Neutral Citation Number: [2020] EWHC 1696 (Ch)

Case No: CH-2019-000322

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
APPEALS LIST (ChD)
ON APPEAL FROM THE ORDER OF HHJ HAND QC dated 31st October 2019 made in the COUNTY COURT at CENTRAL LONDON

Royal Courts of Justice
The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 08/07/2020

Before :

MR JUSTICE BIRSS

- -

Between :

Claudia Zelena Emmanuel	**Appellant**
- and -	
(1) Andrew Avison	
(2) Ginny Avison	
(3) Glenrick White	**Respondents**

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- -

Robert-Jan Temmink QC and **Gabriel Buttimore** (instructed by **Teacher Stern**) for the **Appellant**
Nigel Meares (instructed by **Gardner Leader**) for the **First and Second Respondents**
The Third Respondent in person

Hearing dates: 11th June 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....
MR JUSTICE BIRSS

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30pm on 8th July 2020.

Mr Justice Birss :

1. This is an appeal from the order of HHJ Hand QC dated 31st October 2019, made following the judge's judgment dated 24th May 2019. The appeal is with the permission of the judge. The appellant (Ms Emmanuel) was the claimant below.

2. Ms Emmanuel is a non-practising solicitor. In 2011 she was CEO of the Trinidad and Tobago Securities and Exchange Commission and at that time she relocated to Trinidad. She had been in touch with Mr White since 2010 relating to economic development projects. In 2013 they worked together on a project to build a biomass pellet manufacturing plant based in Guyana. The bulk of the finance (85%) was to be from investors in China. The balance of 15% was to come from a company referred to as IBC which had been set up by Ms Emmanuel and in which Mr White was involved. A number of different companies with similar names are referred to but details of the company do not matter, save to say that it had no funds. In one document the loan amount from the Chinese investors is said to be over US$14 million. The idea of the plant generating revenue of $5 million over three years is mentioned. There were also oral references (not in the documents) to commissions to be paid to the company IBC of about US$2 million.

3. By summer 2014 things had moved forward. It was clear that some kind of proof of funds by Mr White / Ms Emmanuel / IBC was going to have to be produced. For present purposes it does not matter which entity had to be able to do that, but it was going to be necessary to do it in order to unlock the larger funding from China. Money was going to have to be borrowed, at least temporarily, and discussions about that between Ms Emmanuel and Mr White took place in July 2014.

4. At this time Ms Emmanuel was in London but due to travel back to Trinidad on 26th August 2014. Mr White lived in Worthing, West Sussex and was friendly with the first and second respondents (Mr and Mrs Avison).

5. In July /August 2014 an arrangement was discussed whereby Mr and Mrs Avison would lend £200,000 for a relatively short period of time. Mr and Mrs Avison wanted security for the loan and one idea which was discussed was to provide Ms Emmanuel's property at 18 Bennett Park, Blackheath, London as security. Ms Emmanuel and Mr and Mrs Avison did not at that time know each other. Mr White communicated with Mr and Mrs Avison and, separately, he communicated with Ms Emmanuel. There was no direct contact between Ms Emmanuel and Mr and Mrs Avison in this period. Draft documents were exchanged via the medium of Mr White.

6. An interest rate of 40% was discussed but Ms Emmanuel was unhappy with it. In one of the email exchanges (17th August) Ms Emmanuel says to Mr White that while she had agreed that the property might be used as collateral in the event of default, she never agreed to a legal charge over the property. On 19th August Mr White emailed Ms Emmanuel a revised legal charge which included a £10,000 retention from repayment until the charge was removed. Also on that day Ms Emmanuel attended the Whittington Hospital in London for a colposcopy procedure and she changed her flight back to Trinidad from 26th August to 31st August.

7. What we know then happened was that on 26th August in the afternoon a meeting took place in a Costa Coffee shop in Worthing in which a notary, Peter Laverick, witnessed

the execution of a legal charge and loan agreement (a total of four counterparts). The loan agreement bears two signatures witnessed by Mr Laverick on that occasion. One is Mr White's and the other purports to be Ms Emmanuel's. The legal charge also bears a signature purporting to be Ms Emmanuel's, again witnessed by Mr Laverick on that occasion.

8. The loan agreement provides that Mr and Mrs Avison will lend £210,000 to the borrowers Mr White and Ms Emmanuel. There is a 20% interest rate for the first 60 days and 40% after that. The term of the loan is 120 days. The legal charge is over 18 Bennett Park and secures the loan.

9. Ms Emmanuel says these are forgeries and that Mr White arranged for her to be impersonated at the meeting. Mr White says they are genuine and she was there. That is the dispute the judge had to resolve.

10. Mr and Mrs Avison also executed the two documents, I think on 2nd September. In any event on 2nd September 2014 Mr and Mrs Avison transferred £210,000 to Mr White's bank account. On 5th September the Land Registry notified Mr and Mrs Avison's solicitors that the legal charge was registered. The Land Registry's notification to Ms Emmanuel was sent to a different address and there is no evidence she received it.

11. The money was transferred to IBC in St Lucia from Mr White's account. It is not clear what happened to the money after that but in any event it has not been repaid to Mr and Mrs Avison.

12. In April 2016 Ms Emmanuel tried to sell 18 Bennett Park. Her case is it was at this stage that she discovered the charge over her property and realised she was a victim of fraud. Ms Emmanuel started a similar claim in Lambeth County Court, instructing Astute Legal, but it was struck out.

13. Ms Emmanuel brought this claim (i) for declarations that her signatures on the charge and the loan agreement were forgeries and not binding on her, (ii) a declaration that she was not indebted to Mr and Mrs Avison for the sum purportedly loaned pursuant to the Loan Agreement (whether jointly with Mr White or not), and (iii) an order pursuant to Sch 4 of the Land Registration Act 2002 to alter the charges register relating to her property (18 Bennett Park, Blackheath, London) to remove the charge.

The trial

14. The matter came on for trial before the judge over five days at the end of July 2018. Ms Emmanuel and Mr and Mrs Avison were represented by counsel and Mr White represented himself. Both counsel appear on the appeal. Mr Temmink QC, who did not appear at trial, now leads Mr Buttimore for Ms Emmanuel.

