Neutral Citation Number: [2013] EWCA Civ 191

Case Nos: A3/2012/0731 and A3/2012/0936

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
HIS HONOUR JUDGE PURLE Q.C.

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 March 2013

Before:

LORD JUSTICE RIX
LORD JUSTICE LLOYD
and
LORD JUSTICE MCFARLANE

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Between:

Appeal 0731	**ANTHONY JOHN DAY**	**Claimant Respondent**
	- and -	
	(1) CHARLES RICHARD TOBIAS HARRIS	**Defendant**
	(2) ROBERT MALCOLM ARNOLD	**Defendants**
	(3) KATHERINE LOUISE ARNOLD	**Appellants**
Appeal 0936	**ANTHONY JOHN DAY**	**Claimant Interpleader Defendant Respondent**
	- and -	
	THE ROYAL COLLEGE OF MUSIC	**First Defendant**
	CHARLES RICHARD TOBIAS HARRIS	**Second Defendant**
	(1) ROBERT MALCOLM ARNOLD	**Interpleader**
	(2) KATHERINE LOUISE ARNOLD	**Claimants Appellants**

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Andrew Twigger Q.C. and Luke Harris (instructed by **Birketts LLP**)
for the **Appellants** in both appeals
Michael Furness Q.C. and Thomas Dumont (instructed by **Leathes Prior Solicitors**) for the **Respondent** in appeal 0731
Michael Furness Q.C. and Simon Edwards (instructed by **Leathes Prior Solicitors**) for the **Respondent** in appeal 0936
Mr C. R. T. Harris (executor) was present in court but took no part in the appeals
The Royal College of Music was not present or represented

Hearing dates: 30 and 31 January and 1 February 2013

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Approved Judgment

Lord Justice Lloyd:

Introduction to the appeals and general summary

1. This judgment is given in relation to two distinct appeals, both arising from disputes concerning the estate of the late Sir Malcolm Arnold. The protagonists in each appeal are, on the one hand, Sir Malcolm's two children by his first wife, Katherine Arnold and Robert Arnold, and on the other his carer for the last twenty-two years of his life, Anthony Day. I will refer to them respectively as Miss Arnold, Mr Arnold and Mr Day, and to Miss Arnold and Mr Arnold together, sometimes, as the children. For part of the period relevant to these appeals Miss Arnold was married to Mr Anthony King. Sir Malcolm had another son, Edward, by his second wife, but he does not feature in these appeals. I will refer to Sir Malcolm as such although he was not knighted until 1993.

2. By his will dated 25 July 1990, Sir Malcolm gave some legacies, gave annuities to each of his former wives, made gifts to Mr Day by clause 6 on which a question in one of the appeals turns, and gave his residue, in the events which happened, as to half to Mr Arnold and Miss Arnold and as to the other half to Mr Day. Mr Arnold and Mr Day were both appointed as executors, together with Mr C R T Harris. Sir Malcolm died on 23 September 2006. A grant of probate was made in favour of the three executors on 13 February 2008, but later, in June 2010, by an order of the Chancery Division, Mr Day and Mr Arnold were removed as executors, leaving Mr Harris as sole executor.

3. In one of the appeals, the issue is whether Mr Day must account to the estate for five gifts made in his favour between June 2002 and May 2006 out of a bank account in the joint names of himself and Sir Malcolm, the money in which belonged beneficially to Sir Malcolm. The total in issue is £36,000.

4. In the other appeal, what is at stake is the ownership of the manuscripts of some of Sir Malcolm's compositions. Mr Arnold and Miss Arnold assert that their father gave them a lot of manuscripts in 1976. They failed below in their further claim that he gave them some 20 further manuscripts in 1980, and that they do not challenge. As regards the 1976 manuscripts, the first issue is whether they were given to the children in 1976. If they were not, then the next question is whether Sir Malcolm gave them to Mr Day during his lifetime, and that question arises in any event as regards the 1980 manuscripts. If he did not give them to Mr Day in his lifetime, then the question is whether they are included in the gift to Mr Day by clause 6 of Sir Malcolm's will. If not, they fall into the residue.

5. Many of the manuscripts were placed (to use a neutral word) with the Royal College of Music (RCM), where Sir Malcolm had studied. The RCM did not claim that it owned any of them. The dispute as to ownership therefore arose on a claim against the RCM, but it interpleaded as between Mr Day as one claimant and Mr Arnold and Miss Arnold as the other claimants. That accounts for the slightly complicated title of those proceedings. In practice, the RCM took no part in the proceedings, and Mr Harris, though a party and attending court throughout the hearing of the appeals, also took no active part.

6. Sir Malcolm had psychiatric problems which, by 1979, had got to the stage that the jurisdiction of the Court of Protection (which I will call the Court) was invoked. In that year, the Court appointed a receiver of his affairs, on an interim basis in July, confirmed by a final order in October. Mr Day was employed first as Sir Malcolm's housekeeper, chauffeur and carer in 1984, by the Court. In October 1986 the receivership of Sir Malcolm's affairs was brought to an end by an order of the Court, and Sir Malcolm was restored to the management of his own affairs. Mr Day remained in Sir Malcolm's employment continuously thereafter.

7. On 28 June 1990 Sir Malcolm executed an enduring power of attorney (EPA) appointing Mr Day as his attorney under the Enduring Powers of Attorney Act 1985 (which I will call the Act, or the 1985 Act). The EPA was registered with the Court on 8 February 2002.

8. The claim relating to the money gifts came to trial before His Honour Judge Purle Q.C., sitting as a judge of the Chancery Division, in December 2011, for a week. Several other issues were the subject of the same trial, but none of these is still live. The dispute about the manuscripts came to trial before the same judge at the end of January 2012, for four days, with one day of oral closing submissions on 6 March 2012. The judge gave separate judgments orally in each case on 7 March 2012. He held that Mr Day was not liable to account to the estate for the payments of £36,000. The children appeal against that finding. He held that none of the manuscripts had been given to the children. He held that the gift in clause 6 of the will did not include any manuscripts but that the manuscripts were given to Mr Day during Sir Malcolm's lifetime, by an imperfect gift which became complete on Mr Day becoming an executor on Sir Malcolm's death. The children appeal against the finding that there was no gift to them in 1976 and that there was a gift to Mr Day later in Sir Malcolm's lifetime. Mr Day in a Respondent's Notice seeks to support the judge's ultimate conclusion by arguing for a different interpretation of clause 6 of the will. The judge gave permission to appeal to both sides in the manuscripts dispute, but refused permission to appeal to the children on the money gifts. Mummery LJ granted permission to appeal in that case.

9. At the trial the parties were represented by different Counsel in each case: Mr Thomas Dumont, with Mr Adam Solomon, for Mr Day on the money gifts and Ms Constance McDonnell for the children in that case, and Mr Simon Edwards for Mr Day in the manuscripts case, with Mr Luke Harris for the children against him. On the appeal each side brought in leading Counsel: Mr Andrew Twigger Q.C. led Mr Harris in both appeals for the children and Mr Michael Furness Q.C. for Mr Day led Mr Dumont in the money gifts appeal and Mr Edwards in the manuscripts appeal. I am grateful to both teams of Counsel for their presentation of the case, conspicuously able oral submissions being addressed to us on both sides on each appeal.

Appeal 0731: is Mr Day accountable to the estate for the gifts of money?

10. The two appeals are quite discrete and there is no particular logic in dealing with one first rather than the other. I take this appeal first because it is less complicated in terms of both facts and issues.

11. Mr Day was Sir Malcolm's carer and companion from 1984 until his death in 2006. From 1986 Sir Malcolm had the management of his own affairs, the Court having

released him from its control. Nevertheless, he continued to rely greatly on Mr Day. On a date which we do not know, save that it was after the release by the Court in 1986 and before 1990, a bank account was opened with Barclays Bank in the joint names of Sir Malcolm and Mr Day, each having authority to sign cheques on the account. Only one signature was needed. There is no doubt that the money in the account belonged to Sir Malcolm, and that Mr Day was made an account-holder and a signatory so that he could use the account as part of his management of Sir Malcolm's affairs.

12. In the late 1970's Sir Malcolm's financial affairs had been in a parlous state, partly because of his high and uncontrolled expenditure and partly because not much money was coming in from royalties and the like. By the late 1980's and the 1990's Sir Malcolm's financial position was much more healthy. His expenditure was under control, but also his income from royalties had been much increased, partly by successful efforts on Mr Day's part to get many of Sir Malcolm's compositions recorded.

13. In 1994 Sir Malcolm made a gift of £3,000 to Mr Day, and he made gifts to him of the same amount in each of the following four years. Gifts of up to that amount in any one year are outside the scope of inheritance tax. Sir Malcolm had the benefit of tax advice at that time and no doubt these gifts were made on the basis of that advice. In each case the gift was made by a cheque in favour of Mr Day drawn on the Barclays Bank joint account. The cheque was prepared by Sir Malcolm's book-keeper, Jane Clark (employed by Sir Malcolm's accountants, Martin & Acock), and signed by Mr Day. Sir Malcolm could have signed it, but in practice he never did sign cheques.

