Michaelmas Term
[2022] UKPC 42
Privy Council Appeal No 0043 of 2021

JUDGMENT

Flora Moses (administratrix pendente lite of the estate of Jude Moses aka Julie Moses, deceased) (Respondent) *v* Selwyn Moses (Appellant) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

LORD KITCHIN
LORD SALES
LORD BURROWS
LADY ROSE
LORD LLOYD-JONES

JUDGMENT GIVEN ON
10 November 2022

Heard on 21 July 2022

Appellant
Colvin E Blaize
(Instructed by KathyAnn Joseph)

Respondent
Not participating

LORD SALES (with whom Lord Kitchin and Lord Lloyd-Jones agree):

1. This case is concerned with a claim to set aside in equity a deed of conveyance of land on the grounds of mistake and what follows from that.

2. The claimant in the proceedings was Jude Moses ("Jude"), who is now deceased. The proceedings have been continued in Jude's name by her daughter, Flora Moses ("Flora"), who is the respondent to this appeal, representing Jude's estate. Jude was the executor of the will of her husband, Milton Moses ("Milton"), who died in 1982.

3. The appellant is Selwyn Moses ("Selwyn"), who is the son of Jude and Milton and the brother of Flora. Milton also had 12 other children.

4. Milton died in 1982, leaving property in his will to his wife and children. By a deed of conveyance in 1984 ("the 1984 deed") which purported to give effect to a bequest in Milton's will, Jude transferred title to about 3.5 acres of land at Mausica Road, D'abadie, Trinidad ("the Land"), to Selwyn. However, according to Milton's will, the Land was not part of any bequest to Selwyn, but rather formed part of Milton's residuary estate which was left to Jude. In these proceedings, Flora (originally on behalf of Jude pursuant to a power of attorney, then on behalf of Jude's estate) maintains that the 1984 deed was made by mistake and should be set aside in equity. For convenience, since Flora has at all stages acted to represent Jude or her estate, the respondent will be referred to as Jude throughout.

5. At trial at first instance, Seepersad J ("the judge") found that the 1984 deed had not been made as the result of any mistake on the part of Jude and therefore dismissed her claim. By the time of the trial Jude was too infirm to be able to give evidence, as the judge accepted, so the case on mistake fell to be decided on the basis of circumstantial evidence and an assessment on the balance of probabilities in the particular circumstances of the case.

6. Jude appealed. Jude died before the hearing of her appeal, but it was maintained by Flora on behalf of her estate. The Court of Appeal allowed the appeal. They held that the judge had made substantial errors in his assessment of the facts with the result that his decision was flawed and should be set aside. The Court of Appeal considered that they were in a position to assess the facts for themselves without the need to remit the case for a retrial. By the judgment of Jones JA (with which Bereaux and Des Vignes JJA agreed) they found, on the balance of probabilities, that Jude's case of mistake had been made out. In the absence of any

relevant defence, the Court of Appeal decided that the 1984 deed should be set aside in equity as against Selwyn.

7. Selwyn had sold the Land in 2001 to Mr Colvin Blaize for $300,000. It is common ground that Mr Blaize was a bona fide purchaser for value without notice of any interest of Jude in the Land. Mr Blaize developed the land by building a number of residential properties on it. In 2004 Selwyn purchased certain of those properties from Mr Blaize. Later, Selwyn re-sold those properties to others ("the residential owners") at a total profit of $320,000.

8. Consequentially upon their decision that the 1984 deed should be set aside, the Court of Appeal made an order requiring Selwyn to pay Jude's estate $620,000 (ie $300,000 plus $320,000) on the basis that this constituted unjust enrichment of Selwyn at the expense of Jude.

9. Selwyn now appeals to the Board. He submits that there was no proper basis on which the Court of Appeal could disturb the judge's finding of fact that the 1984 deed was not made as the result of a mistake by Jude; that even if the Court of Appeal was right to set aside the judge's finding of fact, in reassessing the facts they should themselves have concluded that Jude made no mistake; and that even if the Court of Appeal were right to find that the 1984 deed was made as a result of a mistake, they were wrong to award any relief, alternatively that the relief should have been limited to payment of $300,000, representing the price Selwyn had received for the land from Mr Blaize.

10. Flora, representing Jude's estate, has not participated in this appeal, whether by written or oral submissions. She has been content to rest upon the judgment of the Court of Appeal.

11. It is a striking feature of this case which cannot pass without comment that Mr Blaize has also acted as counsel for Selwyn throughout these proceedings. Depending on how the argument in the case might have developed at various stages, Mr Blaize's own personal interest was potentially engaged by the claim brought by Jude. On one potential avenue of legal analysis, adumbrated in Jude's statement of claim, Jude might also have had a claim directly against Mr Blaize to recover the Land (see paras 54-55 below). The Court of Appeal noted that Mr Blaize's own interest was engaged and rightly disapproved of Mr Blaize's decision to act as counsel for Selwyn: para 52. The Board agrees. It is only because no such claim remains open to Jude's estate at this final stage of the appeal to the Board that the Board did not consider it necessary to raise a similar objection to Mr Blaize's involvement in presenting the appeal for Selwyn.

Factual background

12. Milton died on 4 September 1982, leaving a will under which Republic Bank Ltd ("Republic Bank") was appointed to be executor and trustee. At his death, Milton owned an extensive range of properties. He had allowed Selwyn to occupy and use the Land for many years and this was permitted to continue after Milton's death.

13. Shortly after Milton died, the will was read out to a family gathering comprising Jude and most of his children. By the will, Milton made bequests to various family members. These included a bequest of property at 74B Anna Street, Arima to Selwyn and bequests of eight other properties to others of his children. The residue of Milton's estate was left to Jude. The residuary estate included the Land. It is unclear exactly what other property was contained in the residuary estate, but the evidence of Flora was to the effect that it included other items of real property and there was no finding in the courts below that the real property in the residuary estate was limited to the Land.

14. On 17 March 1983 Republic Bank renounced its position as executor. On 21 September 1984 Jude was granted letters of administration to act as Milton's personal representative and as executor of his will in place of Republic Bank.

15. In the course of 1984 Jude gave effect to the various bequests in Milton's will by transferring the relevant properties to Milton's named children, including Selwyn.

16. On 12 October 1984 Jude made the 1984 deed to convey the Land to Selwyn. The 1984 deed took the form of a deed of assent to release the Land to Selwyn, registered as deed 19914 of 1984. The significance of the form of the 1984 deed requires a little explanation.

