitted that an implied trust and a constructive trust arise by operation of law. Thus, there may be no intention by any of the parties that a trust should arise, however the circumstances are such that it would be inequitable for the persons controlling the property to deny the interest of the others. He submitted that the constructive trust is based on equity's original principles of fairness, justice and doing what is right according to good conscience, applying where: (a) property legally owned by one party but that party should really own the property on behalf of another party either instead of, or in addition to, himself; or (b) where there is no real trust but equity steps in with the mechanism of a constructive trust to hold a party to account for unauthorized profits he has made and which rightfully belong to another party.

100. Mr. Williams submitted that a constructive trust arises in alternate circumstances of this case and consequently a beneficial interest arises as claimed in paragraph 2 of the prayer in the SOC. Firstly, if the Court finds in favour of the undue influence case and awards Rita damages of \$500,000 then the \$500,000 is held on constructive trust to the benefit of Rita and thus Rita enjoys a beneficial interest in Fairwinds to that extent of the amount of the unpaid damages. Secondly, if the Court rejected Rita's case of undue influence and then went on to find that there was an agreement between the parties - that in return for \$500,000, Rita could live rent in Fairwinds for the remainder of her life - then a constructive trust arises and Rita enjoys a beneficial interest in Fairwinds. In this alternative, Mr. Williams argued that the Court should consider the fairness of the circumstances, in particular, Rita living at Fairwinds without having an interest in the property, having had \$500,000 of her money applied to the mortgage of Fairwinds.

101. Mr. Williams relied on *Lloyds Bank Plc and Rosset* [1991] 1 A.C. 107 (1990) where Bridge LJ stated as follows:

*“The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners,*

*however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or a promissory estoppel.*

*In sharp contrast with this situation is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to reach such an agreement if they had applied their minds to the question, and where the court must rely entirely on the conduct of the parties both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. In this situation direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage installments, will readily justify the inference necessary to the creation of a constructive trust. But, as I read the authorities, it is at least extremely doubtful whether anything less will do.*

102. In respect of the kind of arrangement that Rita agreed with the Defendants, Mr. Williams relied on the House of Lords case of *National Provincial Bank Ltd. v Ainsworth* [1965] A.C. 1175 as follows:

*“There are three different types of cases that come under the head of license. (1) Where an owner of land encourages another person to expend money on that land on the faith of an assurance that part of the land or an interest therein will be granted to such person equity will compel the execution of a proper conveyance or, if that is inappropriate for any reason, will treat the money so expended as a charge upon the land.”*

103. Mr. Williams relied on *Sonya Darrell v Lynda Sharon Peets-Swan* [2008] Bda LR 50 where Wade-Miller J stated as follows:

*“A constructive trust arises where it would be fraudulent for the owner of a legal title to assert his sole beneficial ownership in derogation of equitable rights which have already been bargained away informally to each other. The existence of the prior bargain, once relied on by the claimant party, now renders it unconscionable for the legal owner to assert his beneficial title to the exclusion of that claimant. To prevent such equitable outcomes, equity imposes or ‘constructs’ a trust to give effect to the parties’ earlier understanding as to their respective equitable rights...”*

## The Defendants' Submissions

104. Mr. Masters made submissions about the claim by Rita that she should be compensated for losses she suffered consequent upon a finding that the Defendants breached the life tenancy agreement, or on the Defendants' case, the non-exclusive irrevocable license; and if so how much compensation should she be entitled (the "**Compensation Issue**"). He also made submissions about Rita's case that Fairwinds is held on constructive trust for her benefit until such time as the Defendants have repaid the \$500,000 (the "**Constructive Trust Issue**"). Both issues had to be predicated on the Court making a finding that Rita was 'forced out' of Fairwinds by the Defendants and/or that the Defendants have precluded Rita from exercising her right with respect to Fairwinds. He argued that the Defendants' evidence is clear and shows that Rita's entitlement to live at Fairwinds remains unfettered.
105. Mr. Masters submitted that Rita cannot logically maintain that she was unduly influenced to sell the Homestead and deposit the Proceeds of Sale into the Defendants' account while also arguing that she is the beneficiary of equitable arrangements with the Defendants concerning a beneficial interest in Fairwinds. Mr. Masters also submitted essentially that although Rita was granted a right to live in Fairwinds for the remainder of her life without paying rent there was never an agreement between the parties for Rita to have a beneficial interest in Fairwinds.