15. The witnesses included Ms Emmanuel and her conveyancing solicitor for the April 2016 sale, Mr Phull. Mr White gave evidence as well as his wife and his two daughters. Mr White also called Mr Laverick. Mr and Mrs Avison also gave evidence. There was a report from a single joint handwriting expert, Mr Radley.

16. Ms Emmanuel denied she had been in Worthing on that day at all and denied signing the documents. Mr Phull's evidence was deployed to support the point that Ms Emmanuel was surprised to discover the charge.

17. Mr White's evidence was that the documents were genuine and it was Ms Emmanuel who had been at the café in Worthing to execute them. Mrs White and their two daughters essentially corroborated Mr White's case that Ms Emmanuel had been in Worthing on the relevant day. They said she had come to visit their home (there is a point of detail about that which I will return to).

18. Mr Laverick said he had no clear recollection of the occasion. However his register showed that he had confirmed the identity of the person purporting to be Ms Emmanuel by her driving licence and had noted the driving licence number in his register. The number is the right number for Ms Emmanuel. The address from the licence recorded in the register is an old address for Ms Emmanuel. I will come back to Mr Laverick's evidence below.

19. The evidence of the handwriting and document expert was inconclusive. His opinion was that Ms Emmanuel's genuine signature was simplistic, variable and insecure. It could be simulated by another with a fair degree of pictorial success. There is a point about dots and I will need to return to the handwriting expert's evidence below.

20. Mr and Mrs Avison had no relevant evidence to give relating to the dispute about execution of the documents by Ms Emmanuel. Their case is that the documents are genuine.

After the trial

21. The judgment was not given until about 10 months after the trial, for a number of reasons. Originally the judge indicated he would give an oral judgment in September 2018. However the first thing which went wrong was that the judge's set of the trial bundles, in which he had made copious notes, went missing from the court within a few weeks of the end of the trial. Despite a lot of searching they were never found. A replacement set had to be produced, obviously without the judge's markup.

22. There were also problems with notes sent to the judge after the hearing. These were on the issue of burden of proof. On Ms Emmanuel's behalf it was submitted that the burden lay with the defendants, on Mr and Mrs Avison's behalf it was contended it lay with Ms Emmanuel.

23. The audio recordings were sought but the initial versions included some for the wrong hearings or were of poor quality. Replacements for some of those were required, but usable audio for the first day was never found and the second day was poor quality. The judge also had to deal with difficulties with his own and his wife's health. A possible date for judgment in January 2019 had to be put back for those reasons. In the end the judgment was given in May 2019, close to time beyond which the judge was going to cease sitting.

The judgment

24. In his judgment, after explaining the unfortunate events after trial, the judge then dealt with the background and set out a comprehensive and detailed summary of the cases and evidence advanced by the different parties. Then the judge addressed the authorities on the circumstances when the court can resort to the burden of proof to resolve a dispute. Next he resolved the dispute about who bore the burden of proof and decided that in this case the burden was on Ms Emmanuel. He then turned to make findings on the evidence.

25. The judge had no hesitation in regarding Mr White as an unreliable witness (paragraph 86). Mr White had admitted fabricating documents (not the ones in issue in this case). The judge noted a number of curious features of the evidence from Mr White's wife which I will return to. However he held there was nothing untoward about the evidence of Mr White's daughters.

26. The judge did not accept all of Ms Emmanuel's evidence. He rejected her testimony that Mr White had admitted fraud in relation to the execution of the relevant documents in a telephone conversation with her. He held that Ms Emmanuel's email on 17th August was not an outright rejection in principle of there being a charge against the property. The judge expressed surprise, given her case, that certain WhatsApp messages from her did not state clearly her astonishment in finding there was any charge at all.

27. The judge's conclusion was that this was one of those cases in which it was not possible to say where the truth lies on the key issue and so he decided the matter on the burden of proof. Since he had held that the burden was on Ms Emmanuel, the claim failed. His conclusions on this are expressed in paragraphs 92 and 93, as follows:

> "92. In the end I am left in the position of the Claimant saying she was not the person who signed the documents at Costa Coffee in Worthing and the third Defendant, his wife and children saying that she had been in Worthing that day and the third Defendant and his wife saying that she had signed the document. Plainly somebody did sign it, unless the whole of Mr Laverick's evidence is a fabrication, which whatever my reservations about the care he took, is a finding I am not prepared to make. If that person was not the Claimant than it was somebody able to forge her signature. According to Mr Radley this is not a difficult signature to forge but his expert evidence is inconclusive and I do not derive any assistance in reaching a conclusion from the appearance of dots on some of the documents. I accept the submission of Mr Meares that this was a bold impersonation, if it occurred. There are some odd features about the competing accounts but to my mind none of them compel a conclusion one way or the other.
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> 93. I think it is possible that the Claimant was impersonated. I think it is just as possible that she was in attendance. Mr Meares argued that I must reach a conclusion but I am afraid I regarded it as impossible to do so. The outcome is the unhappy one that the Claimant has not proved on a balance of

> probabilities that she did not sign the documents. She may not have done but there is other evidence that cannot be completely discounted to suggest that she did. In those circumstances I cannot make the declarations she seeks and I will not direct any alteration to the Register."

28. The claim was therefore dismissed. Ms Emmanuel sought permission to appeal on various grounds. The judge gave permission on all grounds, albeit his reason for doing so was said to be because of the delay in producing the judgment and he indicated he would not have given permission for any other reason.

29. Before me the appeal was argued on all grounds.

30. The case on Ms Emmanuel's behalf is first that the judge erred in resorting to the burden of proof, the case did not warrant it and in fact the case could and should have been decided in Ms Emmanuel's favour. The delay alone did not justify allowing the appeal but given the deficiencies in the judgment, the delay and the other problems which beset the judge, the case should be remitted for a retrial. The alleged deficiencies in the judgment included a failure to make various positive findings, failure to give reasons for various findings, and errors in making some findings which the judge did make. Second the judge also erred in his decision about where the burden of proof lay. As a matter of law the burden was on those asserting the documents were genuine, i.e. the respondents. So even if the judge's approach was right, the conclusion was wrong.