17. Under the law of Trinidad and Tobago, the method by which a personal representative of a deceased person who has been granted probate transfers property to the beneficiary of a bequest in the will of the deceased is by a deed of assent: section 12(1) of the Administration of Estates Act, Chapter 9:01. This releases the property from probate directly to the beneficiary, giving effect to the direction of the testator. This process is entirely distinct from a mechanism whereby the person granted probate who is also named as a legatee of property under the will may first release that property to themselves by a deed of assent to give effect to the direction in the will and then may execute a deed of transfer of that property in their own right to convey title in it to another. In the first case, the deed of assent gives effect to a direction in the will. In the second, the deed of assent has the effect that the

property becomes owned by the person who is executor in their own right, in accordance with the testator's direction in the will, and the later deed of transfer constitutes a conveyance by them of what is then their own property to the other person.

18. The judge rightly recognised that the 1984 deed took the form of a deed of assent. It was stated to be made between Jude as "the Legal Personal Representative of [Milton] deceased (hereinafter called the Representative)" and Selwyn, "hereinafter called the Beneficiary".

19. Recital (1) in the 1984 deed referred to Milton's will "whereby he … gave bequested and devised unto the Beneficiary the lands and hereditaments described in the Schedule hereto". The Schedule set out a description of the Land. Recital (2) set out the matters at para 14 above. Recital (3) stated that all expenses in relation to the administration of Milton's estate had been paid; it continued, "the Representative is desirous of consenting to the conveyance of the said lands and hereditaments unto the Beneficiary …". The operative part of the deed stated:

> "… in pursuance of the said desire and in consideration of the premises and by virtue of the Administration of the Estates Ordinance Chapter 8 No. 1 and all the other powers her enabling the Representative hereby conveys unto the Beneficiary … the said lands and hereditaments described in the Schedule hereto …".

20. There are a number of odd and significant features of the 1984 deed which are discussed below. The 1984 deed was registered but Selwyn was not told about it.

21. On 9 October 1985 Jude made another deed, conveying the Land to herself ("the 1985 deed"). This was stated to be a "Deed of Assent" between Jude as "the Legal Personal Representative of the Estate of [Milton] deceased (hereinafter called 'the Administratrix')" and Jude "as sole beneficiary (hereinafter called 'the Beneficiary')". The Schedule to the 1985 deed set out a description of the Land. The deed contained recitals referring to Milton's will, explaining that the residuary estate comprising the hereditaments set out in the Schedule to the deed had been left to her and setting out how Republic Bank had been replaced by Jude as Administratrix of Milton's estate. Recitals (4) and (5) were in similar form to Recital (3) of the 1984 deed, but stated that Jude as Administratrix was desirous of conveying the Land to herself as beneficiary in fee simple. Recital (5) also contained a statement that "the Administratrix as residual legatee is the only person entitled to the said

hereditaments comprised in the estate of [Milton]", ie the Land. The 1985 deed was also registered.

22. Selwyn continued to make use of the Land with Jude's knowledge and consent.

23. On 3 August 1993 Jude mortgaged the Land to Republic Bank as security for a loan ("the 1993 mortgage"). On 22 April 1994 Republic Bank made a deed to release the mortgage and reconvey the Land to Jude ("the 1994 release").

24. In 1999 Jude put the Land up for sale. Selwyn was interested in buying it so he examined the land register, where he discovered that Jude had made the 1984 deed. Selwyn believed that the 1984 deed took effect to make him the owner of the Land and gave him the right to sell it.

25. Selwyn sold the Land to Mr Blaize in 2001 for $300,000 and conveyed it to him by two deeds. It is not in dispute that Mr Blaize was a bona fide purchaser of the legal estate without notice of any interest of Jude. It is unclear what attitude Jude took to this transaction, but she brought no legal proceedings to prevent it happening.

26. Mr Blaize divided the Land into 17 lots and built houses on some of them. He proceeded to sell the lots to third parties, either for development or as fully developed. Lot 11 was sold to Mr Clive Gill for development.

27. In 2004 Mr Blaize sold Lots 13 to 17 to Selwyn for $600,000. Lots 13 to 16 had houses built on them. Lot 17 was an empty plot next to Lot 16.

28. Between 2005 and 2008 Selwyn sold Lots 13 to 16 to the residential owners for a total sum of $920,000, ie at a profit of $320,000. Lot 17 was conveyed to the residential owners who purchased Lot 16, so the courts below identified these lots together as Lot 16.

29. By reason of ill health, on 4 September 2006 Jude executed a wide-ranging power of attorney in favour of Flora.

30. In 2008 Mr Gill was seeking to raise finance to develop Lot 11 and his bank queried his title. His lawyers wrote to Jude asking for her confirmation that he was

the true owner of Lot 11. When that was not forthcoming, Mr Gill commenced proceedings in 2009 against Jude to clarify the position.

31. Jude eventually settled Mr Gill's claim and confirmed his title, but in turn (as Ancillary Claimant) she joined Selwyn in the proceedings in March 2013 as Ancillary Defendant claiming various forms of relief against him, including setting aside the 1984 deed in equity and orders consequential upon that as "further and/or other relief". Thereafter the proceedings continued as a claim by Jude against Selwyn. (In the Court of Appeal Selwyn tried to introduce a new defence by maintaining that the claim against him had been brought by Flora pursuant to the power of attorney and challenging its validity, but at para 17 these contentions were rejected by the Court of Appeal and they are not pursued before the Board).

32. Selwyn raised various defences against Jude's claim. These included a denial that the 1984 deed had been made by mistake, a plea there had been undue delay by Jude in asserting any rights she had in relation to the Land while Selwyn dealt with it, and a plea that Selwyn had acquired title to the Land by adverse possession by his occupation of it for more than 16 years. He counterclaimed for declaratory relief that the 1984 deed was binding and effective.

The proceedings in the courts below: the first instance judgment

33. At trial, as the judge accepted, Jude was too elderly and unwell and had too little memory to be able to give evidence as to why she had made the 1984 deed and the 1985 deed and why she had dealt with the Land in other ways. Instead, Flora and others gave evidence in support of Jude's claim. But, as the judge noted, none of them had knowledge of Jude's reasons for making the 1984 deed. This was, therefore, a somewhat unusual case in which the person who had made a deed which was sought to be impugned on grounds of mistake was not in a position to give evidence in person about that.

34. Although Jude disputed the extent to which Selwyn had occupied and used the Land before and after Milton's death, the judge accepted Selwyn's evidence about this. However, the judge dismissed Selwyn's claim to have acquired title by adverse possession, since he had occupied the Land with consent: para 40.

35. Among the many points to which Jude's statement of claim appeared to give rise was a contention that the 1984 deed could not take effect in law by reason of the legal regime referred to in para 17 above. However, as the case was developed at

trial by counsel for Jude, the principal focus was on whether Jude had made the 1984 deed by mistake so as to be entitled to relief in equity.

36. The judge accepted that if Jude had wished to convey the Land to Selwyn as a gift, the proper procedure would have been for her to make a deed of assent of the Land to herself as the relevant beneficiary under Milton's will and then to make an ordinary deed of conveyance of the Land (as her own personal property) to Selwyn. However, he held that the failure to follow that procedure did not invalidate the 1984 deed or the conveyance to which it gave effect: para 36.

