Neutral Citation Number: [2019] EWCA Civ 4

Case No: A3/2018/1082

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
BUSINESS & PROPERTY COURT IN WALES
PROPERTY TRUSTS & PROBATE (ChD)
His Honour Judge Jarman QC
C30CF102

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/01/2019

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE COULSON

- -

Between:

Gary Joseph McDonald	**Applicant**
- and -	
Michelle Rose	**1st Respondent**
Mary McCrorie	**2nd Respondent**
John McDonald	**3rd Respondent**
Liam McDonald	**4th Respondent**
Maria Watkins	**5th Respondent**
Fintan McDonald	**6th Respondent**
Patricia Duckett	**7th Respondent**
W & M McDonald (Pencarn Farms) Limited	**8th Respondent**
Octavian Development & Construction Limited	**9th Respondent**

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Leslie Blohm QC & Alex Troup (instructed by **Hugh James Solicitors**) for the **Appellant**
Timothy Evans (instructed by **Burges Salmon LLP**) for the **Third to Seventh Respondents**
The **First, Second, Eighth** and **Ninth Respondents** did not appear and were not represented

Hearing date: 1 November 2018

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Approved Judgment

Lord Justice Underhill (giving the judgment of the Court):

INTRODUCTION

1. This application for permission to appeal was listed for hearing because the appeal was filed out of time and the application for an extension raised procedural issues of some general importance on which it was felt that the guidance of the Court was necessary. This judgment, to which all members of the Court have contributed, deals first with the application for an extension and then with the substantive permission application. Both parties were represented by counsel, who provided helpful written and oral submissions on both aspects.

2. At this stage all that we need say about the underlying claims is that they arise out of the deaths of Marlene McDonald on 10 August 2010, aged 72, and of her husband Liam on 3 November 2013, aged 74. Their surviving children are in dispute as to the proper distribution of their parents' estates (including the shareholding held by the parents in the Eighth and Ninth Respondents, W & M McDonald (Pencarn Farms) Ltd and Octavian Development & Construction Ltd ("the Companies")). Gary McDonald ("the applicant") claims the bulk of the estates, on the basis of assurances which he says were made to him by his parents. That claim is resisted by his five siblings ("the defendants"). The trial was heard at the Business and Property Court in Cardiff in February 2018 by HHJ Jarman QC. It involved statements from 47 witnesses of fact in total, 23 of whom were cross-examined (including the applicant and his siblings). The judge decided the dispute in favour of the defendants.

A. THE APPLICATION FOR AN EXTENSION

THE PROCEDURAL HISTORY

3. The judge handed down his written judgment on 9 March 2018 ([2018] EWHC 445 (Ch)). In accordance with the usual practice, on 7 March a draft judgment was circulated to the parties in advance of the hand-down. The parties were notified that the judgment would be handed down on 9 March and that attendance was not required.

4. On 8 March the applicant's solicitors wrote to the court to say that he was considering seeking permission to appeal. They asked the judge, when the reserved judgment was handed down the following day, "formally to adjourn the hearing to enable [the applicant] to apply for permission to appeal". They did not seek any extension of the default 21-day time limit provided for in the Rules for filing an Appellant's Notice with the Court of Appeal (see para. 10 below).

5. On 9 March, having handed down the judgment in the absence of the parties, the judge, by an additional paragraph in his judgment, ordered written submissions on consequential matters "within 14 days of the handing down of this judgment [i.e. by 23 March]". By email on 13 March the court notified the parties that the application for permission to appeal had been adjourned for 14 days from 9 March and was to be dealt with by way of written submissions.

6. On 23 March the parties filed their written submissions in accordance with the judge's order. The application for permission to appeal was only one of a number of

consequential matters that the applicant addressed. In response, not only did the defendants oppose that application but they also, at para. 21 of their submissions, opposed any extension of time for the filing of an appellant's notice beyond 30 March (i.e. 21 days after the date of the hand-down on 9 March). Despite this unequivocal warning, it appears that the claimant's solicitors were not alerted to the risk that, without an extension, the 21 days expired on 30 March.

7. Having considered the written submissions, on 18 April the judge (amongst other things) refused permission to appeal, and an order was made to that effect.

8. On 9 May the applicant filed his appellant's notice. That was the last possible day if the 21 days commenced on 18 April, but it was out of time if the 21 days had started on 9 March, a point made by the defendants' solicitors in their letter of 17 May. On 21 May, the applicant sought to extend the 21-day period if that was necessary, although his primary position at that stage remained that the 21 days did not begin to run until 18 April.

