



Neutral Citation Number: [2023] EWHC 2993 (Ch)

Case No: BL-2023-000602

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

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

Date: 30/11/2023

Before:

MASTER CLARK

Between:

ROBERT JEWKES

Claimant

- and -

(1) SAMUEL ALEXANDER WATSON
(2) EMILY REBECCA WATSON

Defendants

Arnold Ayoo (instructed by Addleshaw Goddard LLP) for the Claimant
The Defendants in person

Hearing date: 17 November 2023

Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10am on 30 November 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

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Master Clark:

1. This is my judgment on the application dated 10 July 2023 of the claimant, Robert Jewkes, seeking to strike out the Defence and/or for summary judgment on his claim.

Parties and the claim

2. The claimant claims under a deed of assignment dated 15 September 2021 (“the Deed”) under which he assigned to the defendants his rights under a number of commercial agreements in consideration for US\$727,000, payable by instalments.
3. US\$697,000 (plus contractual interest) remains unpaid, and the claim is for payment of that sum.

Background

4. There is limited evidence as to the factual background to the Deed. The defendants (who were 22 and 24 at the time of entering into the Deed) are the children of Gavin Watson. I refer to the defendants individually by their first names, to distinguish them from their father.
5. The defendants’ evidence is that they understood that Mr Watson and the claimant entered into a business partnership in 2019. The claimant loaned Mr Watson money to buy a Hong Kong incorporated company, SnB Brands Limited (“the company”), and also loaned the company money to provide working capital. The arrangement involved a holding company, also Hong Kong incorporated, called Ever Successful Limited (“ESL”), which entered into a “Deed of Share Charge” in favour of the claimant in respect of 10,000 shares in the company.
6. These agreements were not in evidence before me. They are referred to in the Particulars of Claim as “the Agreements” comprising:
 - (1) the Personal Agreements – agreements between the claimant and Mr Watson;
 - (2) the Corporate Agreements - agreements between the claimant and the company;
 - (3) the ESL Agreements – agreements between the claimant and ESL (in fact, there is only one).
7. The company’s business did not prosper. It became unable to fulfil its obligations to the claimant under the Corporate Agreements, and Mr Watson was unable to fulfil his obligations under the Personal Agreements. At some time in mid 2021, he was also diagnosed with skin cancer. In about July 2021, the claimant required Mr Watson to repay his personal loan of US\$355,000. He also proposed that the company go into creditors’ voluntary liquidation, and threatened Mr Watson with compulsory liquidation of the company and bankruptcy proceedings if he did not agree to this.
8. The defendants’ evidence is that a mediator, Stuart Corby, proposed that they be assigned the entire debt owed to the claimant (“the Debt”) in consideration of a payment to him, the payments to be made by funds provided to them by the company. The evidence on behalf of the defendants is that they had no involvement in the operations or financial decisions of the company, and had received no personal benefit from the business or the funds advanced to their father. They were, however, it is said, acutely aware that their father’s ability to support the family (including their younger siblings aged 10 and 12) was in jeopardy. Emily’s evidence is that she has suffered from depression and anxiety disorder from the age of 15, and she has filed a GP’s letter confirming this.

9. A formal deed was prepared by lawyers acting for Mr Watson and the claimant. On 31 August 2021, Mr Watson emailed a draft of the Deed (“the draft Deed”) to the defendants:

“Dear Samuel and Emily
This is the formal document for signing later
Please read it, yes, it sounds rather daunting but it is what it is and Daddy will make sure you guys are not affected by it!
We can talk about it later, just let me know when suits you
Daddy”

10. He followed this on 14 September 2021 by sending the signing page of the final version of the Deed, not the entire document. The defendants did not at any stage receive independent legal advice before signing it, nor was it ever suggested to them that they do so.
11. The directly relevant clauses in the Deed are:

- (1) By clause 2.1 the Debt was assigned to the defendants:

“in consideration of the sum of US\$727,000 (the "Consideration") together with interest as aftermentioned, to be paid by [the defendants} to [the claimant] in accordance with Part 6 of the Schedule to this Deed, [the claimant] hereby assigns to [the defendants] absolutely all [the claimant]'s rights, title, interest and benefits in and to the Debt and the Agreements, with effect from the Effective Date”.