14. In 1999 Mr Page, of Martin & Acock, pointed out that in addition to gifts not exceeding the £3,000 annual amount, normal gifts out of income were also immune from inheritance tax, and that, because Sir Malcolm had established a pattern of making gifts of £3,000 per year, his income being amply adequate to cover that amount, those gifts could now be justified as normal gifts out of income. Thus, the £3,000 exemption could be used in addition to the normal expenditure out of income exemption. In the light of this advice, which is recorded in a letter addressed to Mr Day dated 20 May 1999, but had been given orally beforehand at a meeting at which both Sir Malcolm and Mr Day were present, Sir Malcolm started to give Mr Day £6,000 per year from 1999. Gifts of this amount were made to Mr Day each year until 2004. In turn, in 2005 Martin & Acock gave further advice which led to the amount of the annual gift to Mr Day being increased to £9,000, on the same basis. That is reflected in written advice in a letter addressed to Mr Day in December 2005.

15. At trial, Mr Arnold and Miss Arnold challenged all these gifts to Mr Day. The judge rejected this challenge entirely. On the appeal the children have limited their challenge, as it had originally been pleaded, to the five gifts made after the registration of the EPA. These were three of £6,000, in June 2002, May 2003 and June 2004, and two of £9,000, in November 2005 and May 2006.

16. The challenge is made on several bases. The first point is that Mr Day was not able to make these gifts to himself because of his status as attorney under the EPA and the effect of the registration of the EPA. This turns on the terms of the Act. The point was not argued below, or not at any rate on the basis that was put to us, and was therefore not discussed by the judge. It is a pure point of law and no objection was

taken to it being raised on appeal. In the alternative, the appellants rely on the undoubted fact that Mr Day was a fiduciary, and indeed a trustee of the money in the account, and they say that he cannot hold on to the gifts because making them in his own favour conflicted with his duty as trustee. If, which they do not accept, it were relevant to consider whether Sir Malcolm gave consent to the making of the gifts, they argue that there is no sufficient evidence that he gave any consent, or at any rate a proper and informed consent, to the making of any of these five gifts.

17. The judge recorded that Mr Dumont accepted that it was for Mr Day to show that the gifts were made under the instructions of or with the consent of Sir Malcolm, and that the instructions or consent had to be full, free and informed. He referred to the advice about inheritance tax, and said that it had been given to both Sir Malcolm and Mr Day at meetings at which Sir Malcolm was present as well as Mr Day. He referred to evidence from Mr Day that, not only was Sir Malcolm present at these meetings, but "that on a yearly basis, he, Mr Day, discussed the gifts with Sir Malcolm who approved them".

18. The judge had already held, and repeated, that there never came a point when Sir Malcolm lost the capacity to make relatively simple or straightforward gifts of the amounts now at issue. He also pointed out that there was a rational explanation for the gifts, with regard to saving inheritance tax. At paragraphs 57 to 59 he said this:

> "57. Despite the reservations that I have on some aspects of Mr Day's evidence, I accept that he did discuss these gifts with Sir Malcolm on each occasion when they were made and that Sir Malcolm understood their purpose, which was to save inheritance tax, and approved Mr Day's making of those gifts. Sir Malcolm directed that the gifts should be made to Mr Day alone, and not [to] his children.
>
> 58. In many cases one would look askance at a carer effectively giving money to himself. But this is not an ordinary case. Mr Day had already during Sir Malcolm's lifetime been given Sir Malcolm's property, 26 Springfield, in Attleborough, in 1997, and numerous manuscripts. He was also a substantial beneficiary under the will. As well as having a half interest in the residue, he was left all Sir Malcolm's household goods and possessions, including manuscripts.
>
> 59. It is therefore not surprising to find these gifts being made. I find that the annual gifts were made at Sir Malcolm's direction with his full, free and informed consent."

19. Dealing with a point that was taken as to the capacity of Mr Day to make the gifts, the judge noted that the EPA did not allow the attorney to make such gifts, and that for Mr Day it had been argued that he was not acting under the EPA when he signed the cheques, but under the bank mandate. He recorded that Martin & Acock and Mr Harris when giving tax advice knew that Mr Day was Sir Malcolm's attorney and "thought that they were dealing with him, and may in fact have been dealing with him, in that capacity". He dealt with this contention for the children in his paragraph 64 as follows:

> "But the question I am focusing upon here is narrower than that. The question is in what capacity did Mr Day sign the cheques? He did so under the direct authority of Sir Malcolm and under the authority of the bank mandate, not by virtue of the power of attorney. Accordingly it seems to me that the enduring power of attorney is irrelevant to these conclusions."

The Enduring Powers of Attorney Act 1985

20. The Act was passed in 1985, having been preceded by a Report, The Incapacitated Principal, by the Law Commission (Law Com No. 122, Cmnd. 8977, July 1983). The Act is, relevantly, in precisely the same terms as the draft Bill annexed to the Report.

21. The purpose of the Act is clearly indicated by its long title:

> "An Act to enable powers of attorney to be created which will survive any subsequent mental incapacity of the donor and to make provision in connection with such powers"

22. It is intended to provide a mechanism for overcoming the common law principle that an agent can only do that which his principal can do. If, therefore, the principal, having been of full capacity when he created the agency, ceases to be of legal capacity, the agent's authority comes to an end at once, as a matter of the common law. The basis on which the Act proceeds is that, so long as the formal requirements are satisfied, a principal (or donor) can create an enduring power of attorney which will not be revoked by subsequent mental incapacity of the donor. If the donor does cease to be of full mental capacity, then the EPA has to be registered with the Court, and at that stage, pending such registration, the attorney only has limited powers to act under the EPA, except as authorised by the Court. That is the effect of section 1, which I need not quote. Section 2 deals with formal requirements, largely by providing for the making of regulations as to form and execution. Under section 2(12), an EPA may not be effectively disclaimed by the attorney unless notice of the disclaimer is given to the donor or, in certain cases, to the Court.

23. Section 3 is important for present purposes. An EPA may confer general authority on the attorney to act on the donor's behalf in relation to all, or in relation to a specified part, of the property and affairs of the donor, or may confer authority to do specified things on the donor's behalf and, in either case, may be conferred subject to conditions and restrictions. General authority means authority to do on behalf of the donor anything which the donor can lawfully do by an attorney, but subject to any conditions and restrictions in the EPA itself, and in any event subject to limits imposed by subsection (5). Subsections 3(4) and (5) are as follows:

> "(4) Subject to any conditions or restrictions contained in the instrument, an attorney under an enduring power, whether general or limited, may (without obtaining any consent) act under the power so as to benefit himself or other persons than the donor to the following extent but no further, that is to say—

> (a) he may so act in relation to himself or in relation to any other person if the donor might be expected to provide for his or that person's needs respectively; and
>
> (b) he may do whatever the donor might be expected to do to meet those needs.
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> (5) Without prejudice to subsection (4) above but subject to any conditions or restrictions contained in the instrument, an attorney under an enduring power, whether general or limited, may (without obtaining any consent) dispose of the property of the donor by way of gift to the following extent but no further, that is to say—
>
> (a) he may make gifts of a seasonal nature or at a time, or on an anniversary, of a birth or marriage, to persons (including himself) who are related to or connected with the donor, and
>
> (b) he may make gifts to any charity to whom the donor made or might be expected to make gifts,
>
> provided that the value of each such gift is not unreasonable having regard to all the circumstances and in particular the size of the donor's estate."

24. Sir Malcolm's EPA was entirely general and was not subject to any conditions or restrictions. It is not suggested on behalf of Mr Day that the gifts in question come within the scope of section 3(4) or (5). That is why they cannot be justified under the EPA itself.

25. Mr Twigger's new argument turns on section 7 of the Act, of which subsections (1) and (2) are as follows:

> "**Effect and proof of registration, etc.**
>
> (1) The effect of the registration of an instrument under section 6 is that—
>
> (a) no revocation of the power by the donor shall be valid unless and until the court confirms the revocation under section 8(3);
>
> (b) no disclaimer of the power shall be valid unless and until the attorney gives notice of it to the court;
>
> (c) the donor may not extend or restrict the scope of the authority conferred by the instrument and no instruction or consent given by him after registration shall, in the case of a consent, confer any right and, in the case of an instruction, impose or confer any obligation or right on or create any liability of the attorney or other persons having notice of the instruction or consent.

> (2) Subsection (1) above applies for so long as the instrument is registered under section 6 whether or not the donor is for the time being mentally incapable."

26. Mr Twigger's contention is that the effect of section 7(1)(c) is that, once an EPA is registered, a principal, even if of sufficient mental capacity for the purpose, cannot validly give consent to the attorney to authorise something to be done which is not authorised under the EPA itself. That consent or authority can only come from the Court.