THE RELEVANT RULES AND PRACTICE DIRECTIONS

9. CPR 52.3 (2) provides as follows:

> "An application for permission to appeal may be made —
>
> (a) to the lower court *at the hearing at which the decision to be appealed was made* [emphasis supplied]; or
>
> (b) to the appeal court in an appeal notice."

That provision is essentially reproduced by paragraph 4.1 (a) of PD 52A, but with the addition at the end of (a) of the parenthesis "(in which case the lower court may adjourn the hearing to give a party an opportunity to apply for permission to appeal)".

10. CPR 52.12 provides (so far as relevant):

> "(1) Where the appellant seeks permission from the appeal court, it must be requested in the appellant's notice.
>
> (2) The appellant must file the appellant's notice at the appeal court within —
>
> (a) such period as may be directed by the lower court (which may be longer or shorter than the period referred to in sub-paragraph (b)); or
>
> (b) where the court makes no such direction, and subject to the specific provision about time limits in rules 52.8 to 52.11 and Practice Direction 52D, 21 days after the date of the decision of the lower court which the appellant wishes to appeal.
>
> (3) …

(4) …"

Thus the default time limit for filing a notice of appeal is 21 days from the date of the decision in question – see paragraph (2) (b) – but that time can be extended (or reduced) by the lower court – see paragraph (2) (a).

11. PD 52B glosses the provisions of CPR 52.12 about extending time in which to appeal. The relevant paragraphs are as follows:

> "3.1 A party may apply to the lower court for an extension of time in which to file an appellant's notice. The application must be made at the same time as the appellant applies to the lower court for permission to appeal.
>
> 3.2 Where the time for filing an appellant's notice has expired, the appellant must include an application for an extension of time within the appellant's notice (form N161 or, in respect of a small claim, form N164) stating the reason for the delay and the steps taken prior to making the application.
>
> 3.3 The court may make an order granting or refusing an extension of time and may do so with or without a hearing. ..."

THE AUTHORITIES

12. There are a number of authorities dealing with when the 21-day period in CPR 52.12 (2) (b) starts to run and the procedure that the parties must adopt in respect of any application to the lower court for permission to appeal.

13. The starting-point is *Sayers v Clarke Walker* [2002] EWCA Civ 645, [2002] 1 WLR 3095. This establishes that "the date of the decision of the lower court which the appellant wishes to appeal" for the purpose of CPR 52.12 (2) (b) is the date that the decision is formally announced in court. Thus the 21 days within which an appeal must (in the absence of an extension) be filed run from that date and not the date – which may be days, or sometimes even weeks, later – that the formal order recording the decision is issued. That is uncontroversial and should be known to any practitioner, though experience shows that it is often overlooked.

14. In *Owusu v Jackson* [2002] EWCA Civ 877, [2003] PDQRP 13, Brooke LJ made it clear how the rule applies where the judge reserves his or her judgment and, in accordance with the modern practice, formally hands it down (typically after pre-circulating it in draft) at a later hearing which the parties are excused from attending. He said:

> "25. … CPR 52.4(2) [being the predecessor of the current CPR 52.12 (2)] prescribes that where the lower court makes no relevant order, the appellant must file the appellant's notice within 14 days after the date of the decision of the lower court that the appellant wishes to appeal. This means the date when the judge makes his decision, and not the date when the order

> reflecting his decision is drawn up. See *Sayers v Clarke Walker* … .
>
> 26. The judge was sitting in public, and it was his duty to give judgment and make his judgment available to the parties in public. Time for appealing will then run from the time he communicates his decision to the parties (other than in draft form, following the modern procedure discussed in *Prudential Assurance Co Ltd v McBains Cooper (A Firm)* [2000] 1 WLR 2000). If he sends his written judgment to the parties in draft, and they are able to agree the consequential orders, he may be able to excuse their attendance when he delivers the judgment formally in court, thereby making it available to the public and the media (if interested), but he cannot dispense completely with the formality of handing down his judgment in open court. Time for appealing will then start to run."

(The reference at para. 25 to 14 days of course reflects the time limit as it then was: it was increased to 21 days in 2006.)