31. The respondents supported the judge, denied the deficiencies in the judgment and submitted that while they were also disappointed, (because the judge ought to have found the facts in their favour), the judge's decision was open to him. His decision on burden of proof was correct too.

32. In relation to burden of proof, a point was raised on appeal about the impact of the Land Registration Act 2002. Also at the appeal hearing Mr Temmink QC for Ms Emmanuel made new submissions about the form AP1 sent to the Land Registry.

33. After the trial Ms Emmanuel produced a further relevant document. It was a record of her call to Action Fraud.

The law

34. The legal issues in this case are:

    i) The effect of delay in producing a judgment and the approach on appeal;

    ii) Resorting to the burden of proof;

    iii) The standard of proof;

    iv) Where does the burden of proof lie in this case?

Effect of delay

35. The leading cases on the impact of delay in producing a judgment are ***Bond v Dunster*** [2011] EWCA Civ 455 (judgment delayed 22 months) and ***Tex Services v Shibani*** [2016] UKPC 31 (judgment delayed 3 years). Both were addressed by Freedman J in ***Nuttal v Kerr*** [2019] EWHC 1977, which was concerned with another judgment of HHJ Hands QC, delayed by 18 months.

36. The appellant did not submit that the appeal should be allowed simply because of the time taken and the other vicissitudes which befell the judge in producing the judgment. Rather the submission was that the fact finding of the judge here should be scrutinised with more care on appeal, referring to the opinion of Lord Mance in ***Tex Services v Shibani***. Lord Mance explained that reason the appellate court should take that approach in those circumstances was because:

> "the advantage which a trial judge enjoys in relation to matters of fact may be weakened by such a delay and that such delay calls for special care when reviewing the evidence which was before and the findings of fact which were made by the judge. But it is still for an appellant to pinpoint any particular findings of fact which may in the light of that review be open to question by reason of the delay."

See also ***Bond v Dunster*** Arden LJ paragraph 4 referring to ***Goose v Wilson*** [1998] TLR 85

37. The respondents did not dispute that this principle applied in this case.

Resorting to the burden of proof

38. In relation to resorting to the burden of proof, at paragraph 80 the judge referred to paragraph 32 of Lady Hale's speech in ***Re B (Children)*** [2008] UKHL 35 in which she said:

> "In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place. He is not allowed to sit on the fence. He has to find for one side or the other. Sometimes the burden of proof will come to his rescue: the party with the burden of showing that something took place will not have satisfied him that it did. But generally speaking a judge is able to make up his mind where the truth lies without needing to rely upon the burden of proof."

39. The judge also referred to Lord Brandon's speech in ***Rhesa Shipping v Edmonds*** [1985] 2 AER 712 and to a more recent reference to it by Lord Mance in the Privy Council in ***Sienkiewicz v Grief (UK); Willore v Knowsley Metropolitan*** [2011] UKHL 10.

40. For the position on appeal in these burden of proof cases, the appellant referred to the Court of Appeal in ***Stephens v Cannon*** [2005] EWCA Civ 222 and then in ***Verlander v Devon Waste Mgt*** [2007] EWCA Civ 835. In the latter, at paragraphs 18-19, Auld

LJ summarised the propositions identified in the former case after a review of the authorities. They are:

> "First, a judge should only resort to the burden of proof where he is unable to resolve an issue of fact or facts after he has unsuccessfully attempted to do so by examination and evaluation of the evidence. Secondly, the Court of Appeal should only intervene where the nature of the case and/or the judge's reasoning are such that he could reasonably have been able to make a finding one way or the other on the evidence without such resort."

41. At paragraph 24 Auld LJ also explained that the term "exceptional" used in ***Stephens v Cannon*** was not an extra qualification to the criteria to be satisfied when this course is taken.

42. Again none of this was disputed before me. The judge set out the law on this topic without error, the point on appeal is whether he applied it correctly.

Standard of proof

43. Reliance was also placed on observations in various cases about what the civil standard of proof means. The point is that it is an unvarying standard but it is flexible in its application. So while the question is always whether something is more probable than not, some propositions are inherently more likely than others such that more cogent evidence may be needed to prove the improbable one to the same standard as would be needed to establish the more probable one. The judge referred to ***Re D Secretary of State for Northern Ireland*** [2008] UKHL 3 and neither party criticised him for that.

Where does the burden of proof lie?

44. In relation to the question of where the burden of proof lies in this case, both parties referred to passages in Chapter 6 of *Phipson on Evidence*, 19th edition including paragraphs 6-02, 6-03, 6-04, and 6-06. It was common ground that the general rule is that they who assert, must prove. Counsel for Ms Emmanuel submitted that the true meaning of this rule is that where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegations rests on them. Her case, at its core, is an assertion that she did not enter into the loan or charge. The submission is that if a claim was brought by Mr and Mrs Avison to enforce the loan agreement then they would all have to prove that the contract was entered into by Ms Emmanuel. The same would be true for Mr White if he brought a claim against Ms Emmanuel for a contribution. Therefore, it is said, this shows that execution is an essential part of case for Mr and Mrs Avison and Mr White.

45. The respondents supported the judge. Counsel for Mr and Mrs Avison also took the new point about the Land Registration Act 2002, in relation to the effect of the registration of the legal charge. It is not necessary to deal with that.

46. A number of cases have been cited by the parties. I will deal with five: ***Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd*** [1942] A.C.

154, ***Abrath v North Eastern Railway*** (1883) 11 QBD 440, ***Doe v Johnson*** (1844) 7 M & Gr 1047, ***Williams v The East India Company*** (1802) 3 East 192 and ***Saunders v Anglia Building Society*** [1971] AC 1004.

47. The relevance of ***Joseph Constantine Steamship Line Ltd*** is the statement by Viscount Maugham at p174, of the proposition that the legal burden of proof "lies upon him who affirms, not upon him who denies", that it is "an ancient rule founded on considerations of common sense [*which*] should not be departed from without strong reasons".