27. I will deal with that submission on the terms of the Act below. But it seems to me that some passages in the Law Commission report are of assistance in this context. Thus, at paragraphs 4.70 to 4.72, the Commission said this:

> "4.70 *The attorney in charge.* It is no part of our proposals that the mere fact of registration should prevent the donor being able to run his own affairs to the extent that he is actually able to run them. For example, if the donor after registration has sufficient capacity to do his shopping or run his bank account he should be able to do so independently of the attorney; and people with whom the donor deals should not be prevented from relying on his instructions just because they know that an EPA granted by him has been registered.
>
> 4.71 Nevertheless, registration of an EPA carries the implication that the donor is either incapable or becoming incapable. In certain situations it is necessary for our EPA scheme to reflect this implication and show that, to the extent of his authority under the power, the attorney is, after registration, unequivocally authorised to run the donor's affairs. In particular we have in mind situations where the donor attempts to revoke or vary the attorney's authority under the registered EPA.
>
> 4.72 *Revocation*. We recommend that the donor of a registered EPA should not be able to make an effective revocation of the power without applying to the Court for its confirmation of the revocation. The significance of this recommendation lies in the importance we attach to the ability of the attorney and third parties to rely on the fact of registration as verifying the validity of the instrument. Much of this reliance would be jeopardised if the donor were permitted to make informal revocations of his registered power. The attorney and third parties would often be uncertain whether the revocations were effective; that is, whether the donor retained sufficient capacity to revoke. We suspect that in many cases third parties would play safe and refuse to deal with the attorney further. This might not be in the donor's interests especially since the third parties might be wary of dealing directly with him as well. We therefore feel that, in these cases, the attorney and third parties should be entitled to act on the strength of the registered power until such time as the donor's purported revocation had been confirmed by the Court. At that point the Court would cancel the registration."

28. The particular point made in section 7(1)(c) is touched on in paragraph 4.75:

> "4.75 *Varying the attorney's authority.* Any attorney will generally do his best to accommodate his donor's wishes as expressed from time to time. In so far as he acts at all he must, in principle, act in accordance with them. The position would, however, differ somewhat in the case of registered EPAs. Registration of the EPA would take place on the basis that there was at least some doubt as to the donor's mental capacity. Thus, although the donor might still be sufficiently capable to vary the attorney's authority or give sensible detailed instructions as to how the attorney should manage his affairs, it would no longer be safe to allow such variation or instructions to have legal effect. We accordingly recommend that once the EPA has been registered the donor should not be able to vary the scope of the attorney's authority under the power. Furthermore, any instructions or consents that the donor might give should have no legal effect. The attorney and third parties should therefore ignore them.
>
> 4.76 How should the third party (such as the bank manager or the stockbroker) react when he received conflicting instructions from the donor and the attorney? With which should he comply? The answer would depend on whether the EPA had been registered. If it had not, the third party should comply with the donor's wishes. If it had, the third party should obey the attorney and ignore the donor. We recommend this even though the donor might still be capable since, once again, we regard the ability of attorneys and third parties to rely on the fact of registration as being of the greatest importance. Moreover we would consider this approach to be safer from the donor's point of view as well."

29. In turn the explanatory notes to section 7 say this:

> "Furthermore, the donor will be unable to vary the attorney's authority under the power and no instruction or consent given by the donor in relation to the power will have any legal effect (paragraph (c) of subsection (1)). These consequences apply whilst the registration stands (subsection (2))."

30. The point has not been the subject of any comment in textbooks or otherwise, so far as Counsel's researches have revealed. This may not be surprising. The point can only arise if the EPA has been registered, but the donor still has at least enough mental capacity to be capable of consenting to the act in question, being an act which is outside the scope of the EPA because of the terms of section 3(5) of the Act. Moreover, the person who is the attorney must be in a position in which he does not need to rely on the EPA, vis-à-vis third parties, to do the act in question. In the present case Mr Day was in that position, because of the joint bank account arrangements.

31. Mr Twigger's contention is that the 1985 Act should be read as excluding all possibility of the person who is the attorney under a registered EPA doing something which section 3(5) prohibits, even if there is some other mechanism whereby, in other

circumstances, he could do it, subject to having the consent of the donor of the EPA. He contended that such an act can only be done, in those circumstances, with the approval of the Court.

32. He argued that this is the effect of the language of section 7(1)(c) because what the donor would be doing, by giving his consent to such an act, would be giving a consent after registration which would, if Mr Day's argument were correct, confer on Mr Day, the attorney, a right. The language of section 7(1)(c) is compressed so that its effect is not altogether easy to work out. His analysis of the text can be seen by setting out the text of the paragraph with the material words in italics, as follows:

> "the donor may not extend or restrict the scope of the authority conferred by the instrument and *no* instruction or *consent given by him after registration shall*, in the case of a consent, *confer any right* and, in the case of an instruction, impose or confer any obligation or right *on* or create any liability of *the attorney* or other persons having notice of the instruction or consent."

33. It seems to me that the italicised words do not carry the meaning or effect for which Mr Twigger contends. I regard the whole of section 7(1) as concerned with the scope and effect of the EPA itself. I can see no sound basis for concluding that it was intended to have a wider effect than this, and to regulate any other subsisting relationship between the principal and the attorney. Even without the aid of the relevant passages in the Law Commission's report, I would find it impossible to read this rather compressed paragraph in section 7(1) as intended to have a wider effect than that of preserving the effect of the EPA once registered, so as to be immune from anything done by the donor which might otherwise either enlarge it or constrain it, or limit the scope of the acts which the attorney can lawfully or properly do under it.

34. Section 7 fixes the terms of the EPA as at registration. It cannot thereafter be revoked except by the Court, nor can it be disclaimed by the attorney except by notice to the Court. It cannot be extended or restricted by the donor, nor can its effect or operation be affected in any way, whether ad hoc or generally, by anything that the donor says or does, to the attorney or to a third party. In that way it protects the attorney and third parties, but it also protects the donor against the consequences of his own later acts. I accept Mr Furness' submission that this is what section 7(1) is intended to achieve, and does achieve. This is supported by the terms of the Law Commission's report, but I would reach that conclusion even without the report.

35. Mr Twigger pointed out that if the bank account had been in the sole name of Sir Malcolm (without Mr Day having been made an authorised signatory under the bank mandate), so that Mr Day could not draw on it except by using the EPA, he could not have given effect to the gifts without seeking the authority of the Court, because of section 3(5). On the other hand, the converse case would have arisen if the actual cheques, having been prepared by the book-keeper, had been signed by Sir Malcolm. Mr Twigger did not accept that the gifts would have been valid in those hypothetical circumstances, despite the judge's finding as to capacity, but it seems to me that they would have been valid.

36. Mr Twigger argued that, even if, before registration, Mr Day had what appeared to be two distinct powers to act on behalf of Sir Malcolm, namely the EPA and the bank

mandate, that analysis would be incorrect already at that stage, because the bank mandate was no more than an aspect of Mr Day's general actions as agent on behalf of Sir Malcolm. In a general sense these dated back to before even the creation of the EPA. Further, he submitted that after registration the EPA did give power to make the gifts in question, but one only exercisable with the consent of the Court, in place of that of the donor. I cannot accept that submission. To read section 3(5) as conferring on the attorney power, exercisable with the consent of the Court, to do something which section 3(5) expressly excludes from the matters that can be done under the power seems to me an eccentric and untenable reading of the statute.

37. Mr Twigger proposed a hypothetical case to test the issue. Suppose that an attorney under a registered EPA is a joint account-holder with the donor of a bank account, just as Mr Day was, and that the account has negligible funds to its credit. Suppose also that the donor has very substantial funds to his credit in another account of which he is the sole account-holder. The attorney cannot use the EPA to make gifts to himself out of that sole account, even if the donor has capacity to, and does, consent. Then suppose, however, that the attorney transfers £1 million from the sole account into the joint account, something which he can do under the EPA. This he might seek to justify on the basis that it would be easier for him to pay bills on behalf of the donor from an account of which he is himself a signatory than if he has to produce the EPA to justify his drawings. Once the joint account is substantially in credit, he could then make a gift of £500,000 to himself out of it, subject always to the donor's full, free and informed consent, even though he could not have done so out of the sole account. Mr Twigger argued that it could not be right that the attorney could evade the restrictions imposed by section 3(5) in such a way.

38. Mr Furness submitted in answer to this, first, that if the attorney had made the transfer to the joint account in order to evade the effect of section 3(5), then that use of his power as attorney would be in breach of his fiduciary duty. If, however, he could show that that transfer was made with no thought of the later use of the joint account to make gifts which were outside the scope of section 3, then the attorney's act in transferring the money from one account to the other could not be impugned successfully. I accept that proposition.

39. Moreover, on the one hand the attorney would be likely to face a very substantial evidential burden in seeking to justify his actions, especially on the figures proposed by Mr Twigger, and, on the other, it might be all the more difficult for the attorney to satisfy the court that the donor had really given his full, free and informed consent to the substantial gift made at the end of the day. It seems to me that the attorney would face a very steep uphill task in showing that such a substantial gift was one made with the proper consent of the donor. I do not accept that this example shows Mr Twigger to be right in his principal submission that section 7(1)(c) invalidates any consent given by the donor to the attorney in respect of any relationship between them other than the EPA, including the position of the attorney as a joint account-holder in the way that Mr Day was for Sir Malcolm.