15. So far so good, but that gives rise to the question of how an application for permission to appeal should be made in a case where judgment is reserved and handed down in the parties' absence, given that CPR 52.3 (2) (a) provides that any application to the lower court for permission must be made "at the hearing at which the decision to be appealed was made". The normal practice is for the party wishing to appeal to make the application in writing in the interval between the judgment being circulated in draft and the hand-down hearing. The application is treated as having been made "at" the hearing, notwithstanding the non-appearance of the parties, and the judge will usually deal with it on that occasion (though if he or she needs more time or further submissions there is no reason why they cannot do so by producing a written decision later – it is the application, not the decision, which must be "at" the hearing).

16. However there may be circumstances where a party wants more time to consider an application for permission to appeal. Brooke LJ addressed this situation in *Jackson v Marina Homes Ltd* [2007] EWCA Civ 1404, [2008] C.P. Rep 17. After referring to the position where judgment was delivered orally at the conclusion of the hearing, he said:

> "6. Problems arose, however, if the judge delivered a written reserved judgment; particularly if the attendance of the parties was dispensed with when judgment was formally handed down. In Owusu v Jackson & Ors [2002] EWCA Civ 877 at [24-27] I said that there must be an occasion when the judgment was formally delivered in court, and that the time for appealing will run from the date of this formal hand down. The Civil Procedure Rules Committee then acceded to a request that practice might be changed so as to permit the judge in the court below to grant an adjournment to allow a party further time to make an application to that court for permission to appeal. This led to a new paragraph, 4.3B, being added to the practice direction for CPR part 52 in the following terms:

> 'Where no application for permission to appeal has been made in accordance with rule 52.3(2)(a) but a party requests further time to make such an application, the court may adjourn the hearing to give that party the opportunity to do so.'
>
> 7. Nothing was said in the Rules at the time when this amendment was made about the time within which permission to appeal should be made to the Court of Appeal if the judge in the lower court refused permission to appeal at this adjourned hearing…
>
> 8. If all the parties including the judge have their wits about them there should be no difficulty in practice. If, when the judge says he will reserve judgment and excuse the appearance of the parties and one of them wishes to seek permission to appeal should the decision go against him, the judge should, after handing down judgment in an empty court, formally adjourn the hearing to give that party the opportunity to apply for permission to appeal. Then when he has granted or refused permission, he should make a direction extending the period within which Notice of Appeal should be filed at the Court of Appeal. Strictly he should grant this extension at the time when he adjourns the hearing. Ordinarily he would grant a further three weeks from the date of his refusal of permission."

(The paragraph in the PD referred to by Brooke LJ at paragraph 6 is the predecessor of the current paragraph 4.1 (a) of PD 52A: see paragraph 9 above.)

17. We should elucidate one point about Brooke LJ's reference at para. 8 to "adjourning" the hand-down hearing in a case where a party wants more time to consider whether to apply for permission and/or to prepare its grounds. We do not believe that he meant that an adjourned hearing needed actually to take place. That would be an unnecessary formality, and he will certainly have expected the application to be made, at least in the typical case, in writing and decided on the papers. The only important thing is to ensure that the hearing is not formally concluded, so that the court retains jurisdiction under CPR 52.3 (2) (a).

18. In *R (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633, [2015] 1 WLR 2472, this court made plain that any adjournment of the hearing in the lower court to deal with an application for permission to appeal did *not* automatically extend the 21-day period for filing an appellant's notice under CPR 52.12 (2) (b). Moore-Bick LJ said:

> "22. The important words for present purposes are 'the date of the decision'. Time runs from the date on which the court pronounces its decision, not from the date on which the order is drawn up or the date on which it is sealed, either of which may be some days after the decision has been given. Nor does time run from the determination of the lower court of an

> application for permission to appeal *and an order adjourning an application for permission to appeal does not operate to extend time* [emphasis supplied]. Mr. Knafler Q.C. described rule 52.4(2) as a trap for the unwary, but in my view the position is clear and in that respect has remained the same since the CPR came into effect in April 1999. If, as Mr. Knafler suggested, it is not widely known among practitioners in the Administrative Court, that is hardly the fault of those who drafted the Rules. It is the responsibility of practitioners to make themselves familiar with the provisions of the CPR and to comply with them.
>
> …
>
> 52. The notice of appeal was filed out of time because the parties did not realise that the order adjourning the application for permission to appeal for consideration on the papers did not have the effect of extending time. CPR 52.4(2) makes it clear that the 21 days allowed for filing a notice of appeal runs from the date of the decision under appeal, not from the date on which the application to the court below for permission to appeal is determined. I do not think that rule 52.4(2) is a trap for the unwary and the parties' solicitors should have had it in mind (though the Rule Committee might wish to consider whether, as a matter of practical convenience, the adjournment of an application to the lower court for permission to appeal should automatically extend the time for filing a notice of appeal). They may have thought that it was implicit in their agreement to the consent order described at paragraph 4 above that they had agreed to extend the time within which notice of appeal had to be filed, but rule 52.6(2) precluded any such agreement. They could have asked the judge to extend time under rule 52.4(2)(a) pending determination of the application for permission to appeal. Ignorance of the rules will rarely, if ever, provide a good reason for failing to comply with them, especially where professionals are involved. I do not think that there was a good reason for the delay."