Clause 1.1 defines the Effective Date as the date of the Deed, i.e. 15 September 2021.

- (2) By clause 2.2, the defendants agreed with the claimant that:
- (i) that they would be bound by the Agreements from the Effective Date as if they were each a party to the Agreements in place of the claimant; and
 - (ii) undertook to the claimant that they would discharge the Debt and all the claimant’s liabilities and perform all the claimant’s obligations under the Agreements due to be discharged or performed.
- (3) Pursuant to clause 3.1, the defendants agreed to pay the Consideration and all accrued interest to the claimant in the following instalments (the amounts and the dates of which were set out in Part 6 of the Schedule to the Deed):
- (i) US\$30,000 by 30 November 2021;
 - (ii) US\$30,000 by 28 February 2022;
 - (iii) \$US\$60,000 by 31 May 2022;
 - (iv) US\$60,000 by 31 August 2022;
 - (v) the remaining balance plus interest of 10% on 31 August 2022.
- (4) By clause 3.2, if the defendants did not make payment of any sum due, then all amounts (including interest) would become immediately due.

12. The first payment due under the Deed, US\$30,000, was paid on 30 November 2021 by the company on behalf of the defendants.
13. The second payment of US\$30,000 was due on 28 February 2022. On 27 February 2022, Samuel wrote to the claimant:

“Emily and I are writing to advise you that there is a possibility that this month’s payment may be delayed due to personal circumstances that have arisen over the last few months. Our father was diagnosed with an aggressive form of cancer in late September and has undergone a number of urgent operations and treatment prior to his departure back to the UK pre Xmas. The treatment continues here in the UK. With no medical insurance to cover this (in Hong Kong) the cost was high both financially and mentally on the family. The diagnosis was out of the blue and obviously very concerning, and we have not taken its ramifications lightly.

We expect that as a result of this outlay, there may be a delay in payment. However, we can assure you that payment will be made albeit possibly slightly later than previously arranged, possibly 1 to 3 weeks, just waiting on our father to firm up this.

Furthermore, we would like to take this opportunity to request and discuss a more manageable payment plan. We would like to request that the current plan is further spread out so that we would still provide you with the repayments, in smaller amounts, over a longer period, which would allow us to be able to deliver these payments to you consistently on time and in full with interest paid on all outstanding amounts.”

14. On 31 March 2022, the second payment not having been received, the claimant made a formal demand under clause 3.2 of the Deed for the full sum outstanding plus contractual interest. He continued:

“I am saddened to hear of your father’s illness. It is for you to decide whether to take these circumstances into account when seeking to recover sums to which you are entitled under the loans assigned to you under the Deed. These circumstances are not relevant to the arrangements between us, and have no bearing on your obligations to me under the Deed.”

15. This was followed by the claimant’s solicitors’ letter before claim dated 17 June 2022. The claim was issued on 19 April 2023. The defendants have acted in person throughout the proceedings; in setting out the law below, I have allowed for the fact that they are not lawyers.
16. The defences put forward by the defendants can be summarised as:
 - (1) *Non est factum*;
 - (2) Undue influence;
 - (3) Duress;
 - (4) Frustration of the Deed.

Claimant’s application

17. The application notice seeks to strike out the defence on all three of the grounds in Rule 3.4(2) of the Civil Procedure Rules 1998 (“the CPR”), and summary judgment under Part 24 of the CPR. However, in his oral submissions, the claimant’s counsel accepted that ground 3.4(2)(b) did not add to ground 3.4(2)(a) on the facts of this case; and realistically accepted that the court would not strike out the Defence under ground 3.4(2)(c) without giving the defendants the opportunity to correct its deficiencies in compliance with the rules.

Evidence

18. The claimant’s evidence was the witness statement dated 3 July 2023 of his solicitor, Danielle Cooper, who has no direct knowledge of the relevant events, and whose witness statement consists of a commentary on the correspondence and legal argument.
19. The material relied upon by defendants was:
 - (1) a “Statement of Case” filed on 9 May 2023;
 - (2) the Defence Statement of Samuel and Emily Watson dated 9 November 2023 and the exhibits to it (“the Defence Statement”);
 - (3) a witness statement dated 14 November 2023 signed by both defendants;
 - (4) a witness statement dated 15 November 2023 of the defendants’ mother, Paula Watson.
20. Samuel appeared in person at the hearing. Emily’s GP’s letter referred to above also stated that attendance at the hearing would adversely affect Emily’s mental health. I therefore allowed her brother to speak on her behalf.