37. Counsel for Jude submitted that the contents of the 1984 deed showed that Jude had been acting under a mistake when she made it. The deed was a deed of assent in a form appropriate for giving effect to a bequest of the Land in Milton's will to Selwyn, but no such bequest had been made. Counsel maintained that Jude must have made a mistake at the time she made the 1984 deed, in that she thought that under Milton's will the Land was bequeathed to Selwyn whereas in fact it was bequeathed to her as residuary legatee.

38. The judge dismissed this contention. At para 34 he said (correctly) that the court was entitled to go behind the recitals to the 1984 deed to ascertain the true facts; he also placed weight on the fact that Recital (3) said that Jude was desirous of conveying the Land to Selwyn. At para 35, the judge noted that the indications in the 1984 deed that Selwyn was the beneficiary of Milton's will in relation to the Land, rather than Jude, were "clearly not accurate"; but he said that Jude nonetheless "unilaterally and without coercion elected" to deprive herself of her interest in the Land and to convey the beneficial interest in it to Selwyn. He continued: "There was no evidence adduced before the court that could have led the court to conclude that the [1984 deed] was executed as a result of a mistake of fact …". He made a similar point in para 36: "There is no evidence that can lead the court to conclude that [at] the material time [Jude] was unaware that she was the actual legatee of [the Land] as the wording of the will was quite clear and unequivocal."

39. At para 37 the judge again said that Jude "voluntarily elected to divest herself of the interest in [the Land]". He also referred to the 1985 deed, but only to make the point that, consequent upon his analysis about the validity and effect of the 1984 deed, at the time the 1985 deed was made Jude no longer had authority to deal with the Land.

40. At para 38 the judge observed that the court had not had the benefit of having Jude testify. He accepted the evidence of Flora and one of her sisters that Jude was unable to give evidence because she was in poor health and her memory

was very poor (Jude had suffered a stroke in 2007). Accordingly, he said that he was not prepared to draw an adverse inference from the failure of Jude to give evidence; but he also concluded that the evidence given on her behalf was deficient and that he was not able to conclude on the balance of probabilities that she had acted by mistake when she made the 1984 deed. The judge said: "The court had no evidence as to the reasons why she executed the [1984 deed] … The court also had insufficient evidence as to [Jude's] state of mind when the [1985 deed] was executed so as to lead it to conclude that [the] same was done as a clear and unequivocal act that demonstrated that the [1984 deed] was executed in error." The judge also dismissed an alternative claim by Jude that a trust existed (this has not been pursued and it is not necessary to consider this further).

41. On the other hand, the judge did not accept Selwyn's defence that there had been undue delay by Jude in asserting her rights (ie laches), observing that it had not been properly pleaded, even though there might have been grounds for such a plea: para 39.

42. The outcome was that the judge dismissed Jude's claim and made a declaration that by virtue of the 1984 deed the interest in the Land was properly vested in Selwyn.

The judgment of the Court of Appeal

43. Jude appealed. She died before the hearing and the appeal was maintained by Flora on behalf of her estate. Selwyn did not cross-appeal or file a respondent's notice to raise the points on which he had lost at trial, ie undue delay and acquisition of title by adverse possession.

44. Counsel for Jude made it clear to the court that the estate did not seek to challenge the validity of the conveyances by Selwyn to Mr Blaize or the residential owners. The submissions for Jude were focused on her case that the 1984 deed had been made by her acting under a mistake of fact, in that at the time she made the deed she mistakenly believed that Selwyn was entitled to receive the Land as a bequest under Milton's will.

45. The court itself raised with Mr Blaize, counsel for Selwyn, what the consequences would be if it decided that the 1984 deed had been made by Jude by mistake. Mr Blaize was asked about the extent of unjust enrichment Selwyn would have received on that basis. While maintaining submissions that because of Mr Blaize's own acquisition of the Land in 2001 the 1984 deed could not be rescinded

and also that Jude had not pleaded a proper case for recovery of money from Selwyn, Mr Blaize made an alternative submission that the recovery which Jude should receive should be limited to $300,000, the price he had paid Selwyn for the Land. Mr Blaize, for Selwyn, had a fair opportunity to deal with this issue in his submissions.

46. In her judgment, Jones JA identified the first issue for the court as whether the judge had been right to reject Jude's case that the 1984 deed was made by reason of a mistake. She set out a number of errors by the judge. At para 24 she said that the judge was of the opinion that to find in Jude's favour on the issue of mistake he was required to have direct evidence of her state of mind at the time she made the 1984 deed; but the correct approach should have been that in the absence of such evidence the judge was required to make an overall assessment of the whole of the evidence to see what light it shone on Jude's intention, which he had not carried out. Similarly, at para 25, Jones JA said the judge was in error when he determined that there was no evidence that could lead him to conclude that Jude was unaware that she was the actual legatee of the Land, since the 1984 deed by purporting to convey the Land to Selwyn as beneficiary was itself evidence of that; the judge had erred by failing to assess what weight to put on that evidence and what inference should be drawn from it.

47. Also, at paras 26 and 30, Jones JA held that the judge erred in arriving at the conclusion that Jude "elected" to convey her beneficial interest to Selwyn, in that the judge in effect drew an adverse inference from the fact that Jude did not give evidence herself (although, given his acceptance of the reasons given by Jude for not giving evidence, he should not have done so), since there was no evidence that Jude had "elected" to convey her own beneficial interest in the Land to Selwyn and indeed the 1984 deed said that the transfer was pursuant to a disposition in the will (ie was not made by way of a free gift from Jude to Selwyn). Again, Jones JA found that the judge had failed to make an overall assessment of Jude's state of mind based on an examination of all the relevant evidence.

48. At para 31 Jones JA said that the judge had asked himself the wrong question, by focusing on why Jude executed the 1984 deed (which, in the absence of evidence from Jude, would have been pure speculation), whereas he should have asked whether the evidence taken as a whole indicated that Jude intended to transfer her beneficial interest in the Land to Selwyn or showed that at the time of the transfer she was acting under a mistake. The judge had failed to address that question in his judgment. The Board understands the point made by Jones JA here to be in line with the same theme she had developed in the earlier passages in her judgment: the judge focused to an excessive degree on the difficulties posed by an absence of testimony from Jude, and failed to stand back and make an overall assessment in the

light of all the evidence of whether by making the 1984 deed Jude had intended to make a gift of the Land to Selwyn (appreciating that she was the person entitled to it under the will) or had made a mistake and had thought at the time that Selwyn was entitled to it under the will.