19. In *Lisle-Mainwaring v Associated Newspapers Ltd* [2018] EWCA Civ 1470, [2018] WLR 4766, this court dealt with the situation where a party decides that it wishes to appeal only after the judgment has been handed down and has not sought an adjournment of the hearing to deal with any permission application. The court endorsed the approach of Warby J in *Monroe v Hopkins (no. 2)* [2017] EWHC 645 (QB), [2017] 1 WLR 3587, where he said:

> "14. It seems to me that the fairly settled practice that I have described above reflects a proper interpretation and application of the rules. The words of the rule and PD must mean something fairly close to what they say. A reserved judgment is given, and the decision is made, when the judgment is handed down at a hearing in court. On the face of it, the

> application to the lower court must be made then, or at some later date to which the hearing is then adjourned for that purpose, at the request of the potential appellant or at the instigation of the court. If an application is not made at one or other of those times, it can only be made to the appeal court. This is a clear and understandable regime, which places the onus on the party who may wish to appeal to make a decision, or to ask for time to make one. The standard practice of circulating reserved judgments should make it easier for a party to decide whether to seek permission, and to identify grounds of appeal which can be argued at the hand down. It is inherently desirable to avoid afterthoughts, and to avoid the uncertainty for the opposite party that would result if these were permitted."

20. In *Lisle-Mainwaring* the court distinguished *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (no. 2)* [2007] EWHC 447 (TCC), [2007] BLR 195, which was a case on an earlier version of the CPR, and where a retrospective application was permitted. Accordingly, to the extent that paragraph 12 of the skeleton argument of Mr Leslie Blohm QC, for the applicant, suggested that the proper procedure was unclear, any uncertainty has been removed by the decision in *Lisle-Mainwaring*. A retrospective application for permission to appeal, where the judgment has been handed down and the hearing has not been adjourned, cannot be considered by the lower court.

THE CORRECT PROCEDURE

21. It is the experience of the Court that the effect of the rules, as expounded in the authorities referred to above, is often not properly understood by would-be appellants. We think there is value in our summarising in this judgment the effect of those authorities and the procedure that ought to be followed in consequence by parties wishing to seek permission to appeal from the lower court (which is good practice though not mandatory). We would set the position out as follows:

    (1) The date of the decision for the purposes of CPR 52.12 is the date of the hearing at which the decision is given, which may be *ex tempore* or by the formal hand-down of a reserved judgment: see *Sayers v Clarke* and *Owusu v Jackson*. We call this the decision hearing.

    (2) A party who wishes to apply to the lower court for permission to appeal should normally do so at the decision hearing itself. In the case of a formal hand-down where counsel have been excused from attendance that can be done by applying in writing prior to the hearing. The judge will usually be able to give his or her decision at the hearing, but there may be occasions where further submissions and/or time for reflection are required, in which case the permission decision may post-date the decision hearing.

    (3) If a party is not ready to make an application at the decision hearing it is necessary to ask for the hearing to be formally adjourned in order to give them more time to do so: *Jackson v Marina Homes*. The judge, if he or she agrees to the adjournment, will no doubt set a timetable for written submissions and will

normally decide the question on the papers without the need for a further hearing. As long as the decision hearing has been formally adjourned, any such application can be treated as having been made "at" it for the purpose of CPR 52.3 (2) (a). We wish to say, however, that we do not believe that such adjournments should in the generality of cases be necessary. Where a reserved judgment has been pre-circulated in draft in sufficient time parties should normally be in a position to decide prior to the hand-down hearing whether they wish to seek permission to appeal, and to formulate grounds and such supporting submissions as may be necessary; and that will often be so even where there has been an *ex tempore* judgment. Putting off the application will increase delay and create a risk of procedural complications. But we accept that it will nevertheless sometimes be justified.

(4) If no permission application is made at the original decision hearing, and there has been no adjournment, the lower court is no longer seized of the matter and cannot consider any retrospective application for permission to appeal: *Lisle-Mainwaring*.