Striking out and summary judgment – the principles

21. CPR 3.4(2) provides, so far as relevant:

“3.4— Power to strike out a statement of case

 - (2) The court may strike out a statement of case if it appears to the court—
 - (a) that the statement of case discloses no reasonable grounds for bringing ...the claim;
 - (b) that the statement of case is an abuse of the court’s process or is otherwise likely to obstruct the just disposal of the proceedings;
 - (c) that there has been a failure to comply with a rule, practice direction or court order.”
22. CPR 24.2 provides, so far as relevant:

“The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –

 - (a) it considers that –

...

 - (ii) that defendant has no real prospect of successfully defending the claim or issue; and
 - (b) there is no other compelling reason why the case or issue should be disposed of at a trial.”
23. The principles to be applied on applications for summary judgment are well established. They were summarised by Lewison J, as he then was, in *Easyair Ltd v*

Opal Telecom Limited [2009] EWHC 339 (Ch). Since the defendants are unrepresented, I set them out:

- (1) The court must consider whether the defendant has a “realistic” as opposed to a “fanciful” prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
 - (2) A “realistic” defence is one that carries some degree of conviction. This means a defence that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
 - (3) In reaching its conclusion the court must not conduct a “mini-trial”: *Swain v Hillman*;
 - (4) This does not mean that the court must take at face value and without analysis everything that a defendant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
 - (5) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
 - (6) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
 - (7) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.
24. The burden of proof is on the applicant to show that the conditions in CPR 24.2 are satisfied.
25. As to striking out for no reasonable grounds, as noted in the textbook *Civil Procedure 2023* (“the White Book”) at para 3.4.21, there is a considerable overlap between the

court's powers under CPR Part 24 and r.3.4; and the court has a discretion to treat an application made under CPR 3.4 (2)(a) as if it were an application under Part 24. In this case, there is no practical distinction in the test to be applied.

26. As to the evidential basis on which the court approaches a summary judgment application, the position is set out in the Court of Appeal decision of *Bhamani v Sattar* [2021] EWCA Civ 243 at [62]:

“... the assessment that the judge undertakes under Part 24 is one of assessing the evidence, not the pleadings. The question is not whether the pleaded defence has a prospect of succeeding, but whether the defendant has no real prospect of successfully defending the claim. What then is a judge to do if the defendant's evidence appears sufficient to raise a triable issue, but the defendant has served a defence in which the relevant defence has not yet been pleaded? Unless the judge can rule out any possibility of amendment (which would be unusual) I see nothing wrong in the judge concluding that the defendant had some real prospect of success even though this would require the defendant to amend.”

Non est factum – the law

27. The general rule is that a person of full age and understanding is bound by their signature on a document, whether they read or understand it or not.
28. “*Non est factum*” (Latin for “not my deed”) is the expression for the defence that can be relied upon where a person has been misled into signing a document essentially different from that which they intended to sign.
29. The relevant law is summarised in *Chitty on Contracts* (35th edn) at 5-049:

“a party is not permitted to escape the effect of a document that he has signed merely because he did not intend to sign a contract or a contract of the type he has in fact signed. ... the courts have placed strict limits on the doctrine of *non est factum*. The “key elements” for a successful plea of *non est factum* have been summarised thus:

- (a) the belief of the signer that the person is signing a document of one character or effect whereas its character and effect were quite different;
- (b) the need for some sort of disability which gives rise to that state of mind;
- (c) the plea cannot be invoked by someone who does not take the trouble to find out at least the general effect of the document”.