40. The main point of any agency relationship, in one sense, is the position that it achieves as against third parties, whereby the agent can bind the principal to certain acts. Different forms of agency are needed for different purposes. A power of attorney, created by deed, is needed if the agent is to execute deeds on behalf of the principal. An EPA is needed if the agent is to be able to act on behalf of the principal

despite the fact that the principal has lost, or may have lost, full legal capacity since the EPA was created. So far as a bank is concerned, which has the principal as a customer, a bank mandate in relation to an account of which the agent is one of the account-holders and a signatory authorised to sign on his own is just as effective. I would therefore not accept Mr Twigger's argument that all aspects of Mr Day's ability to act on behalf of Sir Malcolm were embraced within the scope of the EPA, once it had been created, and were therefore all affected by section 7 of the Act once it was registered.

41. In my judgment, it remained open to Mr Day to operate the bank account after registration of the EPA as he had done before such registration. He could not use it to benefit himself without the full, free and informed consent of Sir Malcolm but, if he had that consent, as the judge held he did, gifts made by drawing cheques on the joint account were not invalidated by the effect of section 7(1)(c) of the Act even though made after registration of the EPA.

42. Mr Twigger also submitted that Mr Day could not rely separately on the bank mandate because he was, in truth, acting as attorney under the EPA when he signed the five cheques. He relied on the fact that, in relation to the various advisers, Mr Day was acting as Sir Malcolm's attorney, for example in retaining them and thereby making Sir Malcolm liable for their professional charges. He also pointed to a passage in a letter dated 15 December 2005 from Martin & Acock (mentioned above) in the course of which the accountants said this: "the main issue is a legal matter in so far as you have Power of Attorney and whether the power extends to the ability to make a gift in this matter … you were going to contact Sir Malcolm's solicitor". In April 2006 a solicitor wrote to Mr Day referring to a discussion about gifts and pointing out that application could be made to the Court for approval of gifts. If the advice was given to Mr Day in his capacity as Sir Malcolm's attorney, Mr Twigger argued, then it must follow that whatever he did in reliance on or as a result of that advice was done in the same capacity.

43. I do not accept that argument either. In my judgment the judge was not looking at the matter too narrowly when he focussed on the fact that Mr Day signed the cheques without in any way relying on the EPA, but only relying on his position as an account-holder and authorised signatory on the account. This seems to me an artificial variant of Mr Twigger's primary argument, and to be wrong in itself.

44. Putting it differently, Mr Twigger submitted that it was not open to Mr Day to choose, for his own benefit, under which power he was acting on behalf of Sir Malcolm. As to that, the attorney can, of course, only benefit himself out of the donor's money if he has a proper consent from the donor. If he has that consent, and if he has, in fact, two different capacities in which he can act on behalf of the donor, one of them permitting, and the other not permitting, him to do that which the donor has authorised or agreed to, then I see no reason why he should not be regarded as using the power under which the operation can be valid and effective, rather than that under which it could not be done. The critical point is the donor's consent.

Did Sir Malcolm consent to the gifts made between 2002 and 2006?

45. I have quoted the relevant passages in the judgment. The judge heard the evidence of relevant witnesses, in particular that of Mr Day, and came to his conclusions of fact,

as set out in the passages quoted. This court cannot overturn those findings unless it is shown that there is no proper evidential basis for them.

46. It is fair to say that the evidence was limited on this point, but Mr Day gave evidence in his witness statements and was cross-examined. Mr Twigger submitted that even if (which he did not need to put in issue) there was sufficient evidence of consent to the gifts made before 2002, there was no such evidence as regards the last five gifts, made after registration of the EPA. It has to be remembered that, before the judge, the validity of all the gifts was challenged, and there was no argument as to the position being different after from before registration. The judge did not need to focus specifically on the period from 2002 onwards, nor was it relevant to focus in cross-examination or re-examination on the position after registration as opposed to how things were dealt with previously. It is therefore not surprising that the evidence as to Sir Malcolm's consent was dealt with in rather general terms.

47. By the time of registration, a pattern had been established of annual gifts of amounts which satisfied the rules as regards exemption from inheritance tax, being by 2002 £6,000 per year. Three further gifts of that amount were made, and then two at £9,000, which could be justified on exactly the same basis. What needed to be shown was no more than that Sir Malcolm agreed to the making of further annual gifts, in 2002 and each year thereafter, which either repeated exactly that which he had agreed to before, or, for the last two, repeated them with advantage, in the sense of making use of an existing pattern to achieve a greater saving of tax. It would be very different if the gifts after registration had not been part of a regular pattern, or were much greater than those made before. On the actual facts, it seems to me that it would not have required a great deal of thought or consideration on the part of Sir Malcolm to give a valid consent to the annual repetition of the former gifts of £6,000, nor to the level of the gifts being raised to £9,000, on the same basis as the prior increase from three to six thousand pounds, for the last two years of his life. The increase to £9,000 was the subject of advice from Martin & Acock. Mr Twigger submitted that there was no adequate evidence to support a finding that Sir Malcolm had been present at any meeting at which that advice was given orally, but I would reject that submission.

48. This ground of appeal can only succeed if the court is satisfied that the judge's findings of fact as to consent were not open to him on the evidence. It is unnecessary to repeat or even refer to the very familiar authorities on the limits of an appellate court's ability to interfere with the judge's findings of fact, even if they are, to some extent, based on inference. Where, for reasons mentioned above, the evidence is in rather general terms, not distinguishing as to the period which is now said to be critical, the judge's understanding of the evidence is particularly significant. It was therefore for him to decide what to make of Mr Day's answer to the question addressed to him in cross-examination about the increase of the gift from £6,000 to £9,000. The answer is undoubtedly in rather general terms, but it seems to me that it was open to the judge to take it as providing an evidential basis for his finding that each of the annual gifts was made with Sir Malcolm's consent.

49. This ground of appeal is not made out, any more than the others. I would dismiss the appeal by Mr Arnold and Miss Arnold against the judge's rejection of their claim to recover for the estate the last five annual money gifts.

Appeal 0936: the manuscripts

50. At issue in this appeal are manuscripts of works written by Sir Malcolm which were deposited with the RCM during his lifetime. The appeal papers include a list of those manuscripts held by the RCM, numbering 103, of which some but not all had been bound. They include the manuscripts which Sir Malcolm had had delivered to Miss Arnold in 1976, in circumstances which I will describe, and also some which remained in his possession at that time, being removed in 1980 from his flat when it was sold, as well as three which had been in the possession of Faber Music, and were delivered by them to Mr Poulton (to whom I refer below) on behalf of the Court and Sir Malcolm in 1983. It is unnecessary, for present purposes, to go into detail as to the manuscripts dealt with in one way or another. The parties are agreed as to a list of the manuscripts which were in Sir Malcolm's flat in 1980, and the identity of the three which had been in the possession of Faber Music is known. The rest of the manuscripts held by the RCM were those which came to Miss Arnold in 1976.

The facts – up to 1985

51. Sir Malcolm and his second wife, Isobel, separated in February 1976. They had been living in a house in Dublin called Meadowcroft. In June 1976 Sir Malcolm sold this house and moved to a flat in Dun Laoghaire. He had much less space there. In July 1976 there arrived, unannounced, at Miss Arnold's house in Highgate several boxes despatched by Sir Malcolm, evidently because he no longer had space for their contents in his new flat. (Miss Arnold was then married to Anthony King.)

52. The evidence shows that the boxes contained quite a variety of things. The contents included books, paintings, sculptures, the Oscar awarded to Sir Malcolm for the score of The Bridge on the River Kwai, bottles of wine, cutlery, plates, some letters passing from Sir William Walton to Sir Malcolm (and the manuscript of a work by Sir William, called Five Bagatelles), three snuff boxes, and the manuscripts of a large number of compositions by Sir Malcolm.

53. Also in July 1976 Sir Malcolm sent a postcard to Mr Arnold, who lived in Cambridge, as follows:

> "All the books, pictures, sculptures etc. are for you and Katherine to share and keep, or sell if you like! Dad"

54. The judge referred to the initial pleadings and evidence of Mr Arnold and Miss Arnold as suggesting that the items in the boxes were simply stored undisturbed for three years, and he mentioned that Mr Arnold did not go to see what was there until some months later. At paragraph 22 he said that the manuscripts were simply stored and remained so until steps were taken to have them bound. He made no other finding as to what was done with the contents of the boxes. It seems clear from the evidence which was shown to us that Miss Arnold did open up and unpack the boxes, and that she took some items out and used them, including pictures which she hung on the wall, and the wine which was consumed, and that she sold other items, then or later. It does also seem that, having opened the boxes up, she put the manuscripts back, possibly in a smaller number of boxes, and put them away somewhere in her house where they were not in the way.