(5) Whenever a party seeks an adjournment of the decision hearing as per (3) above they should *also* seek an extension of time for filing the appellant's notice, otherwise they risk running out of time before the permission decision is made. The 21 days continue to run from the decision date, and an adjournment of the decision hearing does not automatically extend time: *Hysaj*. It is worth noting that an application by a party for more time to make a permission application is not the only situation where an extension of time for filing the appellant's notice may be required. It will be required in any situation where a permission decision is not made at the decision hearing. In particular, it may be that the judge wants more time to consider (see (2) above): unless it is clear that he or she will give their decision comfortably within the 21 days an extension will be required so as to ensure that time does not expire before they have done so. In such a case it is important that the judge, as well as the parties, is alert to the problem.

(6) As to the length of any extension, Brooke LJ says in *Jackson v Marina Homes* (para. 8) that it should normally be until 21 days after the permission decision. However, the judge should consider whether a period of that length is really necessary in the particular case: it may be reasonable to expect the party to be able to file their notice more promptly once they know whether they have permission.

22. We should add for completeness that the authorities summarised above do not cover a third situation, namely where the judge announces his or her decision, with reasons to follow. That too will start time running, but it should be standard practice, unless there are very unusual circumstances, for the Court to adjourn the decision hearing and extend time under CPR 52.12 (2) (a) until a specified period, normally 21 days, after the reasons are promulgated.

COMPLIANCE WITH THE RULES IN THE PRESENT CASE

23. In the present case, the applicant's solicitors properly sought a formal adjournment of the hearing in advance of the hand-down. As is common, the subsequent permission application was subsequently dealt with on paper.

24. Unfortunately, however, they failed to make any application to extend the 21-day period. This was despite the fact that the defendants' solicitors had expressly anticipated just such an application, and warned the applicant's solicitors that time expired on 30 March. Accordingly, the applicant was originally obliged to argue (through Mr Blohm's skeleton argument) that the 21 days did not commence when the judge handed down the substantive judgment (9 March), but only on 18 April, when the order was made which included the judge's refusal of permission to appeal.

25. By the time of the hearing, however, Mr Blohm had accepted that this submission was unsustainable. In my view, he was right for three reasons. First, such a submission would mean that time would run from the date of the order, not the date of the substantive decision, which is contrary to *Sayers v Clarke* and the other authorities noted above. Second, it would negate the effect of *Hysaj*, because it would mean the application to adjourn the hearing automatically extended the 21 days. Third, such a result would be a contrivance. What the applicant wished to appeal was the substantive judgment, not the judge's refusal of permission to appeal against that judgment. On any view, therefore, it is the date of the substantive judgment (i.e. 9 March 2018) that is the relevant date for the purposes of CPR 52.12 (2). In consequence, the appellant's notice in this case was filed out of time.

RELIEF FROM SANCTIONS

26. The next question is whether or not this court should extend time. It is common ground that this is an application for relief from sanctions, such that the court needs to consider the three elements identified in *Denton v T.H. White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926, namely:

    (i) the seriousness and the significance of the failure to comply with the rules;

    (ii) why the default occurred;

    (iii) an evaluation of all the circumstances of the case, so as to enable the court to deal justly with the application.

(i) The Seriousness and the Significance of the Default

27. In his witness statement on behalf of the applicant, Mr Evans, the solicitor with conduct of the case, properly accepts at paragraph 29 that the delay of 40 days (30 March to 9 May) is serious. It is perhaps to be compared to the eight days (27 February-7 March) that it took the judge to produce his draft judgment.

28. In our view the delay is also relatively significant. Whilst the applicant is right to say that it has caused no quantifiable prejudice to the defendants, that is only one element of the issue of significance. The defendants are individuals who have been through the emotionally-draining experience of a detailed trial about what is, at root, a family

dispute. They would have been entitled to think that the whole process had finally come to an end on 18 April.

(ii) Why the Default Occurred

29. The default occurred because the applicant's solicitors failed to seek an extension of the 21-day period. For the reasons given above it should have been plain to them following *Hysaj* that the only thing that was adjourned was the hearing, and that the 21 days had not been extended.

30. In Mr Blohm's skeleton argument there was a certain amount of criticism of the judge. He suggested that the judge gave "informal and unclear directions by email which were liable to (and did) cause the parties real confusion". We do not accept that. In our view the judge made it plain (in his judgment and in the email of 13 March) that the consequential matters (including permission to appeal) had been adjourned and were to be dealt with by way of written submissions. There was nothing in the judgment or the email which prevented the applicant's legal advisers from realising on 8 March (or at any time before 30 March) that, without an extension, the 21-day period would run from 9 March.