48. ***Abrath*** concerned an action for malicious prosecution, an element of which is prosecution without reasonable or probable cause. The defendants asserted that they had reasonable or probable cause because they had taken reasonable and proper care in prosecuting. The plaintiff, who had proved she was innocent of the charges, argued that the burden of proving such care lay on the defendants. The Court of Appeal disagreed and found that the burden of proving lack of reasonable or probable cause lay on the plaintiff and so, therefore, did the burden of proving lack of reasonable or proper care. Counsel for Ms Emmanuel relies in particular on the statement of Bowen LJ at 457:

> "Wherever a person asserts affirmatively as part of his case that a certain state of facts is present or absent, or that a particular thing is insufficient for a particular purpose, that is an averment which he is bound to prove positively."

49. So, the argument goes, since to enforce the loan agreement against her Mr and Mrs Avison would have to prove that the contract was executed, the burden of proof of that fact must lie with them.

50. In ***Doe***, the plaintiff alleged that a will purporting to devise real property did not validly execute a certain power of the testator to devise certain real property because no reference was made to that power or that property. The defendant alleged that if the testator had no other real property, the will was a valid execution of the power. Neither party adduced evidence as to whether the testator had any other real property. The court found that the burden of proving that there was no other real property was on the defendant, the defendant did not so prove and therefore judgment was entered for the plaintiff. Counsel for Ms Emmanuel here relies on the statement of Tindal CJ at 1060:

> "But it appears to us, that, where a party seeks, from extrinsic circumstances, to give an effect to an instrument which, on the fact of it, it would not have, it is incumbent on him to prove those circumstances, though involving the proof of a negative; for, in the absence of extrinsic proof, the deed must have its natural operation, and no other. In the present case, the devise purports only to convey the property of the devisor, not that over which he has a power of appointment; and, in the absence of proof of extrinsic circumstances, it cannot be construed to operate in any other way than that which its terms naturally import."

51. ***Williams*** was a case arising from a ship destroyed by fire. The plaintiff alleged that the defendant had wrongfully caused dangerous goods to be conveyed on the ship without giving sufficient notice to the ship's master so that they could be safely stored, their lack of safe storage leading to the fire. An issue arose as to whether notice had been given by the defendant and the court determined that the burden of proving that no such notice had been given lay on the plaintiff.

52. Counsel for Ms Emmanuel submits that these authorities show that the common law rule is that the party who seeks to rely on a document must prove the document and that this extends to proving that the document is not forged. The appellant then submits that the common law rule, as it applies to this case, has not been altered by statutory provisions on evidence, such as section 3 of the Evidence Act 1938. The submission about the Evidence Act is not disputed.

53. By contrast counsel for Mr and Mrs Avison submitted that the common law provides that it is for Ms Emmanuel to prove that the relevant document is forged. They rely upon ***Saunders***. In that case, Mrs Gallie signed a document which she was told was a deed of gift of her house to her nephew. In fact, the document was an assignment of her house to a third party who proceeded to mortgage the house. Mrs Gallie proceeded against the mortgagees and the third party, asking, on the basis that the deed was *non est factum*, for a declaration that the assignment was void and that the title deeds should be delivered to her. The House of Lords found for the defendants and, while it was not expressly discussed, proceeded on the basis that Mrs Gallie bore the burden of proving that the deed was *non est factum*. This, the respondents say, is directly analogous to this case. Ms Emmanuel seeks to distinguish ***Saunders*** on the basis that, in ***Saunders***, Mrs Gallie had signed the document and admitted the existence of the deed while, in this case, the appellant alleges that she did not sign and requires the respondents to prove the documents.

Burden of proof – assessment

54. The legal rule is, as counsel for Ms Emmanuel submits, that where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegations rests on them. However in my judgment the proper application of that rule in this case does not help Ms Emmanuel. Putting it another way, there is nothing about the facts of the present case which means that the general principle that they who assert must prove does not apply in its simplest way. Ms Emmanuel has brought this claim. In it she is asserting that her signatures on the documents are forgeries, and that she was not indebted to Mr and Mrs Avison. Ms Emmanuel seeks declarations to that effect and an order to alter the register accordingly. Prima facie, the burden of proving those facts is on her.

55. I agree with counsel for Ms Emmanuel that if instead Mr and Mrs Avison had sued Ms Emmanuel to enforce the loan agreement then they would have to assert, as part of that claim, that it had been entered into by Ms Emmanuel and, assuming the assertion was denied or not admitted, the burden of proof would lie on them. However I do not agree that point provides the answer to the problem in this case. Part of the argument on Ms Emmanuel's behalf was that it cannot matter who is the claimant or the defendant. I do not accept that. The reason why not is that one function of the burden of proof is to operate as a rule of law which determines the outcome of a claim in certain circumstances. A claim is a claim for relief.

56. I recognise that in a case like this, one may end up with the unsatisfactory result that Ms Emmanuel cannot prove she did not enter into the loan, but neither could Mr and Mrs Avison prove that she did. Moreover it would mean that Mr and Mrs Avison have the benefit of a legal charge which, on this assumption, they cannot prove Ms Emmanuel accepted. However considerations of this kind are the reason why the courts strive to avoid deciding cases in this way; they are not a justification for a different approach to the onus of proof.

57. Therefore the judge was right to find that the burden of proof lay with Ms Emmanuel on conventional principles. A further point taken by the appellant is that a r32.19 notice to prove documents was served on her behalf. I was not addressed on it in detail. If, as I have found, Ms Emmanuel bore the legal onus of proof to show that the documents were forgeries, I do not see how serving such a notice on the defendants in this case could operate to shift that legal burden onto them. Therefore I dismiss this ground of appeal. It is not necessary to consider the submissions about the effect of the LRA 2002.

The appellant's case on the deficiencies in the judgment

58. Although they overlap to some degree, it is convenient to address the deficiencies in the judgment relied on as a series of sixteen points. They are of varying degrees of significance. Points eleven to fifteen also constitute direct challenges to some of the judge's findings or conclusions.