49. For these reasons, Jones JA concluded that the judge had erred in his approach and had failed to make the assessment in the light of all the evidence which the case required. Therefore, at para 32, citing *Thomas v Thomas* [1947] AC 484, 487-488, she observed that the matter fell for the assessment of the Court of Appeal. She directed herself by reference to the principles explained by Lord Hodge, for the Board, in *Beacon Insurance Co Ltd v Maharaj Bookstore Ltd* [2014] UKPC 21; [2014] 4 All ER 418. She observed (paras 20 and 32) that since the evidence of the primary facts was undisputed the Court of Appeal was as well placed to draw inferences from those facts as the judge and hence should make its own assessment on the balance of probabilities.

50. At para 33, Jones JA identified five elements of undisputed evidence capable of giving some insight into Jude's intention with respect to the disposition of the Land in 1984: (i) the 1984 deed purported to transfer the Land to Selwyn as though he was entitled to it under Milton's will when he was not; (ii) the 1985 deed made by Jude in accordance with Milton's will sought to vest the Land in Jude as the residuary beneficiary under the will; (iii) the 1993 mortgage and the 1994 release; (iv) the attempted sale of the Land by Jude in 1999; and (v) the fact that Selwyn was not informed of the existence of the 1984 deed and only learned of it some 15 years later, when Jude put the Land up for sale.

51. Elements (ii) to (iv) indicated that from 1985 Jude believed that she was the person entitled to the Land. At para 34 Jones JA observed that, looking at the evidence as a whole, two inferences might be drawn: either Jude made the 1984 deed intending to transfer the Land to Selwyn (ie as a gift) and changed her mind, or the 1984 deed transferred the Land to Selwyn by mistake.

52. At paras 35-37 Jones JA made the overall assessment on the balance of probabilities, having regard to all the relevant evidence, which she considered the judge had failed to carry out. Jones JA concluded that the appropriate inference was that Jude had made the 1984 deed by mistake, thinking that there had been a bequest of the Land to Selwyn in Milton's will and failing to appreciate that in fact it formed part of Milton's residuary estate which had been left to her. In making her assessment, Jones JA emphasised a number of points: (i) the terms of the 1984 deed indicated that when Jude executed it she was under the mistaken impression that it related to land that had been left to Selwyn by Milton and that in executing it she

was complying with her responsibility as Milton's legal personal representative; (ii) a reading of the 1984 deed along with the 1985 deed indicated that her intention was not to make a gift of the land which was due to come to her as part of Milton's residuary estate, since the terms of the 1984 deed showed that she was acting because directed so to act by Milton's will (ie not as a result of a free election by her at all) and by the 1985 deed of assent she transferred the Land to herself as the person entitled to the residuary estate of Milton; (iii) by mortgaging the Land in 1993 and putting it up for sale in 1999 she treated it as hers; and (iv) Jude never told Selwyn that she had transferred the Land to him (the point being that this would be very odd if Jude had in 1984 in fact intended to make a gift to Selwyn of property to which she was entitled, whereas if she thought that she was simply giving effect to a direction in Milton's will there would have been no need to mention it, since Selwyn knew the terms of the will).

53. Jones JA directed herself by reference to *Ogilvie v Littleboy* (1897) 13 TLR 399, CA, and *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 and concluded that the mistake by Jude in making the 1984 deed was so grave that it would be unconscionable and unjust to leave it uncorrected and refuse relief: paras 39-42. She observed (para 45) that under normal circumstances an order that the 1984 deed be set aside and the Land returned to Jude would suffice, but rescission of this kind was not possible because of the intervention of the rights of third parties not joined in the action who, moreover, were bona fide purchasers for value without notice. Instead, relief should be given on the basis of Selwyn's unjust enrichment, in that he had been enriched by the receipt of a benefit, at Jude's expense and it would be unjust to allow him to retain that benefit: paras 47-48. A claim for such relief was covered by Jude's prayer for "further and/or other relief" in her statement of claim: para 49. In Jones JA's view, the unjust enrichment of Selwyn was to be valued not at $300,000, the price which he had initially received from Mr Blaize for the Land, but at $620,000, ie including the additional profit Selwyn made from his acquisition of Lots 13 to 17 from Mr Blaize and their resale to the residential owners: paras 50-51. Accordingly, the court made an order for Selwyn to pay Jude this sum.

The Board's assessment

54. The 1984 deed was clearly in the form of a deed of assent, as the judge recognised. The recitals set out in the deed made that clear, as did the way in which it identified Jude as acting as the personal legal representative for Milton and identified Selwyn as beneficiary (ie under Milton's will). The deed purported to give effect to a direction in Milton's will.

55. As such, the 1984 deed gave assent to the transfer of the Land to a person (Selwyn) who was not the correct legatee according to the terms of the will. At an early stage in the proceedings Jude's case seemed to include a contention that section 12(1) of the Administration of Estates Act had the effect that the 1984 deed was ineffective to convey legal title in the Land to Selwyn. If correct as a matter of analysis, this could also have exposed Mr Blaize to a possible claim by Jude to recover parts of the Land held by him or other forms of relief in relation to the parts he had sold on. This is one reason why Mr Blaize's own personal interest was closely engaged in the case, making it inappropriate for him to act as counsel for Selwyn. However, it appears from the judge's judgment that this line of analysis was not pursued, or not pursued with any vigour, before him. The principal argument for Jude proceeded on the footing that the 1984 deed was effective to convey legal title in the Land to Selwyn and sought to have the deed set aside in equity on the ground of mistake. In the Court of Appeal, counsel acting for Jude disclaimed any contention that Mr Blaize had not obtained legal title, thereby accepting also that Selwyn had indeed obtained legal title to the Land by virtue of the 1984 deed. Again, the argument for Jude in the Court of Appeal was that the 1984 deed had been made by her by mistake and ought to be set aside in equity.

(i) Error by the judge

56. The first issue on the appeal is whether the Court of Appeal was entitled to find that the judge erred in finding that in making the 1984 deed Jude did not act under a mistake of fact. The Court of Appeal correctly directed themselves regarding the strict test which has to be satisfied before a finding of fact by a trial judge can be set aside. As Lord Hodge for the Board explained in *Beacon Insurance Co Ltd v Maharaj Bookstore Ltd* [2014] UKPC 21; [2014] 4 All ER 418, in his review of the authorities at paras 11-17, an appeal court will be very slow to reverse the decision of the trial judge on a point of fact and will not do so unless the appellant can show that the judge was plainly wrong; but (per Lord Hodge at para 17) in making its assessment it is relevant that, as in the present case, what is in issue is an inference drawn from undisputed primary facts.

57. In the Board's view, the Court of Appeal was correct to find that the judge had erred in his approach. This is essentially for the reasons given by Jones JA. There were a number of aspects of the undisputed evidence in the case which indicated that Jude acted under a mistake when she made the 1984 deed, but the judge failed to stand back and make an assessment of the critical factual issue in the case by taking these points into account and weighing them as part of an overall evaluation of all the relevant evidence. He was also unduly influenced by the failure of Jude to give evidence herself, even though he had accepted that she had good reasons for not doing so.