31. The only fair conclusion, therefore, is that the applicant's solicitors misunderstood this part of the procedure and ignored or were unaware of *Hysaj*. That might be said to have been confirmed by the reference in paragraph 16 (4) of Mr Blohm's skeleton argument in which he suggests that the email from the court confirming the adjournment was some sort of "trap". A similar submission was made in *Hysaj*: it was roundly rejected by Moore-Bick LJ at paragraphs [22] and [52].

32. Accordingly, the cause of the default is an inadvertent failure to comply with the rules. As Moore-Bick LJ also said in *Hysaj*, at paragraph [52]:

> "Ignorance of the rules will rarely, if ever, provide a good reason for failing to comply with them, especially where professionals are involved. I do not think that there was a good reason for the delay."

The same conclusion must apply here.

(iii) All the Circumstances of the Case

33. In a typical relief from sanctions case, it may be impractical for the court to embark on a detailed examination of the merits of the application for permission to appeal, unless the application appears either overwhelmingly meritorious or doomed to failure. In the present case, because of the way in which the application has been listed, this court is in a position to consider the merits of the application for permission to appeal more fully than would normally be appropriate. As appears below, we have come to the conclusion that the appeal would have no real prospect of success in any event. That being so, we need not reach a definitive view on relief from sanctions, to extend time for the making of a doomed application.

34. However, we should say that in our view this would have been a borderline case for such relief even if we had been able to form no view on the merits. There are some

points in the applicant's favour: he always indicated that he might or would appeal; his solicitors followed the correct approach of seeking to adjourn the hearing as per *Jackson v Marina Homes*; the delay has not led to the incurring of disproportionate cost or had any specific adverse consequences on the defendants; and the applicant has also complied with the court's directions generally. But, in the defendants' favour, there has been a serious and relatively significant default which arose due to inadvertence, which is not a proper excuse, and which has prolonged a difficult family dispute which the defendants might have been entitled to conclude was over on 18 April 2018.

B. THE PERMISSION APPLICATION

35. As indicated above, we have thought it right in the unusual circumstances of this case to reach a conclusion on the merits of the permission application irrespective of whether the applicant might otherwise be entitled to an extension; and our conclusion is that the appeal would have no real prospect of success. Our reasons are as follows.

36. The applicant seeks permission to appeal so as to challenge the principal findings of fact made by the judge. His claim on the basis of proprietary estoppel to the shares in the Companies and to the "lion's share" of the parents' estates (the estate assets) required him to prove (i) that he had been given assurances by his parents that if he carried out work for the family businesses he would receive the estate assets from his parents, (ii) that he had carried out such work in reliance on such assurances and (iii) that it would be unconscionable for the parents' estates not to give effect to those assurances. The first of these requirements was a pure question of fact: was he given assurances by his parents in the terms that he alleged? Without success on that issue, his claim inevitably failed. While the judge also found against the applicant on the other two issues, on which he also needed to succeed, the focus of the application for permission to appeal has been on the first issue.

37. As Mr Blohm on behalf of the applicant acknowledged in his skeleton argument, an appellate court is reluctant to interfere with findings of fact made by the trial judge, particularly where much of the evidence has been oral. In the present case, the trial lasted seven days, of which five and a half days was taken up by the oral evidence of 23 witnesses.

38. In a number of recent cases, the Supreme Court has re-affirmed the very limited grounds on which an appellate court may interfere with findings of fact, at least where oral evidence has played a material role. For the general approach, it is sufficient to refer to the judgment of Lord Reed in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600, at [67]:

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

39. It is useful to add what Lord Hodge said in *Carlyle v Royal Bank of Scotland* [2015] UKSC 13, in a judgment with which the other members of the court agreed, at [22]:

> "The rationale of the legal requirement of appellate restraint on issues of fact is not just the advantages which the first instance judge has in assessing the credibility of witnesses. It is the first instance judge who is assigned the task of determining the facts, not the appeal court. The re-opening of all questions of fact for redetermination on appeal would expose parties to great cost and divert judicial resources for what would often be negligible benefit in terms of factual accuracy. It is likely that the judge who has heard the evidence over an extended period will have a greater familiarity with the evidence and a deeper insight in reaching conclusions of fact than an appeal court whose perception may be narrowed or even distorted by the focused challenge to particular parts of the evidence."