59. The first point is that the judge did not refer to the alleged oddity of having the documents executed in Worthing rather than London. Ms Emmanuel's evidence was that she was staying in London and, on the respondents' case, she could not drive. Mr White's evidence was that Ms Emmanuel wanted to see "the south coast" as she had never seen it before and so Worthing was chosen. This explanation was rejected by Ms Emmanuel. She stated that she had been to Brighton before, although not to Worthing. Therefore, it is submitted, London was the obvious choice. Counsel for Ms Emmanuel submits that the judge should have referred to these matters and made positive findings.

60. It is correct that the judge did not expressly refer to or address these points. However, there was a sensible answer, the substance of which the judge did hear in evidence and did refer to in his judgment. That is that Mr White's daughters were receiving their GSCE results on the morning of 26 August 2014 in Worthing. This point was not disputed and does provide an explanation for a meeting in Worthing rather than in London. The fact that Mr White's evidence about Ms Emmanuel's motive was contradicted does not mean there is an error by the judge here.

61. The next point, which is connected to the first, was that the judge did not refer to the alleged oddity of having the documents executed in a café rather than a solicitor's office or Mr White's home. This is connected to the first point in that Counsel for Ms Emmanuel submits that the obvious choice for a meeting place was a solicitor's office in London. There is said to have been no good reason provided by the respondents as to why the meeting took place in a café in Worthing. Counsel for Ms Emmanuel also refers to Mr Laverick's evidence that Mr White had told Mr Laverick that the parties had to meet in a café because "*the client had no address in Worthing but was staying there with a friend but could not see me at her address*". That statement appears to be

incorrect on the basis of the other evidence, but whether it was Mr Laverick or Mr White who was incorrect was not addressed by the judge.

62. The respondents submit there is nothing in this point, which has been magnified unduly. There was no significance to a meeting in a café instead of any other place. Counsel for Ms Emmanuel suggested that the lack of a photocopier in the café is significant but I will address that separately. It is true to say that the judge did not expressly deal with this issue but in my judgment on its own the point is a very minor one which does not lend support for either party's case.

63. Third is the photocopier point. Counsel for Ms Emmanuel submits that the consequence of meeting in a café being that there was no photocopier available to copy the driving licence used. This is supposed to support the idea that the venue was chosen as part of a plan by Mr White to use someone impersonating Ms Emmanuel. The judge did not refer to the photocopier point but it is another minor matter. Mr Laverick's evidence, heard by the judge, was that he conducted meetings "fairly regularly" out of the office and that his practice was to write down passport or driving licence details, which he did here. Further, as the respondents point out, as a plan it would be flawed because modern phones can take photographs of documents.

64. The fourth point is that the judge did not deal with the reason why Mr White chose a notary, being Mr Laverick (who was also a retired solicitor), rather than a solicitor as requested by Mr Avison. Mr Avison had requested, in an email, that the documents be signed by Ms Emmanuel in the presence of a UK practising solicitor or, if abroad, by a certified notary. Nevertheless Mr White sought out a notary. His explanation was that he had thought a notary in the UK was also acceptable to Mr Avison. This point is said to be another demonstration that Mr White wanted to avoid the meeting taking place in an office with photocopying facilities. This is a somewhat stronger point than the ones about the venue for the meeting, but in the end it remains a contextual issue and one for which the judge had heard an answer, in the form of Mr White's explanation.

65. The fifth point is that the judge was said to have been inconsistent in finding that Ms Emmanuel was a dog owner but not assessing the evidence of Mr White and his family, who all asserted that Ms Emmanuel was afraid of their dogs, in that light. That is not a fair criticism. In the paragraph in which he dealt with the daughters' evidence, the judge did expressly recognise the inconsistency relating to Ms Emmanuel's attitude to dogs. He called it a "curious feature" about Mr White's and his wife's evidence. Not every inconsistency can be or has to be resolved. The important thing is that the judge was aware of the inconsistency when deciding not to discount the daughters' evidence. He was entitled to do that. There was a possible sensible explanation proffered during trial: that Ms Emmanuel was afraid of small dogs but not large ones but it was not necessary for the judge to expressly take that into account either way.

66. The sixth point is that the judge is said not to have dealt adequately with Mr White's and his wife's evidence that Ms Emmanuel was wearing a "pressure suit" on 26 August 2014. As the judge accepted, Ms Emmanuel had recently undergone a colposcopy examination but this did not require the wearing of any sort of deep vein thrombosis stocking or pressure suit. The appellant's case was that this pressure suit evidence was an invention to explain why Mr White drove to the café. The judge's

conclusion on this was that the account of Ms Emmanuel wearing a pressure suit was "bizarre". He reached that conclusion while assessing the evidence of Mr White and his wife and clearly took that conclusion into account in that assessment. The judge was entitled to deal with it as he did.

67. The seventh point is the submission that the judge did not adequately deal with the inconsistency between the accepted evidence, that Ms Emmanuel's medical procedure did not prevent her from driving on 26 August 2014, and the evidence of Mr White and his wife. Mr White and his wife had given evidence that Ms Emmanuel was driven by a friend because she was unable to drive herself. The judge's conclusion on this was that this was "bizarre" too. However, the appellant says the judge should have rejected Mr White's and his wife's evidence because it was inconsistent with the accepted evidence. In my judgment there is no significant point here. The judge took the point into account when assessing Mr White's and his wife's evidence. He was entitled to deal with the inconsistency as he did.

68. The eighth point was that the judge failed to take account of the lack of documents corroborating Mr White's account that Ms Emmanuel was present in Worthing on 26 August 2014. The appellant highlights that Ms Emmanuel and Mr White often used WhatsApp to communicate and so some communication was expected – as a particular example Ms Emmanuel would need to be told Mr White's address. The respondents submit that the documents that are available do corroborate Ms Emmanuel's presence in Worthing, for instance the change in her airline ticket was consistent with her changing plans in order to meet Mr White somewhere; and submit any gaps can be explained by the phone records not being available for that time. In respect of the point on the address itself, the respondents point out there is evidence that Ms Emmanuel was aware of Mr White's address before the alleged visit, as shown by previous correspondence between herself and Santander.

