

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA64/2023  
[2023] NZCA 630**

BETWEEN	JAYSHREE RATILAL PATEL Appellant
AND	HEMANTKUMAR RATILAL PATEL Respondent
AND	HEMANTKUMAR RATILAL PATEL, AS EXECUTOR OF THE ESTATES OF RATILAL PARBHU PATEL AND SHANTA PATEL Second Respondent
AND	RITA PATEL Third Respondent
AND	KRISAJ PROPERTIES LIMITED Fourth Respondent

Hearing: 29 August 2023

Court: Courtney, Whata and Downs JJ

Counsel: Appellant in person  
K B Arthur for first, third and fourth respondent  
No appearance for second respondent

Judgment: 8 December 2023 at 10.30 am

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**JUDGMENT OF THE COURT**

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- A The application to adduce further evidence is declined.**
- B The appeal is dismissed.**
- C The appellant must pay costs to the respondents for a standard appeal on a band A basis, with usual disbursements.**

## REASONS OF THE COURT

(Given by Whata J)

[1] Jayshree Patel (Jayshree) appeals the decision of Harland J dismissing her claim against her brother, Hemant and his wife, Rita, for 50 per cent of the value of various properties held by them or their company, Krisaj Properties Limited (Krisaj).<sup>1</sup> The nub of her claim is that these properties are held subject to a constructive trust because they were acquired using their deceased parents' wealth. Jayshree claims the Judge erred in multiple ways, but in short, Jayshree argues that the Judge erred in finding that the transfer of the family home to Hemant and Rita in 2004 was lawful and that the financial contributions made by her parents to Hemant and Rita have been properly accounted for.

### **Leave to adduce further evidence**

[2] Before turning to the substantive appeal, it is necessary to address the application by Jayshree for leave to adduce further affidavit evidence:

- (a) A copy of a typical agreement for transfer — this is said to be relevant to the assessment of the lawfulness of the transfer of the family home.
- (b) Testimonials as to Jayshree's employment with the Social Welfare department — this is said to go to the assessment of likely level of contributions by Ratilal and Shanta in the form of social welfare benefits.

[3] This evidence is neither fresh nor cogent. It could have with reasonable diligence been adduced at the trial. Moreover, it adds nothing to the claims made by Jayshree. The application for leave is therefore declined.

[4] Leave was also sought to adduce a video clip of the hearing purporting to show Hemant signalling to Rita during the giving of her evidence. The video was taken without either knowledge of the respondents or the permission of the Court. This is a

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<sup>1</sup> *Patel v Patel* [2022] NZHC 3567 [judgment under appeal].

clear breach of the rules of the Court. Quite apart from the fact the video has no probative value whatsoever, the recording should never have occurred. Given this we simply directed that the video be deleted.

## **Background**

[5] The focal point of Jayshree's claim relates to the properties obtained by Hemant and Rita over a 30-year span. It is helpful therefore to commence with an account of those properties.

### *The family homes*

[6] Ratilal and Shanta Patel moved to New Zealand in the late 1970s with their four children Hemant, Jayshree, Atul and Ajay. In March 1979, Ratilal and Shanta bought a family home in Carlie Street, Papatoetoe, using two loans with the National Bank and the Housing Corporation. Jayshree moved out of the family home in 1987.

[7] In 1991, the family home at Carlie Street was transferred as part of a deal to acquire a property at Oakdale Road, Hillsborough. That property was purchased at a cost of \$245,000, with \$140,000 being the value of the Carlie Street property. The balance was financed via a loan with the Westpac Bank. Ratilal, Shanta, Hemant, and Atul were recorded as the registered proprietors of the Oakdale Road property as tenants in common. Jayshree also returned to live in this family home with her son in 1997 where she stayed until 2002.