55. In 1977 Sir Malcolm returned to London, living first in a hotel in Swiss Cottage, and later at a flat which he bought, Flat 26 Holmefield Court, Belsize Grove in Hampstead.

56. As I have mentioned earlier, in 1979 the Court became involved, and the Official Solicitor was appointed as receiver, initially on an interim basis which was later confirmed by a final order. The interim order was served on Sir Malcolm in August 1979 by Mr Preston, who was then the case officer of the Court's management division with responsibility for the day to day conduct of the affairs of Sir Malcolm. As it happened, Mr Preston had had a musical training and was keenly interested in Sir Malcolm's music. This may well have made it easier for him to deal with Sir Malcolm and to gain his confidence. Mr Preston was received more readily than might perhaps have been expected, so much so that, during the visit, Sir Malcolm offered him an autographed copy of his second symphony, which Mr Preston, with some regret, had to decline. His musical knowledge and interest may also have influenced his attitude to some of the issues that arose in practical terms, including attaching particular importance to the fate of the manuscripts. His note of the attendance records that the flat was small and poorly furnished. The only item of note in it was Sir Malcolm's clavichord. It is clear from other papers at the time that there were some manuscripts in the flat at the time.

57. By 1980 Sir Malcolm was no longer living at the flat, but was at a hospital in Northampton. During that year it was decided that the flat should be sold. Sir Malcolm's clavichord was sent to the hospital so that he could have it with him. An attendance note by Mr Preston in March 1980 records that there were in the flat "various book cases with music, both his and other composers' which he uses as examples". A letter from Sir Malcolm's consultant at the hospital in October 1980 records that by then Sir Malcolm was firmly in favour of sale. He himself wrote to the Official Solicitor saying, among other things, that he hoped that "my daughter Katherine who has recently moved to a larger house will have room for the contents of my flat". The Court then authorised steps to be taken with a view to sale. Mr Preston wrote to Miss Arnold to tell her of this and raising the question of dealing with the furniture and effects and the general contents. By the end of the year Miss Arnold wrote to Mr Preston to say that she had tried to empty the flat to make it ready for sale "as my father asked us if we could keep his things for him".

58. In February 1981 Mr Preston wrote to Sir Malcolm. He said that among the effects removed by Miss Arnold for safe keeping were some of Sir Malcolm's manuscripts. He reported that she felt "although quite happy to have them, she cannot store them properly for there is little doubt in later years they could become of great value". He also reported that he had discussed with Miss Arnold the possibility that the manuscripts might be presented to the RCM or the Royal Academy of Music "for their safe retention during your lifetime", and to be available for study, or loaned to a museum. He sought Sir Malcolm's views. Sir Malcolm replied saying that he would like the manuscripts to go to the RCM, where he had studied. Mr Preston then wrote to Miss Arnold in March 1981, saying that he would write to the RCM but asking for a list or some idea of the manuscripts involved and as to "the amount of manuscript". No doubt she had other priorities than this, and he repeated his request in June. She telephoned him to say that she was trying to collate the music which she held. On 13 September 1981 she wrote listing pictures and other things. The list included "one

cupboard of music – 15/20 scores" and "two boxes of music – mostly copies of other composers' works", as well as some furniture, three snuff boxes and some china and cutlery.

59. Having received that letter, Mr Preston wrote to the RCM to make the suggestion that some of the manuscripts might be lent to the RCM for safe-keeping during Sir Malcolm's lifetime. The RCM was well disposed to the idea in principle. In October Mr Preston wrote again to Miss Arnold, reporting the RCM's preliminary response, and asking if she could provide a list of the relevant music, or would prefer him to prepare the list himself.

60. This led to Mr Preston visiting Miss Arnold at her house in London on 18 November 1981 and inspecting the music which she held. He described the visit in two documents: a report to the Court and an attendance note. He was shown, first, "a cupboard full of music" which included about 20 bound editions of various works and several works in loose manuscript form. The cupboard was an item that had been removed from the flat during 1980. Some or all of its contents had also been taken from the flat at that time. Mr Preston took away with him some manuscripts from among the contents of this cupboard.

61. Miss Arnold also showed him what he described as a tea chest of manuscripts that had been kept in the loft, which he said was "completely full of loose unbound manuscripts some being properly tied up but many others in a jumble". He endeavoured to list all the items in that box. A hand-written list exists, as does a typed version drawn from it: a few so listed were already bound but most were unbound. Miss Arnold and Mr Preston evidently had a discussion about binding. He seems to have misunderstood some of what she said, but she did show him three of her father's works in manuscript which had been presented to her or to another member of the family and which had been handsomely bound. He obtained the authority of the Court to have manuscripts bound, subject to an estimate being obtained. Miss Arnold's husband, Mr Anthony King, was to be involved, though only in designing the bindings, not (as Mr Preston seems to have thought) in doing the binding himself.

62. On 11 December 1981 Mr Preston wrote again to Miss Arnold to say that the Court had approved the proposal that "all the loose music held by you on behalf of your father" should be bound, but that an estimate was needed. She did not reply to this letter.

63. We were shown some later documents to which I should refer. In November 1983 Miss Arnold wrote to her father. In the course of the letter she mentioned that Alan Poulton (who was carrying out research into Sir Malcolm's works and had been appointed by the Court as Sir Malcolm's business manager) had come to look through "the music we have here for you". She said that it seemed that all the scores would be leather bound, and she asked him about the colours to be used. In September 1984, by which time Mr Preston had been succeeded first by Mr Angel and then by Mr Lloyd-Roberts, Miss Arnold telephoned the latter "about the articles which she is holding at her home". Mr Lloyd-Roberts' attendance note records that there was said to be a dispute about ownership of some items. (At this time Sir Malcolm was not willing to speak to his daughter.) His note lists some items which he said she agreed belonged to Sir Malcolm which she would be happy to return, and others which, by

implication, she regarded as hers but which she would be prepared to give to him. The first list is evidently based on that set out in Miss Arnold's letter to Mr Preston in September 1981. The second list includes some letters from Sir William Walton to Sir Malcolm which Lady Walton wanted back, and Miss Arnold had agreed to give them back "but admits that the letters did not belong to her". The note also mentions the Oscar, about which Miss Arnold had said that this had been given to her "10 years ago".

64. It seems that an exchange was arranged between the Court and Lady Walton and took place in 1984, under which Sir William's letters were delivered to her, and the Five Bagatelles manuscript was also delivered to her in exchange for a manuscript of Sir Malcolm, of the Fair Field (opus 110, written for the tenth anniversary of the opening of the Fairfield Halls, in Croydon). As the judge said at paragraph 28, ownership of this manuscript must therefore follow the ownership of the Five Bagatelles manuscript which formed part of the contents of the 1976 boxes.

65. It is not necessary to trace the other dealings with Sir Malcolm's manuscripts in any greater detail. Three bound manuscripts were placed with the RCM by Mr Preston in 1983. Some of the unbound manuscripts were then bound, the cost (£2,752) being paid out of Sir Malcolm's money, and they were deposited with the RCM in the course of 1985. That is sufficient by way of a record of the relevant facts to deal with the issues and the submissions as to what happened in 1976.

66. The sequence which I have just summarised is to be understood in the context of dealings within a family, albeit one in which, because of Sir Malcolm's psychiatric history, there had been, and from time to time there still were, particular problems about relations within the family. It is also relevant to the context that, so far as Mr Preston was concerned, until 18 November 1981, he thought that the only relevant manuscripts were those which had been in the London flat in 1980. Until that date he did not know of the larger volume of manuscripts that had been in the boxes delivered from Sir Malcolm to his daughter in 1976. Miss Arnold, on the other hand, did know that she held both the 1976 manuscripts and, after their removal from the London flat, the 1980 manuscripts as well.

Gift or bailment: the legal test

67. A chattel may be given by one of three methods: a deed of gift, a declaration of trust or delivery. If there is a deed or a declaration of trust, whatever issues of interpretation may arise, there will be some words, probably relatively formal, from which the intention of the party or parties can be found. With delivery, something is needed to show the basis of the delivery to be a gift, but this may be relatively informal, as in *Re Cole* [1964] Ch 175 (though in that case the Court of Appeal disagreed with Cross J and held that there had been no delivery).

68. The 1976 boxes, with their contents, were delivered by Sir Malcolm to Miss Arnold. This was a unilateral, unexpected and unsolicited act on his part. It was not explained by any prior discussions or dealings between them. Miss Arnold did not reject the items, but it is perhaps hardly likely that she would have done, whatever she thought about her father's conduct in this respect. She did not welcome or rejoice in the gift, but, unlike her father (and for that matter her brother), she did have some space in which to keep the boxes in her home. In those circumstances the legal nature of the

act must depend, essentially, on determining what Sir Malcolm's intention was in respect of it. The only words of gift are those on the postcard sent by Sir Malcolm to Mr Arnold.