### Compensation Issue

106. Mr. Masters submitted that Rita's case is put in "two ways" (i) the license to reside in Fairwinds granted to Rita is either a contractual license, which was breached by the Defendants entitling her to damages; or (ii) the license was coupled with equity, to which, estoppel rights and rights under equitable licenses give rise, entitling her to have a life interest in Fairwinds recognized.
107. Mr. Masters submitted that it has never been disputed that the Defendants owe a right to Rita to reside in Fairwinds rent free for the rest of her life. Further, the Defendants had not breached the license because Rita left Fairwinds on her own volition. Thus, by not taking

up her rights, Rita's refusal amounts to an objective manifestation of choice not to rely on the right and a waiver of the same. Mr. Masters relied on *Terceira and Others v Terceira* [2010] Bda LR 67 at [79]. Thus, the Court should not convey any benefit in equity to Rita in such circumstances.

108. In respect of the case of a license coupled with equity, Mr. Masters distinguished *Ainsworth* on its facts wherein the Court held that the interests of the wife did not override the interest of the third-party Bank that was seeking to enforce an order for possession. Thus, the Court allowed the appeal ordering possession to be given to the Bank, with Lord Hodson stating "... *but broadly speaking the view is accepted that the court has a discretion to be exercised in the interest of the parties to restrain or postpone the enforcement of legal rights but not to vary agreed or established rights to property in an endeavour to achieve a kind of palm tree justice.*" Mr. Masters continued that in *Ainsworth*, there was a crucial requirement the entrance and work on the land be carried out on the faith and assurance that part of the land or an interest therein will be granted in order to create a license coupled with equity.

109. Mr. Masters submitted that in the present case there was no doubt about the arrangement between the parties. There was no assurance that Rita would be entitled to a beneficial interest in Fairwinds. On the contrary, the interest was that Rita was being provided with a right to occupy part of Fairwinds for the rest of her life without payment of rent. Thus, the test in *Ainsworth* was not made out.

#### Constructive Trust Issue

110. In respect of the creation of a trust, Mr. Masters submitted that Rita alleges that the \$500,000 paid into Dawn and Will's account was pursuant to her intention to create a trust. He submitted that this was not accepted, as the reasons for the transfer had nothing to do with a trust. He stated that the agreement between Will and Dawn and Rita as recorded in the evidence of Rita and Will is clear. The suggestion of a trust did not exist until the claim was made in October 2018. Further, Rita never communicated the intention of a creation of a trust to Dawn and Will – even in her own evidence Rita does not say that she told (or otherwise expressed) to Dawn and Will that the purpose of the transfer was for them to

hold it on trust for themselves and Tirsite. Thus, the alleged Trust has failed for lack of certainty of words.

111. Mr. Masters submitted that there was no need for any equitable relief as Rita had chosen not to exercise her right to live at Fairwinds, rent free for the rest of her life. Thus, as the Defendants have never taken any steps to prevent this, it cannot be for the Court to reward such behaviour by improving Rita's bargain. He argued that in order to do so, the Court must find that the parties' earlier understanding as to their respective equitable rights included Rita taking a life interest in the entirety of Fairwinds. There had to be a common intention for such a right, however, there was no evidence of this. Thus, Rita having a right to a beneficial interest in Fairwinds was never in the contemplation of the parties.

112. Mr. Masters also relied on *Sonya Darrell* as set out above arguing that equity only steps in when there is a need to remedy circumstances where a party moved away from the agreement between the parties. Further, equity is not used to give a party further rights than what was agreed.