[8] In around March or April 2004, Ratilal, Shanta, Hemant and Rita sought to refinance the Oakdale Road property with the ASB bank, however it required guarantees from all of the registered owners. Legal advice was obtained about this. We return to this below at [42] of this judgment. But it appears that based on that advice, the Oakdale Road property was transferred to Hemant and Rita in June 2004. The Westpac mortgage was repaid and the ASB mortgage registered on the same date. At this time, Ratilal, Shanta, Hemant, Rita and their two children and Atul were living here.

[9] In December 2004, Hemant and Rita purchased a new family home at Rangiatea Road, Epsom for around \$952,000. By this time, Atul had moved out so only Ratilal, Shanta, Hemant, Rita and their two children were living in the family home. The Oakdale Road property was sold in 2005 for \$545,000, and the ASB mortgage of \$475,180 repaid.

[10] In August 2010, Hemant and Rita sold the Rangiatea property and purchased a new family home at St Andrews Road, Epsom for \$1,750,000.

*The Krisaj properties*

[11] Three properties at Central Avenue, Papatoetoe; Coronation Road, Epsom; and Portland Road, Remuera were acquired, it appears by Hemant, in the 1980s. Those properties were transferred to Krisaj on May 2006. The Central Avenue and Coronation Road properties were sold to third parties in 2010 and 2011.

*Deed of acknowledgment of debt and wills*

[12] In 2011, Ratilal was diagnosed with prostate cancer. In June 2011, Ratilal and Shanta met with a lawyer, Sean Kelly. Mr Kelly was, at that time, Hemant's and Rita's solicitor. A file note of that meeting records:

Regarding the loan of \$140,000.00 they advise me that Mr and Mrs Patel senior invested \$140,000.00 initially into the purchase of 42 Oakdale Road, Hillsborough. They consider that as a loan to their son Hemant. It was the net proceeds of sale of their home at 12 Carlie Street, Papatoetoe which they sold in 1990.

Instructed to document [sic] that as a deed of acknowledgment of debt of \$140,000.00 to their son Hemant. The loan is interest free and upon demand.

They advise me that they have lived with their son and daughter in law since 1990 and that their son and daughter in law have provided for them and they have lived rent free.

They just want the \$140,000.00 to be documented as a loan. Upon the death of the survivor of them the \$140,000.00 should then be divided between their four children in equal shares. Effectively then Hemant will pay \$35,000.00 to each of his two brothers and his sister.

[13] He also prepared their wills. A file note of their instructions states:

Mr and Mrs Patel senior advise me that their property comprises:

1. The loan of \$140,000.00 to their son Hemant.
2. Mr Patel's holiday home which is known as the address that Rita's written out on page 3 of my handwritten notes. The property is in the district of Navsaree in the state of [Gujarat].  
...
3. A one sixth share of other land in India.

Mr Patel wishes to leave that property to his wife and then when she dies to his children.

Mr Patel would like to put a direction in his will that the holiday home should stay in the family (that's the half share in the property at Navsaree, [Gujarat]).

[14] A deed of acknowledgement of debt (the Deed) and wills (Wills) were subsequently prepared by Mr Kelly. The Deed was executed on 29 June 2011. It was witnessed by Mr Lamont. The Wills were executed on 12 July 2011. They were witnessed by Mr Lamont and Rita's sister. The Deed and the Wills accurately reflect the instructions recorded in Mr Kelly's file note.

#### *Shanta's estate*

[15] Ratilal passed away in 2011. He left his estate to Shanta. Shanta passed away in 2017. She left her estate to be divided evenly among the children. It largely comprised only of a debt owing by Hemant in the sum of \$128,000.00 together with a small sum in her ASB bank account, and unquantified interests in gold jewellery, a half share in a holiday home in India and a one sixth share of other land, also in India.

#### *Jayshree's basic claims*

[16] Jayshree claims that this value represents only a fraction of the value of the property accumulated by her parents over their lifetimes. She says that Hemant effectively deceived them into transferring the family assets to him for less than fair value. She also says that Hemant also had the benefit of their parents' income over the span of some 30 years. He is then said to have used his parents' wealth to acquire properties now valued in the order of \$10 million. A corollary of this is that, in short, Hemant and Rita hold their properties subject to a constructive trust in favour of the beneficiaries of Shanta's estate.