69. We were shown passages from Palmer on Bailment, 3rd edition, in support of submissions as to the legal test for the effect of a delivery of chattels otherwise than pursuant to an agreement. The point is made at paragraph 3-011 that "the nature and terms of an agreement are not to be determined by the subjective intention of a single party. Rather, they depend on what each party was reasonably entitled to infer from the conduct or attitude of the other". Correspondingly, if the governing intention is that of a single party, the deliverer of the goods, the issue depends on the intention of that party, and again not his subjective intention but rather his intention objectively ascertained from his words and conduct. At paragraph 3-013 the authors go on to discuss in terms the issue "Gift or loan". The text tells us that the recipient, making a case for a gift, must prove an intention in the deliveror to make a gift, an intention of the recipient to accept the gift, and delivery. The intention may be proved by conduct as well as by words.

70. In turn at paragraph 3-014 the authors identify some evidential criteria, based on decided cases, by which a court might decide as between gift and loan. These include the following which were relied on as relevant to the facts of this case:

    i) Credible statements made by one party to the transaction to a reliable third party, identifying or indicating the nature of the transaction.

    ii) One party's acquiescence in, or failure to take obvious steps to contest, statements made or procured by a third party that support the other party's version of the identity of the transaction.

    iii) Conduct by one or both parties indicating a perception of the relationship more convincingly explicable by reference to one possible version of the relationship than by reference to the alternative.

    iv) A denial of ownership by the recipient, when the cost of some past conservation of the object, or some other inconvenient question, is raised with him.

71. We were also shown *Dewar v Dewar* [1975] 1 W.L.R. 1532, a decision of Goff J about whether a payment of £500 by their mother to one of two brothers who were the litigants was to be treated as a gift or as a loan. The evidence showed that the mother always intended it to be a gift, that the son wanted to receive it as a loan, but that he did not refuse to take it at all. The judge considered submissions about the need for the recipient to accept the thing as a gift, and therefore as to the relevance of the intention of the recipient as well as that of the payer or deliverer. He concluded that acceptance by the recipient of the thing given was necessary, but no more than that. The recipient can refuse to take it, or if it arrives without prior arrangement he can reject it or send it back when he becomes aware of it. But otherwise his intention is not relevant. The case was complicated by pleading points, and it is rather far from the facts of the present case, but it is consistent with the view that I have formed that, on facts such as those of the present case, the only intention that matters is that of Sir Malcolm. Given the fact of delivery and the absence of rejection by Miss Arnold

after delivery, if Sir Malcolm's intention (objectively assessed) was to make a gift of the contents, then ownership passed by way of gift on delivery.

72. On that basis, if the subsequent conduct to which I have referred is of any relevance at all on this issue, it is not that it shows what the intention of Miss Arnold or Mr Arnold was, but that it might cast light on what her father's intention should be taken to have been. It has a separate relevance to the argument based on estoppel.

The judge's judgment

73. The case for a gift relies principally on the postcard. The case against a gift depends on reading the postcard as limited to contents of the boxes other than manuscripts, and relies on Miss Arnold's later words and acts as showing that she treated the manuscripts as being still her father's property. This is said to cast light on Sir Malcolm's intention. Alternatively it is relied on as the basis of an estoppel against Miss Arnold (and Mr Arnold) precluding her or them from asserting ownership. That depends mainly on her having allowed or encouraged the Court to spend Sir Malcolm's money on having the manuscripts bound on the basis of a representation, made implicitly, that they were his property.

74. The judge held that the manuscripts delivered in 1976 were not given to Miss Arnold or Mr Arnold but were, in effect, deposited with her for safe-keeping because Sir Malcolm had no room to keep them for the time being. At paragraph 6 he referred to the contents of the boxes as having been stored undisturbed (see paragraph [54] above) "which does not strike one as the behaviour of someone who has just received a gift". In the next paragraph he said that much of the subsequent correspondence with the Court "was written on the basis that [Miss Arnold] was holding these matters on behalf of her father". At paragraph 9 the judge said this:

> "It does not appear to me that either of these siblings ever truly regarded these items as having been gifted in 1976. However, it is urged upon me that I must, by looking at the postcard, infer a gift because that is what, objectively speaking, ordinary people would make of the postcard. I'm not sure what ordinary people would make of the postcard, which did not refer expressly to the manuscripts, or to a gift as such. It seems to me that, especially upon discovering that there were a number of manuscripts among the papers that have been forwarded, ordinary people might query the sender of the postcard's intention and ask whether the "etc" did include manuscripts, and whether a gift was intended."

75. Then at paragraphs 12 and 13 he said this:

> "12. I do not consider that [Miss Arnold] or [Mr Arnold] ever regarded [Miss Arnold] as holding these items, except for their father. Their father was a sometimes unpredictable, somewhat mercurial gentleman, and I do not think they would, or did, or that any objective observer knowing of their father's characteristics would, pay serious attention to the postcard, or regard him as making a gift of the manuscripts, even if the postcard is to be regarded as making a gift of other items. …

> 13. In my judgment, looking at the matter objectively, and even without regard to the later evidence as to what occurred from 1980 onwards, to which I shall come, there is no clear evidence of a gift having been made in 1976, rather than a transmission of the items for safekeeping."

76. At paragraph 18 he said:

> "It is quite clear that [Miss Arnold] saw herself then [that is to say in November 1981] (save in the case of individual items specifically gifted to her) simply as a custodian and, as that is relatively close to [1976], I am entitled to infer that that is how matters were understood and would have been understood to a reasonable observer in 1976, knowing Sir Malcolm Arnold as well as [Miss Arnold] and [Mr Arnold] did, and what he had done in delivering his possessions to her."

77. The judge went on to deal with the manuscripts which were taken from the flat in 1980. His decision that there was no gift of these is not challenged. I need not go over that part of his judgment. The judge did refer on several occasions to the use of words to the effect that Miss Arnold was holding items on behalf of her father, in letters of which I have already referred to the most relevant, in particular that dated 11 December 1981 (see paragraph [62] above).

78. Between paragraphs 33 and 38 he said that, if he had not concluded that there was no gift in 1976, he would have held that Miss Arnold and Mr Arnold were estopped from denying the ownership by Sir Malcolm of the relevant manuscripts because she had represented to Mr Preston that the manuscripts which she had in her possession belonged to Sir Malcolm, she never disabused him or anyone else on behalf of the receiver or the Court of that belief, and to her knowledge the Court arranged for the binding of the manuscripts, at Sir Malcolm's expense, in the belief that the manuscripts were Sir Malcolm's property. At paragraph 35 he said this:

> "[Miss Arnold] never disabused Mr Preston or his successors of this assumption, and her conduct in standing by, knowing that Mr Preston and his successors were treating the manuscripts in question as Sir Malcolm's and incurring expense in binding the loose manuscripts, reinforced the initial representation that the manuscripts were held for Sir Malcolm".

79. That passage did not form part of the judge's judgment as delivered orally in March 2012. Later in March the judge was asked to approve a transcript of the judgment for the purposes of the appeal, for which he had himself granted permission. A long time elapsed before he did so. The revised and approved transcript was made available early in August 2012. The passage which I have just quoted was one of a number which the judge had added.

80. It is unfortunate that the judge should have added a passage containing what appears to be a finding of fact on a controversial issue which had not been made in his judgment as delivered. It is particularly unfortunate for him to have done so when revising the transcript quite a long time after the judgment and all the longer (a full six

months) after he had heard the evidence. The case is not like *Secretary of State for Trade and Industry v Rogers* [1996] 1 W.L.R. 1569, where the judge had delivered an immediate extempore judgment but, when revising the transcript three months later, had inserted a finding that the director had acted dishonestly – a matter which had not been alleged or investigated at the relevant hearing. Nor is it like the very unusual case of *Brewer v Mann* [2012] EWCA Civ 246, in which a series of judgments was delivered. Mr Twigger did not submit that this passage should be disregarded, as not forming any part of the judge's judgment, but he did argue that less weight should be attached to the findings made in that passage (and not otherwise reflected in the judgment) than would be the case if it had been said as part of the judgment as originally delivered.

The postcard

81. The postcard was the only communication by Sir Malcolm as to his intention when sending the boxes of material to Miss Arnold. Without it, there would be no basis for saying that Mr Arnold was involved at all, but it does show that, whatever it was that Sir Malcolm intended, both his son and his daughter were involved.

82. The first of the issues on this appeal turns at least in part on what Sir Malcolm meant by "etc.": did he refer to everything else in the boxes, or to everything other than his manuscripts? The message cannot be understood on its own. If Mr Arnold received it before he had learned of the delivery of the boxes to his sister, he would have had no idea to what it referred. However, the delivery of the boxes, and their actual contents, provides the necessary context to which the words of the postcard have to be applied. On the face of it, the message on the postcard is entirely general. If "etc", short for "etcetera", means (as classical scholarship and the OED tell us) "and the rest", it is said for Miss Arnold and Mr Arnold that "the rest", in this context, can only mean the rest of the contents of the boxes.