Difference in character and effect of the document

30. It is not enough for the document to differ in some respects. It must be of an entirely different kind to that expected. In *Saunders v Anglia Building Society* [1971] A.C. 1004 the House of Lords (now the Supreme Court) emphasised the extent of disparity required as between the document actually signed and that which a party believed they were signing.
31. Viscount Dilhorne at 1022G-H said:

“It will not suffice if the signer thought that in some respect it would have a different legal effect from what it has; nor will it suffice if in some respects it

departs from what he thought it would contain. The difference...must be such that the document signed is **entirely...or fundamentally different from that which it was thought to be**, so that it can be said that it was never the signer's intention to execute the document”
(emphasis added)

32. Lord Wilberforce stated at p.1026A-B

“a document should be held to be void (as opposed to voidable) only when the element of consent to it is totally lacking, that is, more concretely, when the transaction which the document purports to effect is **essentially different in substance or in kind from the transaction intended**”
(emphasis added)

33. Lord Hodson at 1018H-1019A said:

“the difference to support a plea of *non est factum* must be in a particular which goes to the substance of the whole consideration or to the root of the matter”

Disability or trickery

34. In *Saunders* Lord Reid said at 1015H-1016A:

“Originally this extension [of the plea] appears to have been made in favour of those who were unable to read owing to blindness or illiteracy and who therefore had to trust someone to tell them what they were signing. I think it must also apply in favour of those who are permanently or temporarily unable through no fault of their own to have without explanation any real understanding of the purport of a particular document, whether that be from defective education, illness or innate incapacity.”

To these cases, Lord Wilberforce added at 1025F, cases of:

“... persons who may be tricked into putting their signature on a piece of paper which has legal consequences totally different from anything they intended.”

Negligence

35. Lord Reid in *Saunders* at p.1019 stated that:

“Want of care on the part of the person who signs a document which he afterwards seeks to disown is relevant. The burden of proving *non est factum* is on the party disowning his signature; this includes proof that he or she took care. There is no burden on the opposite party to prove want of care”.

Documents signed in blank

36. The above principle applies to documents signed in blank. As stated at *Chitty* para 5-053:

“The plea of *non est factum* is likewise potentially applicable where one person signs a document in blank and hands it to another, leaving him to fill in the details and complete the transaction. However, where erroneous details are inserted

which are not in accord with the instructions of the person executing the document, he may yet be liable if the transaction which the document purports to effect is not essentially different in substance or in kind from the transaction intended. Moreover, the onus is on the person signing the document to show that he has acted carefully, and if he fails to discharge that onus he will be bound.”

***Non est factum* – analysis and conclusions**

37. The basis on which the defendants contend that they should not be bound by their signatures on the Deed is that:
- (1) they only signed the signing page of final version of the Deed; and
 - (2) the final version was substantially different from the draft Deed.
38. As will be apparent from above, it is not enough that the defendants signed only the signing page of the Deed. They would need to show that they acted carefully – by taking steps to find out what was in the remainder of the document. There is no evidence that they did so, and in my judgment, they have no real prospect of showing that they did act carefully before signing the Deed.
39. In any event, the defendants do not in my judgment have any real prospect of showing that the final version of the Deed differed sufficiently from the draft Deed so as to satisfy the test in *Saunders*. In his oral submissions, Samuel relied upon the following clauses added to the final version as rendering it sufficiently different:
- (1) Clause 2.2:
“[The Defendants] agree with [the Claimant] that that they shall be bound by the Agreements from the Effective Date as if they were each a party to the Agreements in place of [the Claimant] and undertake to [the Claimant] that they shall discharge the Debt and all [the Claimant]'s liabilities and perform all [the Claimant]'s obligations under the Agreements due to be discharged or performed.”
 - (2) Clause 3.2
“If [the defendants] fail to make payment of any sum due and payable under the Deed, then all amounts outstanding, including all accrued interest, shall become immediately due and payable by [the defendants].”
 - (3) Clause 7.4
“Each [Defendant] represents and warrants to the [Claimant] that on the Effective Date:
...
he resides in the United Kingdom and shall continue to do so until all the Consideration and all accrued interest has been paid to [the claimant] and no further payments are due under this Deed.”
40. None of these clauses approach satisfying the test in *Saunders*.

Undue influence – legal principles

41. The Defendants rely upon actual pressure placed upon them by their father; but their evidence also supports a defence of presumed undue influence. For the purpose of deciding whether the defendants have a real prospect of success, it is generally enough

to set out the law as summarised in *Chitty*, and not necessary to discuss the relevant caselaw in detail.