## The High Court judgment

[17] The Judge identified two constructive trust claims, one based on fraudulent or dishonest transfer of the parent's family home and one in relation to the use of the parent's superannuation payments.<sup>2</sup> These two claims are said to devolve into the following issues:<sup>3</sup>

(a) Issue 1:

Did Hemant and Rita fraudulently or dishonestly trick Ratilal and Shanta into signing the transfer instrument in May 2004 in circumstances where they knew Ratilal and Shanta were receiving nothing in return?

(b) Issue 2:

Did Ratilal and Shanta make contributions to the acquisition, preservation or enhancement of the Oakdale, Rangiatea and St Andrews Road properties or property owned by Krisaj? If the answer to this question is yes:

- (i) Were such contributions made with an expectation of an interest in the subject property or properties?
- (ii) If so, was that expectation reasonable?
- (iii) Should the defendants reasonably be expected to yield the plaintiff's derivative claim and interest in the subject property or properties?

[18] On the first issue, the Judge set out Jayshree's submissions that the transfer was unlawful because:<sup>4</sup>

- (a) Ratilal and Shanta (and Atul) did not provide their consent or authority in writing for the title to be transferred into Hemant and Rita's name.
- (b) Hemant and Rita did not provide consideration for the transfer.
- (c) Hemant and Rita did not give Ratilal and Shanta (and Atul) the opportunity to seek legal advice before the transfer was signed.
- (d) There was no independent Gujarati lawyer or interpreter provided to explain the effect of the transfer.

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<sup>2</sup> Judgment under appeal, above n 1, at [85].

<sup>3</sup> At [86].

<sup>4</sup> At [90].

- (e) Ratilal and Shanta's (and Atul's) signatures were not properly witnessed by Mr Lamont, who had a conflict of interest but also gave unreliable evidence.

*Consent to transfer and refinancing*

[19] The Judge found that Ratilal and Shanta consented to the transfer.<sup>5</sup> In reaching this view the Judge relied on the nature of the roles of and relationships between the family members. The Judge found that Ratilal had a leadership role in managing the family's finances with the approval of the family, that he wanted each of the children to own a property, and he instigated the refinancing of the loan over the Oakdale Road property. The Judge also found that there was nothing unusual about Ratilal engaging with the bank, and that Rita attended the meeting with the bank and Shanta did not. The Judge also observed that Ratilal would have explained the refinancing issues to Shanta.

*Legal advice and signatures witnessed*

[20] The Judge noted that the bank required guarantees from the owners of the property and that this led to the parties obtaining legal advice from a solicitor, Mr Sanders. While file notes of the advice were no longer in existence, a detailed bill of costs survived. This bill refers to Ratilal, Atul and Shanta being "merely nominal owners of the property at Oakdale Road".<sup>6</sup> Mr Sanders accepted under cross-examination that he did not know that Ratilal and Shanta contributed \$140,000 to the purchase price of Oakdale Road and that it was not likely that the parties told him about it.<sup>7</sup>

[21] The Judge also observed that while there was a potential for a conflict of interest and Mr Sanders should have obtained written consent to act for Ratilal, Shanta, Hemant and Atul, verbal consent was obtained and that this broadly conformed to the requirements of the time.<sup>8</sup> More specifically, the Judge found Mr Sanders told Ratilal that he could obtain separate legal advice in relation to the transaction and that this

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<sup>5</sup> At [94]–[97].

<sup>6</sup> At [104].

<sup>7</sup> At [104].