69. In my judgment the matter of the address itself is answered by the Santander correspondence; and the wider absence of corroborative records cuts both ways. Just as there is no document (other than Mr Laverick's disputed register) which shows Ms Emmanuel was in Worthing on the relevant day, nor is there a document which proves she was somewhere else. There is no error here.

70. The ninth point is the allegation that the judge failed to refer and deal with the evidence that Ms Emmanuel was unaware of the Avisons' charge on her house until very close to the sale. This overlaps with the fourteenth point and I will address it there.

71. The tenth point is the allegation that the judge failed to refer or deal with the fact that Mr White's daughters' account was inconsistent with Mr White's and his wife's account. The daughters gave evidence that Ms Emmanuel and her friend had entered the Whites' home before leaving for the café, although both daughters later doubted that account, Florence in re-examination and Alice in cross-examination. Mr White and his wife meanwhile gave evidence that Ms Emmanuel and her friend had only entered the house after returning from the café. The appellant submits that this inconsistency demonstrated that the daughters, if truthful, were recalling different visitors. The respondents submitted that this type of inconsistency is demonstrative of honest recollection and an absence of coaching only.

72. Contrary to the appellant's case, it seems to me that the judgment shows that the judge was aware of the inconsistency relied on (compare paragraph 42 and 48). The judge also shows that he was well aware of the importance of the daughters' evidence in corroborating Mr White's case and undermining Ms Emmanuel's case. His finding (paragraph 88) was that "there was nothing untoward" in the daughters' testimony. That was a finding which was open to the judge and the inconsistency was not of such significance that the fact it is not mentioned in paragraph 88 would be a reason to undermine the conclusion.

73. The eleventh point is the submission that the judge had wrongly dealt with the evidence that Mr White had admitted the fraud to Ms Emmanuel in May 2016. The appellant had alleged that Mr White had admitted causing the charge and the loan to be forged on two occasions. First orally during a telephone conversation at around 4pm on 26 May 2016 and second in a WhatsApp message at 1.29pm on 27 May 2016 by saying "...I agreed that I would honour any an [sic] all responsibility in this matter…". The first admission is denied by Mr White. There is no dispute that the words in the What's App message were Mr White's, rather it is denied they are an admission of the fraud, and also it is said by Mr White they were written on the basis that he was being threatened by Ms Emmanuel's now-husband.

74. The judge rejected Ms Emmanuel's evidence in respect of the telephone conversation on 26 May 2016. I will come back to that as the twelfth point. In respect of the alleged written admission, the judge, while dealing with the appellant's submissions, stated that Mr White "accepted that this amounted to an admission of responsibility but explained it on the basis that he had been threatened."

75. The appellant says the judge should have found that the written admission was an admission of liability, and that it should be seen in the context of the earlier oral admission.

76. In respect of the written admission, in my judgment the judge was right and entitled to find that the words do not demonstrate an admission of fraud but rather are an admission of responsibility. Therefore the judge correctly summarised the position and that point does not go any further in supporting the appellant's case. I will turn to the alleged oral admission next.

77. The twelfth point, connected to the eleventh, is concerned with the judge's rejection of the claimant's evidence that Mr White had made the admission in a telephone conversation. The judge said this:

> "89. I do not, however, accept the Claimant's evidence that the third Defendant admitted in a telephone conversation that he had behaved fraudulently in relation to the execution of the loan agreement and the Legal Charge. In reaching that conclusion I take account of the fact that the statement he made in May 2016 to the first and second Defendants about his knowledge as to the Legal Charge can only be accounted for by his desire to "*run with the fox and hunt with the hounds*" in attempting to support the Claimant's position that she did not know about the Legal Charge. I admire the way in which the first and second Defendant have stood by the third Defendant

> but it seems to me that in this period he was clearly not being truthful with them. Moreover, to my mind it cannot have been clearer that the first Defendant intended to register the charge."

78. One criticism is that the judge had made an adverse finding about Mr White's credibility and no adverse finding about Ms Emmanuel's credibility. That is true but does not mean the judge was not entitled to reach the conclusion he did. A second criticism is that the judge's point about a "*desire to 'run with the fox and hunt with the hounds'*" does not support his conclusion. There was a debate before me about what this meant. I think it is clear enough. The judge meant that Mr White was saying one thing to Ms Emmanuel and another thing to Mr and Mrs Avison, with a view to keeping them both happy.

79. To understand the issue itself, which relates to exchanges in May 2016, one needs to see paragraph 74 of the judgment in which the judge was addressing part of the claimant's submissions:

> "74. The Claimant believed, and, submitted Mr Buttimore, was right to believe, that the third Defendant had accepted that he had behaved fraudulently in respect of the execution of charge. This had happened during a telephone conversation in the period around 24 to 26 May 2016. In the exchanges between himself and the Claimant and himself and the first and second Defendants in May 2016, the third Defendant had attempted to appear to the Claimant as though he was supporting her contention that she did not know a Legal Charge had been registered and at the same time to appear to the first and second Defendants simply to be relaying to them what the Claimant was saying. The difficulty of this position was illustrated by the email that he sent to the first Defendant on 27 May 2016 (see page 495 of the hearing bundle). One can see there his dilemma because he had to say that he did not know the charge had been registered. This led to the WhatsApp at 13:29 on 27 May 2016 (see page 545 of the hearing bundle). The third Defendant had accepted that this amounted to an admission of responsibility but explained it on the basis that he had been threatened."

80. The argument is that the judge was wrong in paragraph 89 to say that the only way to account for the Mr White's statement to Mr and Mrs Avison which was meant to suggest he was unaware of the charge, was lying to them and the desire to "run with the fox" etc. whereas instead it could be accounted for by Mr White knowing that Ms Emmanuel knew nothing of the charge and then him having to come up with an excuse to give Mr and Mrs Avison as to why this had suddenly become an issue now in 2016.