83. The message shows that, as regards at least some part of the contents, the delivery was made by way of gift to the two children. That is shown by the words "share and keep or sell if you like". The gift extended to whatever books, pictures and sculptures were in the boxes. It was not limited to those categories of item. The judge's finding is that the "etc" did not include Sir Malcolm's manuscripts. For Mr Day, Mr Furness contended that this was correct, on the basis that manuscripts are of a quite different nature from books, pictures and sculptures, and that the manuscripts represented a large part of Sir Malcolm's professional output which he cannot be supposed to have intended to part with, especially if (as was true of some of them) it was the only copy of an unpublished work. Conversely, Mr Twigger argued that there is nothing to limit the word "etc" in this way, and no reason to read it as not referring to all of the rest of the contents of the boxes as delivered.

The later conduct

84. Before I express a conclusion on the meaning of "etc", I will consider what was said and done later, which I have already described, to see whether it casts light on how the delivery was or should be understood, as regards the manuscripts, and the basis on which matters proceeded as between Miss Arnold and the Court.

85. Even if it had been the case that Miss Arnold had left the contents of the boxes undisturbed for several years, that would not have any relevance to the question of Sir Malcolm's intention. She did repack the manuscripts and put the boxes away in a place that was not inconvenient for her, but that seems to me completely neutral as to ownership.

86. The relevant dealings began late in 1980 but the only important communications took place in 1981. Most of these related to the items which had been in Sir Malcolm's London flat and which were removed from there in order to make possible the sale of the flat. It is not now argued that these items were held by Miss Arnold otherwise than in safe-keeping for her father. Until 18 November 1981 Mr Preston had no idea that Miss Arnold held any other manuscripts of Sir Malcolm than those which were among the items removed in 1980. He cannot, therefore, have understood anything that she said before then as relating to anything other than the manuscripts which had been in the flat. It follows that, so far as the understanding of Mr Preston and the Court is concerned, nothing said before that date is of any relevance to the status of the manuscripts which were or had been in the boxes delivered in 1976.

87. That is not the only possible relevance of later conduct, but there is precious little before November 1981 that could cast light on Miss Arnold's understanding of the effect of her father's act in sending her the manuscripts. Mr Preston's reference in a letter to Sir Malcolm in February 1981 (see paragraph [58] above) to a discussion they had had about manuscripts is, on the one hand, so general that she may have been referring only to the manuscripts taken from the flat (as he would have understood, not then knowing of the other manuscripts) and, on the other hand, by no means clear as being a statement of either ownership or non-ownership on her part.

88. Miss Arnold's letter in September 1981 (see paragraph [58] above) sets out a rather general list of items which she held. The list includes the manuscripts which she took from the flat in 1980. It does also include "two boxes of music" which might be what she had received in 1976, except that she says that the music was mostly copies of other composers' works. The list includes the snuff boxes which, it seems, had been received in 1976, and some china and cutlery, which may well also have been part of the 1976 delivery. It also included a list of pictures, identified by marking on a valuation. That valuation was made for insurance purposes in 1979, and was of the contents of Sir Malcolm's flat, so these too had been removed from the flat in 1980, and were not part of what was delivered to Miss Arnold in 1976. Nothing in the list seems to me to amount to a statement as to whether any of these items listed, still less any other item not listed, was or was not in the ownership of Miss Arnold or of Sir Malcolm.

89. Moving on to 18 November 1981, Miss Arnold showed Mr Preston first the manuscripts that she had taken from the flat in 1980. No issue arises as to those. She then showed him the boxes of material which she had received in 1976. In addition, à propos of the binding of manuscripts, she showed him three leather bound manuscripts which had been presented by her father by way of gift, and inscribed accordingly. Mr Preston recorded that all three had been gifts to her, but according to her evidence that is a misunderstanding. In fact only one of them had been a gift to her, that of the second flute concerto. She had another manuscript which had been given to her, but this was more simply bound. She also had two bound manuscripts which Sir Malcolm had given to his second wife Isobel (Four Cornish Dances, and

John Clare Cantata), and one which he had given to Miss Arnold's husband Mr King (Philharmonic Concerto). Whatever she showed Mr Preston as examples of fine binding would have been among these manuscripts.

90. Mr Preston's evidence was that he took Miss Arnold's position to be that she owned the manuscripts which had been inscribed as gifts to her (he said there had been three, but that is clearly a misunderstanding) and that she did not claim to be the owner of any of the other manuscripts but rather accepted those as still belonging to Sir Malcolm. He did not suggest that she said this, other than referring, whether implicitly or explicitly, to the ownership of the scores that had been the subject of specific and express gifts. In cross-examination he said that, she having produced the three scores "that she said were gifts", this showed that the others were not. He did not raise the question of ownership in their discussion at that or any other time.

91. One feature of Miss Arnold's evidence is that she understood that the transfer to the RCM would be by way of gift, not on loan, and that she was content with that, it being (as she understood) her father's wish. She said in cross-examination "I didn't want them myself, they were troublesome to me as things and also in what they represented, and I wanted them to be looked after properly … to give them to the [RCM] seemed a very good idea." On that basis she was a great deal more interested in the question where the manuscripts were to go than in who owned them at the time. If they were to go to the RCM, and if all who were or might be concerned, namely herself, her father and her brother, agreed on that, it hardly mattered to her who owned them before the transfer to the RCM.

92. Moreover, for Miss Arnold to be willing to take account of her father's wishes as to what should happen to manuscripts of his works would not, as it seems to me, be inconsistent with his having given them to her. In a family context, a child to whom a parent has given a chattel, and who still has it, might well be ready to give it back if asked, or to give it to someone else at the parent's request, depending on what it is and on the circumstances. For this reason, Miss Arnold's attitude in 1984 to her father's request to have some items back, referred to at paragraph [63] above, does not seem to me to show that she was not, or did not regard herself as, the owner of the items in question.

93. The high points of the case for saying that Miss Arnold showed that she did not regard the 1976 material as having been given to her are the meeting on 18 November 1981 and Mr Preston's letter of 11 December 1981, to which Miss Arnold did not respond. Having considered the evidence as to the meeting, the contemporary documents prepared by Mr Preston, and the context and purpose of the meeting, which was to identify manuscripts which might be offered to the RCM, it seems to me that nothing in what Miss Arnold said or did on that occasion showed that she did not regard herself as the owner of any manuscript other than that or those which had been presented to her specifically. The topic of ownership was not then on the agenda; it had not been mentioned either by Mr Preston or by Miss Arnold. The scores which had been given to recipients (whether or not Miss Arnold) specifically were not produced in the context of ownership, but in order to show Mr Preston what might be done by way of a handsome binding. Therefore it was not legitimate or justified for Mr Preston to infer, from their being produced, that Miss Arnold did not regard any others among the manuscripts present in her house as belonging to her.

94. As for the subsequent letter, it too was mainly concerned with the subject of binding and thus, implicitly, with the proposed offer to the RCM. It does use the phrase "all the loose music held by you on behalf of your father". If it has any significance it is only because Miss Arnold did not respond and query the use of that phrase. However, it did not call for a response in terms. Moreover, it is interesting to note that, even in the course of cross-examination, when this letter was put to Miss Arnold, her first response was that it just said that her husband was going to be asked to do the binding, and did not imply anything about ownership either way. It was only when the point was put to her again that she began to see that the letter might be understood as having such an implication (Day 2 pages 33-34). That is consistent with the view that I would have formed even without that evidence, that this letter is not one which put to Miss Arnold the proposition that she did not own any of the loose manuscripts, in such a way that, if she disagreed with it, she should have corrected or disputed it before the Court went ahead with the proposal to incur expense out of Sir Malcolm's money by having the manuscripts bound.

95. Accordingly, I do not agree with the judge's view that the dealings between Miss Arnold and the Court from 1980 onwards either show that Miss Arnold did not regard herself as owning the manuscripts delivered to her in 1976, or that she made a clear and unequivocal representation to the Court by conduct or silence, to the effect that she did not own the manuscripts and that her father did, in reliance on which the Court acted by incurring the expense of having some of the manuscripts bound.

96. To my mind nothing in these later dealings casts any light either way on how the events of 1976 should be understood. Therefore, I do not need to consider whether, if they did, they would be admissible. It seems to me that the judge treated them as relevant because they showed Miss Arnold's subjective intention. Even if they did so (contrary to my view) they would be irrelevant. I also consider that there is no factual basis for an estoppel to be raised against Miss Arnold. The issue of gift or no is therefore to be answered on the basis of what happened in 1976, without regard to what was said or done later.

What does the postcard mean?

97. For Mr Day, arguing against a gift of manuscripts having been made in 1976, Mr Furness submitted that the word "etc" should be read as indicating things of the same kind as those specifically mentioned. He pointed to the fact that the boxes included manuscript scores, probably unique, of a lot of Sir Malcolm's works, many of which had not yet been published. The copyright would not, of course, pass with a gift of the physical score, but if the work had not been published, to give the score away might make it difficult or impossible to have the work published or performed later, and thereby to earn royalties or other income from it. Thus, such manuscripts are the composer's stock-in-trade and sources of income, and not at all of the same kind as books, pictures and sculptures, or other household items. On that basis he argued that they should not readily be inferred as being included in a gift in general terms by the composer, even to his children. To the fact that Sir Malcolm had been generous with manuscripts before, he pointed out that this was true only of gifts of specific manuscripts to particular people, which was not comparable to what Sir Malcolm is said to have done in 1976.