<sup>8</sup> At [108] and [112], citing *Clark Boyce v Mouat* [1993] 3 NZLR 641 (PC).

advice was passed onto to Shanta.<sup>9</sup> The Judge further observed that “if Ratilal had decided independent legal advice was not needed, Shanta would have agreed with that approach.”<sup>10</sup> The Judge also placed no significance on the fact that Mr Sanders had been found guilty of professional misconduct in respect of unrelated matters.<sup>11</sup>

[22] The Judge also found that a Justice of the Peace, Mr Lamont, witnessed the signatures of Hemant, Ratilal and Shanta and that Mr Lamont did not witness any coercion.<sup>12</sup> She was further satisfied that Ratilal had an adequate understanding of English, so an interpreter was not necessary, and that while Shanta may not have understood business English, Ratilal would have explained what was occurring to her.<sup>13</sup>

### *Consideration*

[23] The Judge rejected Jayshree’s claim that there was no consideration for the transfer, noting that consideration had been provided by the verbal agreement that the \$140,000 from the sale of Carlie Street was a loan to Hemant and Rita to be repaid on demand and that Hemant and Rita would pay for any significant medical expenses needed by Ratilal and Shanta.<sup>14</sup>

### *Trickery*

[24] The Judge also rejected Jayshree’s claim that the Deed was void because no prudent lawyer would write that they lived “rent-free” in a house that was their family home or that they would give an “interest free” loan. The Judge observed that in family situations, there are many occasions when deeds of debt are entered in these terms.<sup>15</sup> The Judge also rejected the claim that Rita planned and orchestrated the preparation of the Deed, noting that she simply organised the meeting with Mr Kelly.<sup>16</sup> The Judge also dismissed concerns about language difficulties.<sup>17</sup>

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<sup>9</sup> At [112] and [113].

<sup>10</sup> At [113].

<sup>11</sup> At [115].

<sup>12</sup> At [119].

<sup>13</sup> At [123].

<sup>14</sup> At [124].

<sup>15</sup> At [133].

<sup>16</sup> At [135].

<sup>17</sup> At [145].



[25] Overall on the first issue, the Judge concluded that while the documenting of the arrangements between the family members was not ideal and some members may have had different expectations, Ratilal and Shanta were not duped.<sup>18</sup> The Judge also observed that Ratilal and Shanta received no income from 1981 until 1991 when Ratilal started to receive superannuation, and after only two years of purchasing Carlie Street, Hemant became responsible for the mortgage as well as providing income for the family. Twelve years later, the Oakdale Road property was acquired based on an equity contribution of \$140,000, while Hemant funded the mortgage and the other investment properties.<sup>19</sup>

*Superannuation and other contributions*

[26] Turning to the second issue, Jayshree claims that a constructive trust arises in relation to the Rangiatea and St Andrews Road properties on the basis that Ratilal and Shanta's incomes, including the unemployment benefit and superannuation went towards those properties.<sup>20</sup> The Judge identified the key issue as being whether income received from Ratilal and Shanta was used for and to benefit the assets now held by Hemant and Rita.<sup>21</sup> In this regard the Judge observed that the two bank statements available of Ratilal's accounts suggest fortnightly superannuation payments of \$383.22 with no transfers out; it was not possible to quantify Ratilal's earnings between 1991 to November 2011; and Shanta's total superannuation between 11 October 2011 to 30 October 2017 was \$119,581.29.<sup>22</sup> She then made the following key findings:<sup>23</sup>

- (a) Prior to 2004, there is insufficient reliable evidence to satisfy me of Jayshree's claim that such a trust arises.
- (b) Although care must be taken to infer too much from Ratilal's two bank statements, they tend to support Hemant and Rita's account that in 2004 Ratilal's superannuation income was used for Ratilal and Shanta's personal expenses.
- (c) After 2004 and before October 2010, there is insufficient reliable evidence to satisfy me of Jayshree's claim that a trust arises.

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<sup>18</sup> At [148]–[151].

<sup>19</sup> At [151].

<sup>20</sup> At [153].

<sup>21</sup> At [158].