42. The starting point is the distinction between actual and presumed undue influence.

Actual undue influence

43. Actual undue influence consists of emotional pressure, or misrepresentation as to the consequences of entering into a transaction: see *Chitty* at 11-104; particularly if the transaction benefits the person exercising the influence or is clearly unwise for the influenced person: *Chitty* 11-107.

Presumed undue influence

Existence of presumption

44. As to presumed undue influence, as stated in *Chitty* at 11-118:

“it is well established that the child reposes trust and confidence in the parent, even though the child may have attained his majority not long before. If a gift is made to a parent shortly after the child reaches the age of majority, the parent will be required to show that the child was acting independently of his influence. This presumption can continue even after marriage, although the duration of the presumption is a question of fact and degree in the circumstances of each particular case. This presumption of a relationship of influence is thus a rebuttable one.”

45. The presumption of undue influence can also arise in any relationship where one person in fact reposes trust and confidence in another: see *Chitty*, 11-123 citing *Tate v Williamson* (1866) L.R. 2 Ch. App. 55, 61; or where there is evidence of dependence or vulnerability: *Malik (Deceased) v Shiekh* [2018] EWHC 973 (Ch), [2018] 4 W.L.R. 86 at [50].

Transaction not explicable by ordinary motives

46. It is not enough to raise an inference that undue influence has been used that the parties were in the type of relationship in which influence of one over the other is presumed or proved. It must also be shown that the transaction in question was, in the words of Lindley LJ in *Allcard v Skinner* (1887) L.R. 36 Ch. D. 145, 185.:

“... not reasonably to be accounted for on the grounds of friendship, relationship, charity or other ordinary motives on which ordinary men act.”

47. However, in cases of actual undue influence, it is not necessary to show that the transaction was one “requiring explanation”: *Chitty* 11-094 citing *CIBC Mortgages Plc v Pitt* [1994] 1 A.C. 200.

Rebutting the presumption

48. Once the presumption of undue influence has been raised, the transaction will be set aside unless it is rebutted. As *Chitty* states at 11-137:

“In order to rebut the presumption of undue influence, evidence must be adduced to satisfy the court “that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing”. The most

usual, though not the only, way of rebutting the presumption is to prove that the claimant had competent and independent advice”

Undue influence by a third party: actual or constructive knowledge

49. *Chitty* at 11-148 states:

“Where one party seeks to avoid a contract on the ground of undue influence by a third person, it must appear either that the third person was acting as the other party’s agent, or that the other party had actual or constructive notice of the undue influence. [See *Bank of Credit and Commerce International SA v Aboody* [1990] 1 Q.B. 923, 973; *Barclays Bank Plc v O’Brien* [1994] 1 A.C. 180]”

50. The claimant’s counsel sought to limit the scope of this proposition. He relied upon *Darjan Estate Co Plc v Hurley* [2012] EWHC 189 (Ch), [2012] 1 W.L.R. 1782, in support of the following proposition: where undue influence is exercised by a third party, then, unless the transaction is one of suretyship, the defendant must show that the claimant had actual knowledge of that undue influence and took no steps to remedy it.
51. The facts in *Darjan* were that a husband and wife were joint signatories to a lease of licensed premises. The wife alleged that her signature on the lease had been procured by undue influence exerted by the husband, of which the landlord had constructive notice, giving her an equitable right to have the lease set aside. It was held that:
- (1) In cases involving suretyship or any other non-commercial agreement between husband and wife, a lender will be put on inquiry (i.e. is taken to have notice of the risk of undue influence): *Royal Bank of Scotland Plc v Etridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773;
 - (2) In standard contractual scenarios, for example, where money is being advanced to the husband and wife jointly, then the lender is not put on inquiry, unless it is aware that the loan is being made for the husband's purposes, as distinct from their joint purposes: *CIBC Mortgages Plc v Pitt* [1994] 1 A.C. 200;
 - (3) The *Etridge* principle has not been applied outside the context of suretyship;
 - (4) The facts in *Darjan* were more akin to joint borrowing than suretyship because the wife received a direct benefit under the lease in the form of an interest in land;
 - (5) Constructive notice on the part of the landlord was therefore insufficient – actual notice was required; and in that case “[t]here was nothing about it to set any alarm bells ringing”.
 - (6) The wife therefore failed to show that there were substantial grounds for setting aside the lease on the basis of undue influence by the husband.
52. However, *Darjan* was a case involving a husband and wife, a relationship which does not give rise to a presumption of undue influence: *Etridge* [19]. In *Etridge*, it was held that notwithstanding the absence of the presumption, in cases of suretyship, the lender was nonetheless on notice of the risk of undue influence.
53. *Darjan* has no effect on the general principle set out at paragraph 48 above; and is distinguishable from cases in which there is a presumption of undue influence arising from the relationship of the parties, which is of itself enough to set the alarm bells ringing. This is confirmed in *Etridge* [84]:

“in the case of a father and daughter, knowledge by the bank of the relationship of father and daughter should suffice to put the bank on inquiry. When the bank knows of the relationship, it must then take reasonable steps to ensure the daughter knows what she is letting herself into.”

Undue influence – analysis and conclusions

Actual undue influence

54. In my judgment, the evidence establishes that the defendants have a real prospect of showing that their father exerted emotional pressure on them to execute the Deed; and that he misled them as to the consequences of signing it: “Daddy will make sure you guys are not affected by it!”.

Presumed undue influence

55. As set out above, a presumption of undue influence arises from the relationship of parent and child. The defendants also have a real prospect on the evidence before me of showing that they did in fact repose trust and confidence in their father, in Emily’s case increased by her vulnerability due to her mental health issues.

Transaction not explicable by ordinary motives

56. As noted above, the Agreements were not in evidence. Whilst the rights under them may have had a notional value, plainly (not least in the light of later events) that value was wholly dependent on the fortunes of the company. The claimant was pressing to exchange those rights for a cash payment within a short timescale. Under the Deed, the defendants undertook a life-changing liability to the claimant, with the only means to meet that liability being entirely outside their control. In these circumstances, I consider that the defendants have a real prospect of showing that this transaction was manifestly disadvantageous (to use the pre-*Etridge* expression) to them or one that is not explicable by reference to the ordinary motives by which people act.

57. Again, as noted, if the defendants show actual undue influence, then they will not need to show that this requirement is satisfied in order to succeed.

Rebutting the presumption

58. Since the defendants were not given independent legal advice as to whether they should enter into the Deed, and there is no other basis suggested as to how the presumption was rebutted, then they are likely to succeed on this part of the defence.

Actual or constructive knowledge by the claimant

Actual knowledge of the claimant

59. The defendants were not, it seems, directly involved in the negotiations between Mr Watson and the claimant that led to the Deed. They do not put forward any evidence as to what the claimant was told by Mr Watson. The claimant himself has not made a witness statement. There is therefore no evidence before the court as to the claimant’s actual knowledge of Mr Watson’s conduct towards the defendants in the run-up to the Deed.

Constructive knowledge of the claimant

60. The defendants’ evidence, supported by email correspondence, is that the claimant and Mr Watson (and their respective families) became family friends. The claimant was plainly aware that Mr Watson was the defendants’ father, and of the relatively young

age and inexperience of the defendants. The defendants have in my judgment a real prospect of showing that the claimant was on notice of the risk that Mr Watson would exert emotional pressure on them to enter into the Deed.

61. I am not therefore satisfied that the defendants have no real prospect of setting aside the Deed on the ground on undue influence.

Duress – legal principles

62. A contract which has been entered into a result of duress may be avoided by the party who was threatened: *Chitty* 11-003. A distinction is drawn between legitimate and illegitimate or unlawful threats. In this case, there is no suggestion of unlawful threats.