58. The Board considers that each of the critical paras 34 to 38 of the judge's judgment indicates errors of approach. In para 34 he attached weight to the statement in the 1984 deed that Jude was desirous of conveying the Land to Selwyn although he was not the relevant beneficiary under Milton's will; this appears to be the basis for the judge's assertion in para 35 that Jude "unilaterally and without coercion elected" to deprive herself of her interest in the Land and convey it to Selwyn. But, with respect, this is to misread the 1984 deed. It did not contain any expression of desire on Jude's part to make a unilateral gift to Selwyn; on the contrary, the deed itself explained that she desired to convey the Land to Selwyn because she understood that to do so would be to comply with a direction in Milton's will, which was her obligation as Milton's personal legal representative.

59. In para 35 the judge said that Jude "elected not to assent the property to herself", "elected to deprive herself" of her interest in the Land under the will, and "elected to convey the beneficial interest in [the Land] to [Selwyn]". This demonstrates the same misreading of the 1984 deed and assumes the very point in favour of Selwyn which in fact required an overall evaluative assessment to be made: did Jude act freely to make a gift of her interest in the Land to Selwyn, or did she act under a mistake, believing that the will contained a bequest of the Land in favour of Selwyn, as the 1984 deed stated in terms? This feature of para 35 bears out the criticism made by the Court of Appeal. In addition, para 35 contained the positive statement that "[t]here was no evidence … that could have led the court to conclude that the [1984 deed] was executed as … a mistake of fact". This was plainly incorrect, as there were several aspects of the evidence which supported that inference, as summarised by the Court of Appeal at para 33 (see para 50 above). Again, this shows that the judge failed to embark upon the overall assessment of all the evidence bearing on the issue of mistake, as he should have done.

60. Of course, as was observed by Lord Hoffmann in *Biogen Inc v Medeva plc* [1997] RPC 1, 45 (cited in *Beacon Insurance Co Ltd v Maharaj Bookstore Ltd*, para 16), "[t]he need for appellate caution in reversing the judge's evaluation of the facts is … because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation." It is not incumbent on a judge to spell out in his judgment every point which may have made some impact in his assessment of the facts and an appellate court should read the judgment with a degree of benevolence in the light of this, not with a view to combing through it in fine detail to identify errors. But it is one thing to read a judgment with a degree of benevolence in this way and quite another to ignore clear errors of approach by a

trial judge and clear statements by him that show he has omitted to bring relevant evidence into account. In the Board's view, the present case falls into the latter category of case.

61. Para 36 further demonstrates the same error of approach as appears from para 35. The judge made the positive statement that "[t]here is no evidence that can lead the court to conclude that [at] the material time … [Jude] was unaware that she was the actual legatee of the D'abadie lands as the wording of the will was quite clear and unequivocal". This again shows that the judge failed to stand back and assess the countervailing features of the evidence that plainly *were* capable of supporting the inference that Jude acted on the basis of a mistake. Moreover, the judge's assessment of what could be taken from the terms of the will was overstated. It did not refer in terms to the Land, only to the residuary estate, and there was no evidence that Jude had the will before her when she made the 1984 deed or indeed at any time after it had been read to her shortly after Milton's death in 1982.

62. At para 37 the judge repeated the point that Jude "voluntarily elected to divest herself of the interest in [the Land]": for the significance of this, see above. The judge also referred to the 1985 deed, but only to make the point that by then, on his analysis, Jude had no power to deal with the Land: see para 39 above. He did not make any attempt to weigh the significance of the 1985 deed in relation to the factual issue which required determination, namely whether Jude acted under a mistake when she made the 1984 deed. Nor did the judge mention the 1993 mortgage, the 1994 release and Jude's putting the Land up for sale in 1999, all of which were only consistent with a belief on Jude's part that she was the true owner of the Land and were inconsistent with a belief that she had made a gift of the Land to Selwyn.

63. Para 38 also reveals flaws in the judge's approach. The Board agrees with the Court of Appeal that by beginning from an assumption in Selwyn's favour regarding Jude's "election" to gift the Land to him, rather than making an evaluative assessment whether that was supported by the evidence overall, the judge in effect drew an unjustified inference against Jude based on her failure to testify to explain why she had made the 1984 deed. This is also supported by the judge's statements in para 38 that "the evidence presented on behalf of [Jude] was deficient"; that the court "had no evidence as to the reasons why she executed the [1984 deed]"; and that the court "had insufficient evidence as to [Jude's] state of mind when the [1985 deed] was executed so as to lead it to conclude that [the] same was done as a clear and unequivocal act that demonstrated that the [1984 deed] was executed in error". The judge was again in error in stating that there was no evidence as to the reasons why Jude executed the 1984 deed, which further demonstrates his failure to make

an overall assessment in light of all the evidence bearing on that issue: see above. The judge was also in error in stating that the relevance of the 1985 deed was whether it showed in a "clear and unequivocal" manner that the 1984 deed was made by mistake. That was to misstate the test to be applied in a way which unduly favoured Selwyn. Instead, the judge should have asked what the 1985 deed indicated on the balance of probabilities was Jude's state of mind when she made the 1984 deed, when weighed alongside all the other relevant evidence bearing on the question of mistake.

64. As a further indication that the judge failed to carry out the overall assessment which was needed, he failed altogether to refer to the oddity of the situation which would have arisen if Jude really had intended to make a personal gift of her interest in the Land to Selwyn, but omitted to mention this to him.

(ii) Was the Court of Appeal entitled to conclude that Jude acted under a mistake

65. In the Board's view, having set aside the judge's judgment, the Court of Appeal was entitled to find that Jude had made the 1984 deed under a mistake, for the reasons given by them. There were several important indications from the undisputed primary facts, as identified by the Court of Appeal, which supported the drawing of the inference that when Jude made the 1984 deed she was acting under a mistake. The Board agrees with the assessment of the Court of Appeal. Given that there was no possibility of Jude herself giving evidence and that the case necessarily turned on an evaluation of the inference to be drawn from undisputed primary facts, the Court of Appeal was entitled to, and was right to, determine the matter itself without remitting the case to the lower court for a retrial.

66. The Court of Appeal was also plainly entitled to hold that the mistake involved was so serious as to warrant the setting aside of the 1984 deed in equity under normal circumstances, under the doctrine explained in *Ogilvie v Littleboy* and *Pitt v Holt*, and to seek to grant appropriate relief to take account of the particular circumstances of the case. The Board has heard no argument to question the conclusion of the Court of Appeal that rescission in this case was barred. The court confined its analysis to a claim by Jude in unjust enrichment at common law and it is unnecessary to consider other possibilities (cf Dominic O'Sullivan, Steven Elliott and Rafal Zakrzewski, *The Law of Rescission* (2nd edn, 2014), para 20.23).