<sup>22</sup> At [160]–[162].

<sup>23</sup> At [164].

- (d) After October 2010 and up to Ratilal's death in November 2011, Shanta's bank statements tend to support Hemant and Rita's account that Ratilal and Shanta's superannuation income was used for their personal expenses.

[27] While the Judge made no express credibility findings, it is clear from her conclusions regarding allegations of dishonesty in relation to day-to-day matters, that she found Hemant and Rita to be honest witnesses. The Judge referred to and accepted Rita's evidence that Ratilal's and Shanta's income did not go to the properties, that some of their money went to investments or family in India,<sup>24</sup> that sometimes money was put to groceries, and that deposits into the family account were for things like groceries, healthcare/medical expenses, clothes or gifts.<sup>25</sup> She also accepts Rita's evidence that the payments made by Shanta to Hemant and Rita's account amounted to \$27,540<sup>26</sup> and payments by Shanta into other savings account were reimbursements for money spent on gifts, purchases or for money sent overseas.<sup>27</sup> Finally, the Judge found that no contributions were made to Krisaj.<sup>28</sup>

[28] In the result, the Judge found that Ratilal and Shanta did not make contributions to the Oakdale, Rangiatea or St Andrews Road properties or any property owned by Krisaj.<sup>29</sup>

### **The alleged errors**

[29] Jayshree's appeal rests on the following key claims:

- (a) Rita and Hemant were dishonest witnesses.
- (b) The financial contributions made by Ratilal and Shanta were misrepresented and substantially underestimated.
- (c) Rita and Hemant were dishonest about the transfer of the Oakdale property.

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<sup>24</sup> At [169] and [170].

<sup>25</sup> At [171] and [172].

<sup>26</sup> At [173].

<sup>27</sup> At [175]–[177].

<sup>28</sup> At [178].

<sup>29</sup> At [180].

(d) The Oakdale property transfer was unlawful.

(e) The Deed and the Wills are a sham.

[30] We address each of these key claims before coming to a view on whether the Judge was wrong in any material respect. For completeness we do not address claims that Hemant failed to discharge his duties as executor as that matter was not pleaded or properly argued in the High Court. Moreover, it adds nothing to the central claims made by Jayshree.<sup>30</sup>

### **Dishonest witnesses**

[31] Jayshree claims to have exposed multiple instances of dishonesty by Rita and Hemant. We consider these claims to be unfounded and largely conjectural. For example, she contends that Rita unlawfully collected Work and Income New Zealand (WINZ) overpayments out of Shanta's account after her death, was evasive under cross-examination about this and that the Judge promised to address this, but never did. Reference is also made to bank statements said to show that Rita gained access to Shanta's accounts the day after her death, again without permission. Jayshree claims instances of other allegedly dishonest takings or behaviour, including payments totalling \$12,900 out of Shanta's account in the financial period ending 12 January 2017. This is said to be an instance of doubling dipping by Hemant for funeral expenses (in the sum of \$12,000) already transferred to their accounts in 2013. Jayshree also highlights that amounts spent on groceries or on a property in India are excessive. All of this is said to show that Rita and Hemant were dishonest.

[32] We see nothing in these points. Rita gave evidence that she would have repaid WINZ for any money overpaid into Shanta's account. She also gave evidence that withdrawals the day after were used for funeral expenses. More generally Rita was steadfast under cross-examination that withdrawals made from Shanta's account would have been made at her request. We have not identified any basis to justify a

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<sup>30</sup> This claim was only raised in Jayshree's closing submissions and not pleaded. As to jurisdiction to disregard fresh matters raised on appeal see *McCollum v Thompson* [2017] NZCA 269, [2017] NZAR 1106 at [52]–[54]; and *Foodstuffs (Auckland) Ltd v Commerce Commission* [2002] UKPC 25, [2004] 1 NZLR 145 at [9].

finding that Rita is to be disbelieved about any of this. Furthermore, we could find no evidence of “double dipping” in respect of Ratilal’s funeral expenses. On the contrary, on our review of the evidence, Rita plausibly explained that the \$12,900 likely related to travel expenses involving a trip to Dubai, Singapore, and India.