63. In *Pakistan International Airline Corp v Times Travel (UK) Ltd* [2021] UKSC 40, [2023] A.C. 101, it was said:

- “3. The boundaries of the doctrine of lawful act duress are not fixed and the courts should approach any extension with caution, particularly in the context of contractual negotiations between commercial entities. In any development of the doctrine of lawful act duress it will also be important to bear in mind not only that analogous remedies already exist in equity, such as the doctrines of undue influence and unconscionable bargains, but also the absence in English law of any overriding doctrine of good faith in contracting or any doctrine of imbalance of bargaining power.... .
4. If one focuses on the few cases in which a remedy has been provided for what would now be analysed as lawful act duress, there are to date two circumstances in which the English courts have recognised and provided a remedy for such duress. The first circumstance is where a defendant uses his knowledge of criminal activity by the claimant or a member of the claimant's close family to obtain a personal benefit from the claimant by the express or implicit threat to report the crime or initiate a prosecution. The second circumstance is where the defendant, having exposed himself to a civil claim by the claimant, for example, for damages for breach of contract, deliberately manoeuvres the claimant into a position of vulnerability by means which the law regards as illegitimate and thereby forces the claimant to waive his claim. In both categories of case the defendant has behaved in a highly reprehensible way which the courts have treated as amounting to illegitimate pressure.”

Duress – analysis and conclusions

Defendants’ case on duress

64. Paragraph 1.2 of the Defence Statement states:

“Their purported assent to the Deed was procured under duress, without a full understanding or any actual benefit derived from the funds that constituted the original agreements”.

65. This allegation is more relevant to the defendants’ case of undue influence discussed above. There are other references to duress in the Defence Statement, but only one that relates to the defendants’ entering into the Deed: "This imposition of the deed, crafted

under the duress of potential liquidation” (para 7.4) . This appears to refer to the claimant, as the defendants’ evidence is that he threatened Mr Watson with compulsory liquidation of the company. That threat was not unlawful.

66. Thus, leaving aside other issues that would arise in a defence of duress, the (lawful) threats made by the claimant do not fall into either of the above two categories set out in paragraph 63 above; and in my judgment the defendants have no real prospect of succeeding in this defence.

Frustration – legal principles

67. A contract may be discharged on the ground of frustration when something occurs after the formation of the contract which renders it physically or commercially impossible to fulfil the contract or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of entry into the contract: *Chitty* 27-001.
68. The test may be formulated as follows: If the literal words of the contractual promise were to be enforced in the changed circumstances, would performance involve a fundamental or radical change from the obligation originally undertaken?: *Chitty* at 27-013 citing Lord Simon *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675, applying the test in *Davis Contractors v Fareham Urban DC* [1956] A.C. 696.
69. This involves determining the meaning of and scope of the contract in the particular factual circumstances in which it was made. However, it is a relatively restrictive doctrine. The relevant event must change the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of the contract’s execution, such that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances: *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675, 700.
70. Thus, it is not simply a question whether there has been a radical change in circumstances, but whether there has been a radical change in the “obligation” or the actual effect of the promises of the parties construed in the light of the new circumstances. Was “performance ... fundamentally different in a commercial sense”? *Chitty* 27-014, citing *Tsakiroglou & Co Ltd v Noble Thorl GmbH* [1962] A.C. 93, 119.

Frustration – analysis and conclusion

71. The defendants rely upon two events: Mr Watson’s unforeseen health crisis and the effects of the Covid-19 pandemic on the viability of the company’s business. Samuel submitted that the Deed was predicated on the basis that the company and Mr Watson would provide the income to enable the defendants to make the payments due under it.
72. Both events occurred, he said, after the Deed was entered into. There was an unexpected downturn in the company’s online sales following the lifting of the lockdown and people visiting bricks and mortar stores. As to his father’s health, although he had been diagnosed with cancer at the date of the Deed, there was a significant deterioration in his condition following its execution.
73. However, the Deed itself does not refer to performance by or through the company or Mr Watson. Indeed, its purpose was to transfer the obligation to pay the claimant from

them to the defendants, so that the claimant would be unaffected by their inability to pay him. That inability has not changed the nature of the defendants' obligations. It cannot, therefore, in my judgment, be said with any real prospect of success that the change in the company's and Mr Watson's circumstances has changed the nature of the defendants' obligations under the Deed.

Conclusions

74. For the reasons set out above:

- (1) I will strike out those parts of the Statement of Case dated 9 May 2023 and the Defence Statement dated 14 November 2023 that set out defences of *non est factum*, duress and frustration;
- (2) I will dismiss the application for summary judgment.