(iii) Other defences

67. Mr Blaize, for Selwyn, argued that the Court of Appeal acted unfairly by deciding that Jude had a good claim for recovery in unjust enrichment. However, the issue of mistake had been pleaded (and was indeed central to Jude's case) and the court was entitled to find that relief in respect of unjust enrichment was sufficiently covered by Jude's pleading. As observed above, they gave Mr Blaize a fair opportunity to deal with this aspect of the case at the hearing before them.

68. In his submissions to the Board, Mr Blaize accepted that the usual legal framework for a claim based on unjust enrichment is applicable, citing *Samsoondar v Capital Insurance Company Ltd* [2020] UKPC 33; [2021] 2 All ER 1105, para 18 (Lord Burrows): a claimant must prove that the defendant has been enriched, that the enrichment was at the claimant's expense, and that the enrichment was unjust; and any such claim is subject to defences which may be available to a defendant. Mr Blaize accepted that if the conveyance of the Land to Selwyn was made by mistake, as the Board holds it was, this constituted a factor to show that for the purposes of such a claim the enrichment was unjust (cf *Kelly v Solari* (1841) 9 M & W 54). Although Selwyn had conveyed the Land to Mr Blaize, he received money ($300,000) in return, and to that extent Mr Blaize accepted that Selwyn had been enriched. He also did not dispute that this element of enrichment was at Jude's expense.

69. However, in addition to submitting that Jude's claim that she had acted under a mistake should fail, Mr Blaize contended that the profit of $320,000 which Selwyn realised from purchasing Lots 13 to 17 back from Mr Blaize and then selling them to the residential owners did not constitute unjust enrichment of Selwyn at the expense of Jude. Mr Blaize also sought to raise before the Board the defences based on undue delay and adverse possession which had been the subject of rulings by the judge at first instance. Mr Blaize contended that the Court of Appeal had erred by failing to consider these defences before reaching their conclusion that Jude's claim for recovery in unjust enrichment should succeed.

70. So far as concerns the defences of undue delay and adverse possession, the Board does not accept these submissions. These were points on which Selwyn lost at first instance, which were not raised by him by way of a respondent's notice on the appeal to the Court of Appeal and which were not the subject of any ruling by that court. In these circumstances, there was no error by the Court of Appeal and Selwyn is not entitled to seek to rely on these points on his appeal to the Board. The question of the extent of Selwyn's unjust enrichment is addressed in the following section.

(iv) The relief granted by the Court of Appeal

71. The Board has, however, reached the conclusion that the Court of Appeal erred in the extent of the relief which they granted. The true extent of Selwyn's unjust enrichment is only $300,000 (the price he obtained when he sold the Land), not $620,000 (ie that sum of $300,000 plus the $320,000 profit) as identified by the Court of Appeal.

72. Selwyn was enriched by the transfer of the Land to him in 1984 by the 1984 deed and Jude could in theory have maintained a claim in unjust enrichment against him from that time, with the enrichment being measured by the value of the Land which Selwyn received (in old-fashioned Latin legal terminology, a claim for a quantum valebat). When Selwyn learned of the transfer to him, he sold the Land to Mr Blaize in an arm's length transaction at the price of $300,000. Accordingly this is a fair indication of the value of the Land and is an appropriate yardstick for the extent of Selwyn's enrichment. Jude did not seek to introduce any other evidence of the value of the Land.

73. The position thereafter is very different. When Selwyn purchased Lots 13 to 17 back from Mr Blaize he did so in a completely distinct arm's length transaction, whereby he made a fresh acquisition of the title to those parts of the Land. Selwyn's onward sale of these lots to the residential owners was the result of further arm's length transactions with them. It is arguable that neither the purchase from Mr Blaize nor the sale to the residential owners could be said to be affected by Jude's original mistake in conveying the Land to Selwyn in 1984, but in any event his enrichment by way of the profits from these transactions was not at the expense of Jude in the required direct sense: see *Investment Trust Companies v HM Revenue and Customs* [2017] UKSC 29, [2018] AC 275, paras 32-74, and *Prudential Assurance Company Ltd v HM Revenue and Customs* [2018] UKSC 39, [2019] AC 929, paras 68-80. On the contrary, Selwyn made the profits by selling his own property, acquired by him at arm's length from Mr Blaize. Accordingly, Jude's claim in unjust enrichment cannot be sustained in relation to the profits of $320,000.

Conclusion

74. For these reasons, the Board allows the appeal to the extent of reducing the sum recoverable by Jude to $300,000, but otherwise it is dismissed.

LORD BURROWS AND LADY ROSE (DISSENTING):

75. We have read the judgment of Lord Sales (as agreed with by Lord Kitchin and Lord Lloyd-Jones) and are most grateful to him for setting out the factual background

to this dispute with such clarity. We will not repeat those facts. However, with respect, we do not agree with his central reasoning and decision. In our view, the Court of Appeal (Jones JA, with whom Bereaux JA and des Vignes JA agreed) was not entitled to overturn the essential finding of fact of the trial judge (Seepersad J) that Jude Moses had not proved on the balance of probabilities that she made a mistake (of fact) when she transferred the D'abadie land ("the Land") to Selwyn Moses.

76. We would stress at the outset that, as explained at para 55 in the judgment of Lord Sales, the Board is not concerned with the question whether, irrespective of any mistake by Jude Moses, the 1984 deed might have been challenged as ineffective to convey legal title in the land to Selwyn Moses (because, for example, Jude Moses as executor had no power to make that deed).

77. The Board is here dealing with a finding of fact made by the first instance judge (ie that Jude Moses had not proved that she made the alleged mistake). We are not dealing with a question of law and we are not dealing with the application to the facts of a legal standard requiring an evaluative decision (such as the application of the standard of reasonable care in the tort of negligence). It is not in dispute that, in relation to a finding of fact, an appellate court should be slow to reverse the decision of the trial judge: see, for example, *Beacon Insurance Co Ltd v Maharaj Bookstore Ltd* [2014] UKPC 21, [2014] 4 All ER 418, paras 11-18. It is also not in dispute that one possible way of expressing this caution, as Jones JA recognised at para 18 of her judgment, is to say that the trial judge should be overturned only if he or she was "plainly wrong" (see the *Beacon* case at para 12; cf *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911, at para 44). In our view, in this case, contrary to the view of the Court of Appeal, the trial judge was not "plainly wrong".

78. As Jones JA in the Court of Appeal correctly indicated (at paras 20, 21, 31 and 34), there are two possible analyses of what Jude Moses was doing when she made the 1984 deed: either she was intending to make a gift to Selwyn Moses of the Land, which had been left to her by Milton Moses as part of his residuary estate, and then subsequently changed her mind; or she was making a mistake incorrectly believing that Selwyn Moses was entitled to the Land under the will of Milton Moses. Put shortly, she was either making a gift with full knowledge of what she was doing; or she was making a mistake as to the content of the will. The decision as to which of those two analyses is correct is a question of fact not law.