### **Financial contributions**

[33] Jayshree submitted that based on the available evidence it can be inferred that Ratilal and Shanta made very significant contributions to the family over their lifetimes not properly accounted for by Hemant and Rita. She referred in particular to unaccounted for unemployment benefit payments, New Zealand Superannuation payments and evidence of regular withdrawals out of Shanta’s accounts to a general account out of which the loan and interest payments owing by Krisaj were made. Based on her estimate, her parents would have collected at least \$491,542 in Superannuation payments in the period from 1991 to 2017. Prior to this she submits that they would have also received unemployment benefits.

[34] Ms Arthur for Hemant and Rita submits:

- (a) There is no evidence that Ratilal and Shanta received an unemployment benefit.
- (b) Ratilal received \$383.22 a fortnight in superannuation between 13 May and 6 September 2004, but no transfers or withdrawals were made out of his account.
- (c) Between 11 October 2010 and 30 October 2017, Shanta received \$119,581.29 in superannuation payments, at an average of \$17,083.04 per year or \$328.52 per week.
- (d) In the same period, Shanta transferred money into five accounts, the majority of which were into Hemant and Rita’s “01” account — and this was a mixed funds account and used by the family as a general account.

- (e) The total of Shanta's transfers was \$27,540 while over the same period the contributions made by Hemant and Rita were \$602,608.59.
- (f) There were no direct payments from Shanta's account to a Krisaj account.

### *Analysis*

[35] There is no direct evidence that Ratilal or Shanta received an unemployment benefit. Jayshree's recollection otherwise based on her time working in the "Social Welfare Department" is unsubstantiated. We therefore give that claim no further consideration.

[36] We accept that contributions appear to have been made by both Ratilal and Shanta out of their superannuation incomes into a general account in the name of Hemant and Rita. We also accept that Ratilal likely would have made contributions to this general account while he was receiving superannuation. But based on the available evidence, those contributions were likely to have been relatively modest. As Ms Arthur highlighted, Shanta's total contribution to the general account was \$27,540 over about seven years, while in the same period, Hemant's and Rita's contribution was about \$602,000.

[37] There is also no evidence that Ratilal and Shanta made contributions directly to the benefit of Krisaj. While the contributions made by them to Hemant and Rita's general account added to the net pool of funds then used to pay among other things, loan principal and interest owed by Krisaj, the same account was used to pay the family's general expenses, including living expenses incurred by Ratilal and Shanta. In the result we see no merit in Jayshree's claim about unaccounted for contributions from income.

### **Trickery and unlawful transfer**

[38] Jayshree effectively repeats in this Court the claims she made in the High Court — Ratilal and Shanta were tricked unlawfully into the transfer of the Oakdale property to Hemant and Rita in 2004. She emphasises:

- (a) Her parents contributed \$140,000 (57 per cent) to the purchase price of the Oakdale Road property, while Hemant contributed nothing.
- (b) Hemant's claim that he supported the family since the 1980s was plainly untrue given that he was only a teenage school leaver then.
- (c) Hemant used \$40,000 of a mortgage in respect of the Oakdale property for his personal benefit and should account for this.
- (d) The contribution by Ratilal and Shanta was never disclosed to Mr Sanders, the lawyer advising on the transfer.
- (e) Rita's failure to disclose the \$140,000 contribution to the Oakdale property was dishonest and she misled Mr Sanders when she said Ratilal and Shanta were "nominal owners".
- (f) Mr Sanders was both conflicted and negligent — among other things he did not properly document his advice and he had no clear consent to act or instructions from Shanta, having never met her.
- (g) Mr Sanders should have documented his instructions and consent to act in writing (citing s 2 of the Contract Enforcements Act 1956 and ss 164, 164A and 164C of the Land Transfer Act 1952).
- (h) The transfer was not properly witnessed (Atul testifying as much).
- (i) The witness, Mr Lamont was effectively a family friend and therefore conflicted.
- (j) Rita had no basis to become a legal owner.