## Analysis

### Beneficial Interest

113. In my view, as I have already stated, there was an agreement between the parties for Rita to live at Fairwinds for the remainder of her life rent free. I have already found that this was in exchange for Rita gifting the Defendants a sum of money yet to be determined and which has not yet happened. Upon careful consideration of all the evidence, in my view there is no evidence to support Rita's claim that there was an agreement that she was to have a beneficial interest in Fairwinds. As a starting point, there is no documentary evidence or other express statement of any party that Rita was to obtain or be granted a beneficial interest in Fairwinds.

114. Further, in my view, there are no facts upon which I can rely to draw an inference that there was an agreement that Rita was to obtain a beneficial interest in Fairwinds. On the contrary,



I refer to the evidence that Rita wanted to do several things with the Proceeds of Sale in an order as follows: (a) keep some for herself (b) give some funds to Cheryl; (c) give some funds to Tirsite to assist her in purchasing a Condo; and (d) give some funds in an amount to be determined to the Defendants to put on the Fairwinds' mortgage. There is no mention of Rita obtaining an interest in Fairwinds. To that point, I find that Rita was intending to give the Defendants some funds as part of the agreement that she live in Fairwinds for the remainder of her life rent free but without obtaining any interest in Fairwinds. Thus, per *Lloyds Bank Plc and Ainsworth*, I dismiss the claim for a beneficial interest in the property.

115. I agree with Mr. Masters that Rita's claim of having a beneficial interest as a result of the damages claim found in her favour, is more akin to a tracing claim which is a post-judgment application.

#### Constructive Trust

116. In my view, at the time when Rita transferred the \$500,000 to the Defendants' Bank account, she failed to satisfy the requirements of the "three certainties" as set out in *Lewin on Trusts* and cited in *Pedro*. To that point, the intention has to be "*gathered from the language used*" in order for the Court to execute that intention. Simply put, Rita's evidence at trial was about why she transferred the \$500,000 to the Defendants, in particular that she trusted them and she was going to disperse the money as she wished later on. In my view, Rita did not communicate her intention or set it out in any words to anyone. To that point, she denied that she wrote the words "mortgage proceeds" on the Wire Transfer Form. Thus, there is no evidence of the "certainty of words" – or in this case Rita's thoughts being expressed.

117. In my view, there is also no evidence of certainty of objects as Rita's plans for the \$500,000 was that some be used for Tirsite's Condo and an amount, yet to be determined, was to be used as a Balloon Payment for the Defendants. Those plans were not expressed at the time of the transfer. In any event, at the time of the transfer, Dawn took the transfer to mean that she could apply the \$500,000 to the Defendants' mortgage. In light of these reasons, in my

judgment, I am not satisfied that I can gather from the language used that Rita manifested an intention that the \$500,000 be held on trust by the Defendants for her.

118. In light of these reasons, I deny Rita's applications for: (a) a declaration that the \$500,000, is being held by the Defendants by way of constructive trust in Rita's favour as a result of her manifest intention at the time of the transfer; and (b) a declaration of a beneficial interest in Fairwinds as set out in paragraph 2 in the prayer in the SOC.

### **Conclusion**

119. I have found that Rita made the transfer of \$500,000 under undue influence by the Defendants. Thus, I grant the relief as follows:

- a. Damages to Rita by way of repayment of \$500,000 as the total funds belonging to Rita that the Defendants' applied to their mortgage as the Balloon Payment.

120. I have declined the applications for declarations that:

- a. There is a constructive trust in Rita's favour; and
- b. Rita has a beneficial interest in Fairwinds.

121. I grant the relief sought that the Defendants pay statutory interest.

122. Unless either party files a Form 31TC within 7 days of the date of this Judgment to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Plaintiff against the Defendants on a standard basis to be taxed by the Registrar if not agreed.

Dated 10 October 2023



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**HON. MR. JUSTICE LARRY MUSSENDEN**  
**PUISNE JUDGE OF THE SUPREME COURT**