79. Clearly the burden of proof in relation to the mistake was on Jude Moses as the claimant (albeit that, strictly speaking, because a separate claim was being brought against her, with which we are not concerned, her claim for mistake was an

ancillary claim and she was therefore referred to at first instance as the "ancillary claimant"). She was required to prove on the balance of probabilities that the transfer of the Land to Selwyn Moses was made by mistake. The decision of Seepersad J was that she had not proved on the balance of probabilities that a mistake had been made (see para 38 of his judgment): the claim based on mistake therefore failed.

80. A central aspect of the evidence relied on by Seepersad J – and it should be noted that this was not mentioned by Jones JA in her summary of the evidence at para 33 – was that the will of Milton Moses was "clear and unequivocal" that the Land had been left to Jude Moses. He stressed this twice in his judgment at paras 23 and 38. The clarity of the will, plus the supporting evidence referred to in the next paragraph - not least Jude Moses' role as personal representative – indicates, as the trial judge decided, that there was a need for direct evidence from Jude Moses (which was not available) in order for her to prove, on the balance of probabilities, that she made a mistake as to the content of the will.

81. There is supporting evidence (ie in addition to the clarity of the will) that it was unlikely that Jude Moses was mistaken as to the content of the will. First, as expressly adverted to by Jones JA at para 3 – and as set out in the witness statement of Flora Moses – after Milton Moses' death in 1982 there was a meeting attended by the beneficiaries, including Jude, Flora and Selwyn, at which the will was read out by a representative of Republic Bank Ltd (the then executor). Secondly, in taking over the role of executor from September 1984 (after the withdrawal of Republic Bank Ltd) Jude Moses, as the personal representative of Milton Moses, had a legal duty to ensure that the bequests in his will were effected. Thirdly, the estate left by Milton Moses was substantial being valued at over $3 million. The will included pecuniary bequests to five named legatees of $50,000 each and bequests of no fewer than nine different houses at specified addresses to Milton Moses' various children including a bequest of 74B Anna Street, Cleaver Rd, Arima to Selwyn Moses. There is nothing at all to indicate that any of those bequests was not properly administered by Jude Moses, including the bequest of 74B Anna Street to Selwyn Moses. It should be noted that, according to Jones JA's judgment at para 4, those transfers of land were also (ie in addition to the making of the 1984 deed) carried out in 1984 although we do not know precisely when in that year. Jude Moses must surely have made herself very familiar with the terms of the will in order to give effect to Milton Moses' detailed and carefully expressed wishes. It is unlikely (and indeed highly implausible) that she made such a fundamental mistake as to think that Milton had left a substantial additional gift of what was undeveloped land to Selwyn Moses given the clarity of the will and the fact that he had left no such additional land to any of his other children.

82. While it is obviously correct that the 1984 Deed misdescribed the contents of the will – in particular, it referred to Selwyn Moses as having been entitled as a beneficiary to the Land under Milton's will – Seepersad J made express reference to those inaccuracies at para 35 of his judgment (set out at para 83 below). It does not seem to have been suggested to the judge that there was some other reason, such as savings in costs, that prompted the use of a deed of assent to convey the Land directly to Selwyn Moses rather than a deed of assent first to herself followed by a transfer to Selwyn. But the judge was entitled to decide – not least because of his justified reliance on the clarity of the will - that it would not be right to conclude simply from the use of the inappropriately worded form that Jude Moses was mistaken as to the content of the will.

83. The most crucial paras of Seepersad J's judgment are at paras 35-36 where he said the following:

> "[35] It is accepted that an executor cannot alter the intention of a testator, however, although the deceased left the property under his will to the Ancillary Claimant [Jude Moses], she was free to divest herself of the said interest. Under the 1984 Deed, the Ancillary Claimant as the personal representative was duly empowered to deal with the said lands and she elected not to assent the property to herself but instead conveyed same to the Ancillary Defendant [Selwyn Moses]. The recital which recorded that the Ancillary Claimant was the beneficiary of the lands under the Will was clearly not accurate and it cannot be disputed that the D'abadie property fell into the residuary of the estate. However, the Ancillary Claimant unilaterally and without coercion elected to deprive herself of the said benefit and interest in the said lands and she elected to convey the beneficial interest in same, to the Ancillary Defendant. There was no evidence adduced before the Court that could have led the Court to conclude that the 84 Deed was executed as a result of a mistake of fact or that the Ancillary Claimant was the victim of fraud, or deception, undue influence or coercion.
>
> [36] The proper process that should have been adopted, should have been an assent of the lands to herself as beneficiary and then a conveyance of same to the Ancillary Defendant. The failure to follow that process did not however invalidate the conveyance. There is no evidence

> that can lead the Court to conclude that [at] the material time … the Ancillary Claimant was unaware that she was the actual legatee of the D'abadie lands as the wording of the Will was quite clear and unequivocal."

In those paragraphs we therefore see Seepersad J recognising that there were obvious inconsistencies between the 1984 deed and the terms of Milton's will and also recognising that the correct procedure for Jude Moses making a gift would have been for her first to have made a deed of assent transferring the Land to herself and then conveying the Land by a separate deed to Selwyn Moses. But he indicates that she was free to make a gift of the Land to Selwyn Moses and that, in his view, albeit short-circuiting the need for two deeds, it had not been proved that she had not intended to make that gift.

84. The supposed errors of the trial judge, as identified by Jones JA, were threefold. First, Jones JA reasoned that the judge did not consider the whole of the evidence that was capable of giving some insight into the mind of Jude Moses (see para 24). Jones JA set out at para 33 what she saw as five relevant elements of the evidence on this:

> "[33] The undisputed evidence capable of giving some insight into the Appellant's [Jude Moses'] intention with respect to the disposition of the land was as follows:
>
> (i) the disputed deed purported to transfer the land to the Respondent [Selwyn Moses] as though he was entitled to it under Milton's will when he was not.
>
> (ii) the subsequent deed of assent made by the Appellant in accordance with Milton's will sought to vest the land in the Appellant as the residuary beneficiary under the will;
>
> (iii) the deed of mortgage executed by the Appellant and the subsequent release;
>
> (iv) the attempted sale of the land by the Appellant; and
>
> (v) the fact that the Respondent had not been informed of the existence of the disputed deed and only knew of it

> when, some 15 years later, the Appellant put the land up for sale."