81. I do not accept this. A fair reading of the judgment is that the judge was recognising that he, the judge, needed to account for the email from Mr White to Mr and Mrs Avison, given his decision rejecting the evidence of an oral admission; and the judge was accounting for it because Mr White was "running with the fox etc.", and not being truthful to them. He was entitled to deal with the issue this way.

82. Further points were taken by the respondents, also said to cast doubt on Ms Emmanuel's case that Mr White had admitted fraud: the failure to refer to any admission in the earlier Lambeth proceedings, nor in a letter to the Land Registry on 8 June 2016. It is not necessary to deal with those, nor with a point arising from a report to Action Fraud in June 2016 (a document relating to which emerged after the trial).

83. The thirteenth point is that the judge was wrong to consider it significant that Ms Emmanuel's email of 17 August 2014 was "*not an outright rejection in principle of a charge against the Property*". This arises in paragraph 90, as follows:

> "90. I agree it is odd that the Claimant neither took the counterpart documents away with her nor asked for copies later. Nevertheless, despite Mr Buttimore's persuasive advocacy, I am perturbed by two aspects of the Claimant's account. Firstly, it seems to me that her email of 17 August 2014 (see above at paragraph 32 of this judgment) was not the outright rejection in principle of a charge against the Property, which I would have expected had she definitely decided against it at that stage. I accept that the interest rate was not attractive to her, although I find it difficult to accept that it was ever a serious suggestion that a loan might be available from a banking institution. Given her experience in financial investment this seems to me to have been fanciful having regard to her means, the means of the third Defendant and the creditworthiness of any of the companies. What I find particularly telling is that in this email she does propose a mechanism for removing the charge."
>
> [the second aspect which perturbed the judge is in para 91, addressed below]

84. The email of 17 August 2014 is from Ms Emmanuel to Mr White and states that she did not agree to a charge and that a contractual relationship was more appropriate and asks whether certain details about the registration of the charge can be agreed. The submission is that Ms Emmanuel' evidence in her witness statement (paragraphs 26-27), which did not change in cross-examination, was that she had only decided against the charge on 19 August 2014 after receiving a revised draft. Therefore the fact that that email of 17 August 2014 is not an outright rejection of a legal charge is not inconsistent with her evidence. The judge's assessment therefore, the appellant says, is based upon a misunderstanding, not of the email itself but of her evidence which he thought was inconsistent with it.

85. The relevant paragraphs in the witness statement are:

> "26. On 16 August 2014 I received an amended loan agreement and a separate charge agreement from Mr White. On reviewing the draft documents I informed Mr White that I was not happy with the proposed terms — in particular and on further consideration I viewed that the interest rate of 40% was extremely high. I was also particularly concerned that a formal

> legal charge would be placed on my property, 18 Bennett Park, Blackheath, London, 5E3 9RB ("the Property"). We discussed my concerns at length on the telephone and I confirmed my particular issues with the legal charge in an email to Mr White on the same day. I made it clear to Mr White that I was not happy to proceed with the loan on this basis and so Mr White told me he would speak with Mr Avison.
>
> 27. On 19 August 2014, Mr White sent me a revised legal charge and drew my particular attention to the addition of Clause 4. On reviewing the revised document I telephoned Mr White and reiterated that I was not happy to proceed with the loan on those terms. I told him the interest rate was too high and that I was not prepared to put a charge on my property. I suggested that we approach a bank as I thought we could get much better terms than those being offered by Mr Avison but Mr White said going to a bank would take too long and that he would find a solution."

86. Paragraph 26 relates to 16th/17th August while paragraph 27 refers to 19th August. The distinction between these two periods is not as clear as counsel's submission seeks to make them. It is true that paragraph 26 refers to particular issues with the legal charge and not being happy "on this basis" but paragraph 27 refers to Ms Emmanuel's concerns being "reiterated" on the 19th and to not being happy to proceed "on those terms".

87. Turning to the passage from the cross-examination on which emphasis is placed on appeal, Ms Emmanuel is asked about the text of the 17th August email as follows:

> Q. Just looking at the plain text, it is not saying charge no way. You're saying, "Can you find these things out?"
>
> A. This was, remember, this is on the 16th of August and then Glenrick came back and I said to Glenrick, "Look I'm really uncomfortable and I don't want to" and he said to me, "Can you put your concerns in writing?" which is the only reason I tried to do — to put it into writing what my concerns were and then ---

88. The question is whether the judge was entitled to form the view that what Ms Emmanuel was telling the court her views were at the stage of the 17th August email, was not consistent with the terms of the email itself. In some cases the fact the judge had heard the oral evidence would be relevant on appeal, but that is of much less weight in this case (***Tex Services v Shibani***). Nevertheless, on this material, it seems to me that the judge was entitled to form the view that he did, that Ms Emmanuel's oral testimony about how firmly opposed she was to the legal charge as at 17th August was not consistent with the documents.

89. The fourteenth point relates to the second thing which perturbed the judge. This was that Ms Emmanuel was not as surprised as the judge would have expected if the documents had been forged. It is addressed in paragraph 91:

> "91. Secondly, I am surprised that the WhatsApp messages do not state clearly the Claimant's astonishment at finding that there was any charge at all. Mr Buttimore submitted that she does refer to the fact that there should not be a charge at all. But amongst a torrent of accusations, entirely justifiable, about the conduct and honesty of the third Defendant there is nothing that asks how it comes about that there is a charge against her property or that asserts then, what she asserted in July 2016, namely that the only explanation must be that he had forged the documents.?"

90. This is linked to the ninth point, which is that the judge allegedly failed to deal with the evidence that Ms Emmanuel was in the process of selling her house, and close to exchange, when her conveyancing solicitor, Mr Phull, notified her of the Avisons' charge. Mr Phull's evidence was that Ms Emmanuel was very surprised by this.