[39] Ms Arthur submits that there was ample evidence to support the Judge's findings that there was no fraud, that Ratilal instigated the Oakdale property transfer and was properly advised by Mr Sanders; and that Ratilal would have explained Mr Sanders' advice to Shanta and that they voluntarily signed the transfer instruments.

She also submits that the Judge was correct to find that Ratilal and Shanta considered the \$140,000 from the sale of the Carlie Street property to be an interest free loan to Hemant, subsequently documented in 2011.

### *Analysis*

[40] In essence, Jayshree claims that Hemant and Rita fraudulently obtained their interest in the Oakdale Road property from Ratilal and Shanta. Having done so, she claims that the benefits of that fraud should be transferred to Shanta's estate. Undoubtedly if there were such a fraud or similar wrongdoing, this Court would have little trouble in requiring Hemant and Rita to disgorge their profits from it.<sup>31</sup> But there must first be some wrongdoing by Hemant and Shanta. We acknowledge Jayshree's claims on this matter however, in agreement with the High Court Judge, we find that Jayshree has failed to prove any such wrongdoing by Hemant and Rita.

[41] As Ms Arthur submits there is ample basis in the evidence to find that Ratilal instigated the Oakdale Road property transfer, and that he and Shanta agreed to lend the value of their interest in the Carlie Street property to Hemant. As Hemant plausibly explains, his parents wanted him to use this money for their large expenses like hospital bills, in the future. As he also plausibly explains, his parents did not want to guarantee a mortgage loan over the Oakdale Road property. There is also ample evidence that Hemant and Rita carried the responsibility for the mortgages over the various properties. Their account is consistent with the available documentary record, including bank statements, and for reasons we will come to, we are satisfied that the Deed and the Wills are no sham. Finally, lengthy cross-examination by Jayshree did not undermine the credibility or reliability of Hemant and Rita's evidence.

[42] In terms of Mr Sanders' dealings with Ratilal and Shanta, we are satisfied they were adequately advised about the legal significance of the transfer of the Oakdale Road property to Hemant and Rita. As noted in *Clarke Boyce v Mouat*:<sup>32</sup>

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<sup>31</sup> Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Brookers Ltd, Wellington, 2011) at [10.2.3] and cases cited therein. See also *Avondale Printers & Stationers Ltd v Haggie* [1979] 2 NZLR 124 at 160 and 163.

<sup>32</sup> *Clark Boyce v Mouat*, above n 8, at 646.

There is no general rule of law to the effect that a solicitor should never act for both parties in a transaction where their interests may conflict. Rather is the position that he may act provided that he has obtained the informed consent of both to his acting.

[43] The evidence shows that Mr Sanders was instructed to act for Ratilal, Hemant and Rita on the transfer, obtained their verbal consent to act for all of them, advised them to obtain independent legal advice, and advised them that the transfer would obviate the need for Ratilal and Shanta to be guarantors. There is also evidence from Hemant that they all consented to Mr Sanders acting for all of them, that Mr Sanders gave legal advice to Ratilal, that Ratilal understood what was happening, and that he explained what was happening to Shanta. We have no reason to doubt the credibility of this evidence. Furthermore, there is nothing of substance in the evidence to suggest that Shanta was pressured into agreeing to the transfer or the debt arrangements. We also consider that the transfer was properly documented and likely to have been properly certified.<sup>33</sup>