But, as we have made clear, the trial judge did take into account the first of those elements. Moreover, Jones JA failed to mention the evidence, set out in paras 80-81 above, supporting the trial judge's decision that it was unlikely that Jude Moses was mistaken as to the content of the will. The last four elements are neutral. True it is that the second third and fourth show that in 1985 and afterwards Jude Moses wished to regard herself, and did regard herself, as the owner of the Land. But those elements offer no real assistance as to her state of mind at the time of the making of the 1984 deed. In other words, whether making a mistake or not in 1984, she was aware that she had transferred the Land to Selwyn Moses by the 1984 deed (whether as a gift or in compliance with the will) so that she must surely have known that the 1985 deed and the subsequent mortgage and dealing with the Land were inconsistent with that. Her conduct after she made the 1985 deed is puzzling not only because it is inconsistent with the 1984 deed but because she allowed Selwyn to continue to occupy and farm the Land for his own benefit and then did nothing whilst the Land was being fully developed by the construction of the houses which were then sold off to various third party purchasers. This point was noted by the judge at paras 9 and 39 of his judgment when he rejected, as he was entitled to do, the evidence of Norris Moses given on behalf of Jude Moses and preferred the evidence given by Selwyn Moses as to the use made of the Land over the years. The fifth element referred to by Jones JA - that Selwyn Moses did not know of the 1984 deed - is again neutral as between her having made a gift or having made a mistake. Certainly, one might have expected her to tell Selwyn Moses if she was (unexpectedly) making him a gift of the Land. But, if mistaken as to the content of the will, one would equally have expected her to tell him at what point she had effected the will by transferring the Land to him (just as one would have expected her to tell him when she had effected the bequest of 74B Anna Street and the other children when she had effected the bequest of each relevant house to them).

85. The second supposed error of the trial judge is that Jones JA criticised him for having said that he would not draw any adverse inference from Jude Moses' failure to give evidence, whereas in effect he did so. This criticism is unmerited. The judge expressly stated at para 38 of his judgment that he declined to draw an inference against Jude because of her inability to give evidence. It would be very strange for a judge to accept that a potential witness cannot give evidence because of age and ill-health but then to draw an inference adverse to her case from her failure to attend. We see no basis for assuming that the judge adopted such an irrational stance, particularly having stated that he was not going to do so. Rather his judgment can be fairly interpreted as taking the view that, in the light of the implausibility of Jude Moses having been mistaken as to the content of the will, there was an evidential

gap in her case on mistake which required filling and which might have been filled by her direct evidence. As she did not give that evidence, the gap was not filled. He was perfectly entitled to take that view. With respect, that is not the same as drawing an adverse inference from her failure to give evidence.

86. Thirdly, Jones JA said that the judge had asked himself the wrong question. She said at para 31:

> "In coming to his conclusions the Judge asked himself the wrong question. The question was not why did the Appellant execute the disputed deed. In the absence of the Appellant's evidence the answer to that question would have been pure speculation. The question that the Judge ought to have asked himself was whether the evidence taken as a whole disclosed that the Appellant intended to transfer her beneficial interest in the land to the Respondent or whether it showed that at the time of the transfer she was operating under a mistake. That was the question for his determination."

With respect, that was not a fair criticism. The question that the judge saw himself as answering was whether Jude Moses had proved on the balance of probabilities that she made a mistake as to the content of the will when making the 1984 deed. That was the correct question to be asked, and the judge was entitled to answer it "no".

87. While the trial judge could certainly have expressed himself more clearly and more fully, it is not the role of an appellate court to overturn a first instance judgment merely because one can point to imperfections in it. In our view, Jones JA was in error in considering that the trial judge was "plainly wrong" or had otherwise made errors that undermined his finding of fact that it had not been proved that Jude Moses was mistaken as to the content of the will. In other words, Jones JA did not identify errors by the trial judge that would justify appellate intervention on his central finding of fact. On the contrary, Jones JA appears to have been over-influenced by the glaring inaccuracies in the form of the 1984 deed and may have failed to appreciate the force of what the trial judge was indicating about the low likelihood, given all the surrounding circumstances, of a mistake as to the content of the will having been made by Jude Moses.

88. In our view, therefore, the trial judge should be upheld in his decision that the claim that the transfer was mistaken has not been proved on the balance of probabilities. Jude Moses was therefore not entitled to rescind the 1984 deed for

mistake and was not entitled to any personal restitutionary remedy for a mistaken transfer (ie for the value of the Land transferred to Selwyn Moses).

89. For these reasons, we would allow the appeal and restore the decision of Seepersad J.

90. Although unnecessary for us to do so, it may be helpful to add a few remarks about what the position would have been had the Court of Appeal been correct, contrary to our view, that Jude Moses was mistaken as to the content of the will (and transferred the Land by reason of that mistake). We would accept that, in that scenario, the mistake would have prima facie entitled Jude Moses to rescind (or, as synonymously expressed, to set aside) the 1984 deed following the leading case on rescission of a deed for a mistake which is *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108. But there are well-established bars to rescission and, at least normally, one such bar is concerned to protect the rights of third parties (see, for example, in the context of misrepresentation inducing a contract, Edwin Peel, *Treitel on The Law of Contract* (15th edn, 2020) paras 9-113 -9-131; cf Dominic O'Sullivan, Steven Elliott and Rafal Zakrzewski, *The Law of Rescission* (2nd edn, 2014) para 20.23). Here it is not in dispute that the Land had been sold by Selwyn Moses to a bona fide purchaser for value without notice. Jude Moses could not therefore "pull back" legal title to the Land by rescission because good title had subsequently been obtained by the bona fide purchaser for value without notice. But that bar to rescission would not prevent the award of a personal restitutionary remedy for a causative mistake of fact falling within the common law part of the law of unjust enrichment. This would be analogous to a standard claim for restitution for a mistaken payment. The principal difference would be that in this situation one would be dealing with the value of a non-monetary benefit - the Land - mistakenly transferred rather than the value of money mistakenly paid. Using the traditional language, the claim would be one for a quantum valebat. But the value of the Land transferred from Jude Moses to Selwyn Moses does not include the subsequent profit made by Selwyn Moses when he later bought back some of the Land, much of which had been developed, and sold it making a profit of $320,000. That profit was not "at the expense of" Jude Moses (and hence of her estate as represented by Flora Moses) in the required direct sense: see *Investment Trust Companies v HMRC* [2017] UKSC 29, [2018] AC 275, paras 32-74, and *Prudential Assurance Co Ltd v HMRC* [2018] UKSC 39, [2019] AC 929, paras 68-80. The appropriate quantum of restitution would therefore be $300,000. That was the price at which Selwyn Moses sold the Land to Mr Blaize and was the best evidence of the value of the Land (as realised by Selwyn Moses) transferred by Jude Moses to Selwyn Moses. It follows that, if (contrary to our view) the Court of Appeal had been correct on the mistake issue, we would have agreed with the decision of the majority of the Board that $300,000 would have been the correct quantum of restitution for the unjust enrichment of Selwyn Moses at the expense of Jude Moses.