91. The appellant submits that the judge should have also referred to emails between Ms Emmanuel and her conveyancing solicitor, Mr Phull, which did demonstrate surprise that there was a charge and taken into account Mr Phull's evidence that Ms Emmanuel was shocked. Further, the appellant submits that when considering the significance of Ms Emmanuel's surprise or lack thereof, the judge should have taken into account that Ms Emmanuel did not see copies of the loan and charge until June 2016, that, in later WhatsApp messages between Ms Emmanuel and Mr White, Ms Emmanuel did state that she did not sign any relevant documents and that the clear inference from such was that Mr White had forged the documents. The appellant also highlights that the judge did not have access to a good recording of parts of trial relevant to this issue.

92. The respondents submit that the WhatsApp messages between Ms Emmanuel and Mr White are consistent with Ms Emmanuel having signed the documents but not expecting the charge to be registered and, indeed, focus upon the registration, rather than the existence, of the charge.

93. Looking at the judgment, paragraph 63 shows that the judge had well in mind the appellant's case that she discovered the charge in the context of trying to sell her house in 2016 and that Mr Phull's evidence was that she was shocked by the news of the charge. Given that, I am not satisfied there is anything in the ninth point. Moreover it cannot be said that the judge's finding in paragraph 91 fails to take that into account. The judge's point in paragraph 91 is concerned with the content of the WhatsApp messages. The judge recognised the torrent of accusations from Ms Emmanuel at the time. He was not finding that Ms Emmanuel was not upset, which might have been falsified by Mr Phull; the judge's finding was that despite the accusations which were made, they did not include forgery.

94. The fifteenth point is that the judge failed to find the dots accompanying the disputed signatures significant or corroborative of Ms Emmanuel's case. The dots in question were dots placed after each of disputed signatures made on 26 August 2014 at the café at Worthing. These dots are not present in any of Ms Emmanuel's admitted signatures. The conclusions of Mr Radley, the handwriting expert, in this regard were:

> "Whilst it is generally assumed that a dot following a signature is terminal punctuation produced by the signatory, there is also a possibility that the dot is placed on the paper by another party, in order to identify the position in which the signature has to be made. A further issue with regards to the dots is whether this is a habitual feature of someone other than Ms Emmanuel writing the questioned signatures and unconsciously including this terminal mark or whether their presence is a subtle form of disguise by Ms Emmanuel (bearing in mind that the signatory had to produce a signature in a very similar form to the identification document, the driving licence, produced). On the documentation before me I am unable to assess which of these two possibilities is the most likely.*"*

95. The judge's conclusion was in paragraph 92, as follows:

> 92. In the end I am left in the position of the Claimant saying she was not the person who signed the documents at Costa Coffee in Worthing and the third Defendant, his wife and children saying that she had been in Worthing that day and the third Defendant and his wife saying that she had signed the document. Plainly somebody did sign it, unless the whole of Mr Laverick's evidence is a fabrication, which whatever my reservations about the care he took, is a finding I am not prepared to make. If that person was not the Claimant than it was somebody able to forge her signature. According to Mr Radley this is not a difficult signature to forge but his expert evidence is inconclusive and I do not derive any assistance in reaching a conclusion from the appearance of dots on some of the documents. I accept the submission of Mr Meares that this was a bold impersonation, if it occurred. There are some odd features about the competing accounts but to my mind none of them compel a conclusion one way or the other.

96. The appellant submits that this way of dealing with the dots was inadequate because Mr Radley's evidence gave three possibilities for how the dots came to be there and the first possibility, that a third party placed the dots on the documents, was excluded in cross-examination of Mr Laverick and Mr Avison. In respect of Mr Laverick in particular, the appellant highlights that his evidence was that he sometimes places dots next to his own signature but that he did not do so in respect of Ms Emmanuel's disputed signatures. The appellant submits that this therefore leaves only the possibility of forgery or of Ms Emmanuel's intentional disguise. The latter possibility is so inherently unlikely, the appellant says, that the judge should have found that the presence of the dots supported the account of a forgery. The respondents submit that, as the expert found the dots to be inconclusive, the judge was entitled to find the same.

97. I agree with the respondents. It is notable that there are dots on the signatures which are in issue and none elsewhere, but the fact remains that the handwriting expert had the point clearly in mind, was within his expertise and expressed the inconclusive conclusion he did. The judge therefore had an evidential basis for reaching the

conclusion he did, particularly when he did so bearing in mind, as he was entitled to, the inherent likelihoods or unlikelihoods associated with an impersonation.

98. The sixteenth point was about inconsistencies in Mr Laverick's evidence. The appellant highlighted that Mr Laverick had given evidence that the woman and her friend who had attended the café in Worthing on 26 August 2014 were Caucasian. Ms Emmanuel is of African Caribbean descent and Mr White's evidence was that the friend was mixed race and of Ghanaian or Caribbean descent. Mr Laverick had also written in his contemporaneous note that he had given no advice but in an email of 28 August 2014 had stated that he "advised them of the effect of the deeds". The judge expressly referred to both of these issues in his judgment. He concluded in relation to Mr Laverick's evidence that it needed to be scrutinised with care but that he was not willing to find that it was entirely a fabrication. That is an approach which the judge was entitled to take on the basis of the evidence before him.

Standing back

99. In addressing the points individually above, I have taken into account the principles that findings need to be scrutinised with special care given the combination of the timing and the other difficulties the judge encountered in preparing the judgment, and that this is a case in which the judge resorted to the burden of proof. Although I am not convinced by the individual points, it is appropriate to stand back and consider them all together.

100. I am not convinced that the counsel for Ms Emmanuel has been able to identify any error made by the judge. At most counsel has identified a number of points which the judge did not refer to expressly. However some of these are very minor and for all of them there was material before the judge which answered the point. Looking at the judge's overall judgment, it is given with reasons and makes findings which were open to the judge to make. He grappled with the facts and evidence and, in a number of places, when he felt able to do so, the judge reached clear conclusions on the facts and about the quality of certain witnesses. In his conclusion (paragraph 92), he recognised there were odd features about the competing accounts but held that none of those odd features compelled a conclusion one way or another. He found that both possibilities – impersonation of Ms Emmanuel and her attendance at Worthing – were equally possible. Looking at it in the round, I am not persuaded that there is any ground for allowing this appeal. It will be dismissed.