[44] We acknowledge that Mr Sanders was told that Ratilal and Shanta were nominal owners only and he was not told about the \$140,000 they had contributed to the purchase of the Oakdale Road property. But both these matters are consistent with the fact that there had been a prior agreement that their contribution to the purchase price be converted to a debt owed by Hemant to be used to pay for their large expenses in the future. We also see nothing in the fact that Mr Lamont, a Justice of the Peace, witnessed the signing of the transfer documents. While he was well-known to the family, there is nothing to suggest that it affected his capacity to properly witness the execution of the 2004 transfer instrument.<sup>34</sup>

[45] Accordingly, like the Judge, we reject Jayshree's complaint about trickery. There was none. The transfer was simply one part of a mutually beneficial familial

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<sup>33</sup> This responds to Jayshree's claim of breach of s 2 of the Contract Enforcements Act 1956 and non-compliance with ss 164, 164A, 164B and 164C of the Land Transfer Act 1952 (LTA). For the former, the key requirement for documentation in writing was clearly met. The LTA provisions relate to the certification of instruments and retention of evidence relating to the certification. Mr Sanders gave evidence that his practice would have been to note on his file the advice given, but this file no longer existed at the time of the hearing.

<sup>34</sup> Atul gave evidence that his signature was not witnessed. Mr Lamont was however adamant under cross-examination he was present at the signing of all signatures. We have no reason to doubt Mr Lamont's credibility on this issue.



arrangement, involving Ratilal and Shanta living in the various family homes for more than 30 years, much of that time free of the burden of mortgage debt or rental costs, and supported by Hemant and Rita in their dotage until they passed away.

### **The Deed and Wills**

[46] Jayshree submits that the Deed and the Wills were orchestrated by Rita. She highlights that the Deed was only reduced to writing when her father was bedridden and relates to a transaction that occurred in 1990. Jayshree notes that Mr Kelly was Hemant's property lawyer, her parents did not have a good grasp of English, and did not receive independent legal advice, even though Mr Kelly advised them they would need independent advice in relation to an enduring power of attorney, because he had acted for Hemant and Rita.

[47] Jayshree also submits she had caught Hemant out in a lie when he said he had never been to Penney Patel solicitors, because his signature had been witnessed by Mr Patel on a mortgage document. She said this was significant because Hemant would not have wanted Mr Patel involved as he would have explained in Gujarati to Ratilal and Shanta what Hemant and Rita were about to do with their Oakdale Road property.

[48] Ms Arthur responds that the Judge correctly rejected these complaints.

### *Analysis*

[49] We agree. Mr Kelly diligently recorded his instructions and gave effect to those instructions. While Mr Kelly was a long-time advisor to Hemant, his file note records the care with which he approached his advice to them, including an instruction they should receive independent legal advice on the issue of the power of attorney. Moreover, there is nothing to suggest on any of the evidence that Ratilal and Shanta were forced or duped into the debt arrangement agreement with Hemant. The Wills accorded with the instructions given and conform to the usual requirements for testamentary instruments. We also agree with the Judge that the instruction to appoint Hemant as their attorney for all purposes reflected the faith Ratilal and Shanta had in Hemant.

## **Overall assessment**

[50] We have not identified any material error in the Judge's reasoning. We can see no basis whatsoever for a derivative interest in the properties held by Hemant and Rita vesting in Shanta's estate. As the Judge observed, the overwhelming weight of the evidence supports a finding that this was a close and loving family and that the contribution to the financial and emotional wellbeing of Ratilal and Shanta by Hemant and Rita was significant. While the transfer of the Oakdale Road property to Hemant and Rita and the associated debt arrangements could have been better documented, like the Judge, we are satisfied it was approved by both Ratilal and Shanta as part of a lifelong commitment between family; and there is nothing to suggest that Ratilal or Shanta had any expectation of an interest in Hemant and Rita's properties.

## **Result**

[51] The application to adduce further evidence is declined.

[52] The appeal is dismissed.

[53] The appellant must pay costs to the respondents for a standard appeal on a band A basis, with usual disbursements.

Solicitors:  
Pidgeon Judd, Auckland for First, Third and Fourth Respondents