40. Although Lord Hodge there speaks of the credibility of witnesses, it is clear that the same approach applies when it is reliability that is in issue: see *Beacon Insurance Co Ltd v Bookstore Ltd* [2014] UKPC 21, [2014] 4 All ER 418, at [17] per Lord Hodge. To this may be added the passage from the judgment of Lewison LJ in *Fage UK Ltd v Chobani Ltd* [2014] EWCA Civ 5 at [114], justifiably often cited, which refers, among other considerations, to:

> "iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas the appellate court will only be island hopping.
>
> v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
>
> vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

41. In the present case the judge accepted generally that the applicant and his siblings were not "seeking to give untruthful evidence to enhance his or her case". He added that: "In this context documentary evidence, evidence from third parties and inherent likelihoods become particularly important", although he went on to find that the documents were neutral in their effect. However, the *reliability* of the evidence of the applicant and his siblings was very much in issue, particularly the reliability of the applicant's evidence of the assurances given to him.

42. It should not be thought that the judge shrank from assessing the applicant's evidence against the evidence of his siblings where it was necessary to do so. On what he rightly described as an important point, he preferred the evidence of the siblings, finding that the family remained very close-knit during the parents' lives and rejecting the applicant's evidence that he was the only child to have a strong relationship with his parents. This was important because, if true, it would have provided important support for his case on the assurances.

43. In reaching his conclusion that the parents had not given the assurances alleged by the applicant, the judge assessed a wide range of evidence and factors. The applicant's siblings gave evidence that the parents had on many occasions told them that they would all share in the estate. The judge accepted this evidence, supported as it was by the evidence of friends of the parents that they had been told by the parents that this was their intention, while acknowledging that it did not necessarily follow that they had not given to the applicant the very different assurances that he alleged. The judge observed that, if they had given those assurances to the applicant, it "would indicate a very high degree of duplicity over many years on the part of the parents in giving their respective children such widely differing impressions as to what they might expect to inherit". This, he considered, would be "surprising, especially given the closeness of the family and their father's fear of offending his children by an unequal distribution".

44. The judge had regard to the conflicting evidence of friends and business associates of the parents as to what they had been told by the parents or, in most cases, by the father alone. Some said that Mr McDonald made it clear that the applicant would inherit the businesses while others said that they were told that they would be divided between the children. None of these witnesses could speak to the terms of assurances given to the applicant because none claimed to have witnessed them or to have been told the terms of any assurances. The relevance of their evidence was that it was consistent, or (as the case may be) inconsistent, with the alleged assurances.

45. More direct evidence of the assurances was given by the applicant's wife. Her evidence, as recorded by the judge, was that "they would make sure he was looked after" and that "this was typical of the assurances which she heard – that Gary would be rewarded in due course for his work". She recalled that "he expected quite a bit of money when the farm was sold, although he did not then put a figure on it". In fact, of course, he did not get any money when the farm was sold.

46. The evidence of the applicant's wife was, not surprisingly, a significant element in the judge's ultimate finding on the terms of the assurances. He said at [97]:

> "In conclusion on the issue of what assurances were given to Gary, whilst there are indications on the evidence which point either way as to whether those assurances were in the terms he claims they were, when all the evidence is put in the balance and weighed, in my judgment the balance tips firmly against the assurances being in those terms. I have no doubt that assurances were given to him. In my judgment the assurances were likely to have been in the terms recalled in evidence by Gary's wife, namely that if he stuck with it he would be looked after."

47. Other important factors on which the judge relied included the following. First, the applicant's oral evidence that there was no change in the terms of the assurances over the years from 1986 to 2013 was surprising, both because his written evidence was that they had changed as circumstances changed and because the sale of the farm in 1997 for £8.4 million was, as the judge found, an event that "changed the lives of the parents, and their children, dramatically. From struggling to keep the farm and the plant hire businesses going by very hard work, the parents became very wealthy people".

48. Second, the judge found it surprising that the assurances should continue to be along the lines of "stick with it and this will be your reward" when, as the judge put it, "in a very real sense he did not stick with it". While he continued to work unpaid for his parents at evenings and weekends and returned to work for them over long hours with little pay in between jobs, he found employment once he settled down with a family and he built up his own successful business from 2006.

49. Third, an assurance to inherit the businesses and the lion's share of the parents' personal estates, whose total value is some £10 million and had been known from 1997 to be very substantial, would in the judge's view have been disproportionate to the amount of work that he undertook for his parents and their businesses.

50. It should also be remembered, as Mr Evans appearing for the applicant's siblings emphasised before us and as the judge noted at [99], that to succeed the applicant had to establish that Mrs McDonald as well as her husband had given the alleged assurances, and there was little, if any, corroborative or circumstantial evidence that she had done so.

51. In seeking permission to appeal, Mr Blohm on behalf of the applicant seeks to challenge certain parts of the judge's reasons for his final conclusion.

52. First, Mr Blohm submits that the judge misunderstood and mischaracterised the evidence given by some of the friends and associates called by the applicant as to what they were told by Mr McDonald – specifically, Mr Scarlioli, Mr Lewis, Dr Glyn Jones, Mr Norman and Mr McDonald's solicitor, Mr Thomas. The judge considered that this evidence indicated that Mr McDonald was concerned that the applicant should be in a position to control the businesses after Mr McDonald died, rather than with the ownership of the businesses.

53. We do not consider that this criticism of the judgment is justified. It is a fair reading of the evidence given by Mr Norman, who considered that he probably knew more about Mr McDonald's intentions than any of his children apart from the applicant. It is an accurate reading of the evidence of Mr Thomas. In the week leading up to his death, Mr McDonald consulted Mr Thomas as regards both the companies and his personal estate. He wanted the applicant to have 51% of the shares in the companies and 55% of his personal estate, thereby ensuring control but not full ownership for the applicant. Moreover, it is also an accurate reading of the evidence of Mr Scarlioli and Mr Lewis. Mr Scarlioli said that Mr McDonald told him that the applicant was his heir apparent and natural successor and that, if anything should happen to him, "Gary should take over the running of the companies with assistance from Craig and myself and that Gary was always to have the majority shareholding to enable him to control the companies". This is clearly directed to control and there is a great difference between the 100% ownership of the companies that the applicant said he was promised and a bare majority holding sufficient to give him control. To similar effect, Mr Lewis said that Mr McDonald "was always clear that Gary would take over the business after his days and push it on". Dr Glyn Jones' evidence is more equivocal. At one point in his witness statement, he said that it was the intention of Mr and Mrs McDonald "to ensure that Gary would carry on with Pencarn Farms after their days" and at another that Mr McDonald was vocal in expressing the wish that he wanted the applicant to inherit the farms.

54. Where the applicant's witnesses gave evidence that Mr McDonald had said words to the effect that "it would all come to Gary", the judge acknowledged that it provided a stronger indication of Mr McDonald's intentions as alleged by the applicant. But he had to set that against the evidence of other friends of Mr and Mrs McDonald that went the other way.

55. Mr Blohm's second ground of challenge is to the judge's view that the alleged inheritance would be disproportionate to the applicant's "pattern of working", by which the judge was including all aspects of the work performed over the years by the applicant. Mr Blohm submitted that the judge should not have focussed on the applicant's work and contribution to the businesses but to the financial and personal detriment which that entailed for the applicant. We consider the judge was fully entitled to test the probability that the parents gave the alleged assurances against the work performed by the applicant. He was also entitled to form the view that by any standard something of the order of £8-9 million was disproportionate to the applicant's contribution, and to regard that as a relevant factor in determining whether the parents had given the assurances alleged by the applicant.

56. Third, Mr Blohm challenges the judge's reliance on the improbability of a "very high degree of duplicity over many years" on the part of the parents if the applicant's case was true. He submitted that "there was a wealth of evidence to show that the parents were duplicitous". However, the judge expressly dealt with the evidence on which Mr Blohm relies and acknowledged that, like many parents, they were not always consistent in what they told their different children. But he was entitled to form the view that it did not reach "the very high degree of duplicity over many years" that the applicant's case suggested, which would be surprising given, as the judge had found, "the closeness of the family".

57. Mr Blohm also criticised the judge for finding it surprising that the applicant's oral evidence was that the assurances did not change with changing circumstances and that the assurances should remain the same despite the fact that the applicant was for much of the relevant period in full-time employment elsewhere or running his own successful construction business. For the reasons given by the judge, we see no force in these criticisms.

58. In conclusion, the applicant can show no grounds on which an appeal against the judge's findings of fact, made after a trial with a large cast of witnesses giving oral evidence over five and a half days, has any real prospect of success. In our view, the judge with commendable speed produced a judgment that fairly assessed the conflicting evidence and circumstances and came to a clearly reasoned conclusion that is not open to any legitimate challenge.

DISPOSAL

59. We refuse permission to appeal.