98. I can see that it might well, in general, be regarded as improvident for a composer to give away his unpublished and uncopied manuscripts. It seems to me that this is the thinking behind the judge's approach. For the children, Mr Twigger submitted that such an enquiry is inconsistent with the requirement of an objective consideration of the relevant intention, and that the judge had wrongly concentrated on subjective intention. He showed us that the mention in paragraph 12 (quoted at paragraph [75] above) of the objective observer was another passage introduced by the judge when revising his judgment. That is a harmless addition, in that it is open to the appellate court to form its own view of what the objective observer would conclude, regardless of what the judge might think, at any rate in a case such as the present, where there was no dispute as to the relevant primary facts.

99. For my part, improvident as it might have been (though in the event the manuscripts did not cease to be traceable or available), it seems to me that there is nothing in the circumstances of the delivery in 1976 to suggest that Sir Malcolm drew a distinction between different parts of the contents of the boxes. No case is made, or could be, that Sir Malcolm was under any mistake or misapprehension as to what was in the boxes. He certainly gave some of the contents of the boxes to Miss Arnold and Mr Arnold. In my judgment the only reasonable reading of the word "etc" in the postcard is that it referred to everything else in the boxes. The message cannot properly be read as meaning: "books, pictures, sculptures and anything else of a domestic nature but not the manuscripts of my compositions". Undoubtedly the message referred to the contents of the boxes, and showed that a gift was intended, not a mere temporary deposit for safe-keeping, and that the gift was to both children. It was of more than just the three categories of item mentioned specifically. It was of these "and the rest". It seems to me that "the rest", here, can only mean everything else in the boxes. On this issue, therefore, I disagree with the judge, as I do also (for reasons already given) as to the alternative case of estoppel. I therefore do not need to go into an intricate argument developed before us as to whether, in any event, Mr Day could take advantage of any estoppel. That point does not get to first base.

100. It follows from this conclusion that Miss Arnold and Mr Arnold own the manuscripts which were in the boxes delivered to Miss Arnold in 1976, and also the Fair Field manuscript. They do not own those manuscripts that were removed from Sir Malcolm's flat in 1980, nor the three manuscripts that were handed over by Faber Music Ltd in 1983. As regards these remaining manuscripts, it is necessary to address the other issues on the appeal.

Sir Malcolm's will: clause 6

101. Sir Malcolm made his will on 25 July 1990. For present purposes what matters is clause 6, which was as follows:

> "I give to [Mr Day] my house free of tax and of any mortgage or other encumbrance of a like nature and such of my household goods and possessions as are not otherwise dealt with hereunder together with my motorcar and a sum of £10,000 (including any manuscripts scores and musical literary or other written material but not any copyright or other right therein except ownership of the physical item and excluding money or securities for money)"

As I have mentioned earlier, this gift follows clauses giving some legacies to others and annuities to Sir Malcolm's former wives, and is followed by the gift of residue under which Mr Day takes half, as do the children between them. The gift of residue expressly includes "the copyright and any other right in my musical and literary compositions".

102. The question is whether manuscripts owned by Sir Malcolm at the date of his death and on deposit at the RCM at that time passed to Mr Day under this gift. The judge held that they did not.

103. Beyond doubt the clause is oddly drafted. None of Sir Malcolm's household goods and possessions are dealt with by any other clause of the will, so the words "such of" and "as are not otherwise dealt with hereunder" are not necessary. They may have been taken from a standard provision in a precedent, and included without thought as to whether they were necessary. It is also a little odd that the legacy of £10,000 does not appear in clause 4 which sets out the other pecuniary legacies. If the gift is to be read as extending, principally, to the house, the household goods and the car, it is very odd that it should be thought necessary to exclude from the category of "household goods and possessions" either copyrights or money and securities for money. The reference to copyright is understandable because of the inclusion of manuscripts, but the inclusion of manuscripts, and its presentation in parenthesis, is odd because one would not normally think of the manuscripts of a composer's own works, even if kept in his house, as being among his household goods or possessions.

104. It is not clear to what extent Sir Malcolm still owned manuscripts in 1990 other than those which I have already discussed. Those which I have held did remain in his ownership were with the RCM, not in his house. The evidence is that he gave the manuscripts of his works written after 1986 to Mr Day as each was completed. A file note of Mr Harris made in 1998, relating to the 1998 record of gift to which I will come, indicates that at that time there were some manuscripts in the house which belonged to Sir Malcolm. Therefore it seems that, if the gift had been of "manuscripts kept in my house", there would or might have been some manuscripts which could have passed under the gift. The position may have been the same at Sir Malcolm's death.

105. Mr Twigger's submission, which accords with the judge's reasoning, was that the clause is dominated by the gift of the house, that all else is ancillary to that, and that therefore the mention of manuscripts and other material in the parenthesis is to be read as doing no more than pointing out that there may be manuscripts or such other things which are household goods or possessions, and that they pass under the gift. On that basis the words of inclusion in the brackets are only explanatory. They do not extend the gift so as to cover anything that would not be within it if the words in brackets had not been there.

106. To the contrary, Mr Furness submitted that this does not make proper sense of the words in brackets. They show that the gift was intended to include manuscripts, scores and other musical and literary material, some or all of which would not normally be considered to be household goods or possessions, at any rate in the case of a composer's own works. The drafting is not ideal, for this purpose, but then it is far from satisfactory on any basis. It would have been better, on this view of Sir

Malcolm's intentions, not to put the relevant words in brackets, and to introduce them, not by "including", but by "together with" or some such words.

107. The judge made the point that a manuscript is in no real sense a household good or possession, but that on a natural reading the words in brackets did qualify or relate to "household goods and possessions". He held that the words extended to any manuscript which was at the relevant time in the house, but that it did not extend to those which were on deposit at the RCM. He also observed that "at least at this stage" Sir Malcolm seems to have thought that he had given (and not merely lent) the manuscripts to the RCM. For my part, it seems to me dangerous and unreliable to allow the proper reading of clause 6 to be affected by a view as to what Sir Malcolm thought in 1990 about the status of the manuscripts then at the RCM. The evidential material is far too slender and indirect to form a clear view of that, even if it would be relevant to do so.

108. I agree with the judge that the clause is not well drafted and that it is not easy to construe. However, I regard it as significant that the gift speaks of "any manuscripts scores" etc. and gives them to Mr Day, to whom, as we know, Sir Malcolm had by then been giving the manuscripts of newly composed works as they were completed. It seems to me that a gift of his manuscripts is likely to have been of some importance to a composer, when making his will. I am not deterred from that view by the perhaps imprudent and even cavalier way in which Sir Malcolm dealt with his manuscripts in 1976, as already discussed. For those reasons it seems to me that the correct way in which to reconcile the difficulties presented by clause 6 is to adopt Mr Furness' reading, and to read the words in brackets as an addition to what had gone before, despite the word "including". The use of that word can be justified as saying that the gift is to include the items then described, rather than as pointing out that there may be manuscripts or scores which are within the gift because they are household goods or possessions. I accept that the drafting of clause 6 is not as it should be, but that is true whatever view one takes of the clause. For that reason, differing on this point from the judge, I hold that the gift in clause 6 of the will includes the balance of the manuscripts which were on deposit at the RCM (that is to say, those that had not been given to Miss Arnold and Mr Arnold in 1976), as well as any other manuscripts owned by Sir Malcolm at the time of his death.

The 1998 record of gift

109. On 5 August 1998 Sir Malcolm signed a document prepared by Mr Harris as a letter addressed to Mr Day. It was headed "my manuscripts" and the text was as follows:

> "As you know, in my will, dated 25th day of July 1990, I have given you (in clause 6) "any manuscripts scores and musical literary or other written material" (but not any copyright or other right in them except ownership of the physical items). I would now like you to have these papers whilst I am still alive as a gift from me. This is not a gift of copyright.
>
> So there is no doubt, I would like you to have the papers catalogued as and when it is convenient. I am happy for my business to pay for this because I think it is useful for copyright purposes. You may also like to get the papers valued, so that you have a record. That is up to you.

> When you have a full list, I will sign it to confirm that all the items are included in this gift."

No list was prepared or signed, then or later.

110. The document could not take effect as an immediate gift of the manuscripts then at the RCM because there was no delivery of them under the gift. However, if the document was otherwise effective, it is accepted for the children that the lack of delivery was remedied when Mr Day took the grant of probate, because of the principle of *Strong v Bird* (1874) LR 18 Eq 315.

111. Two issues arise: to what manuscripts did the document relate, and did it take effect immediately or, as was argued for the children, was it incomplete until the contemplated list had been prepared and signed? As to the first point, on the face of it the document relates to the same category of manuscripts as does clause 6. On the judge's narrower reading of clause 6, it was argued for the children that the 1998 gift did not include any manuscript that would not have been comprised in the clause. The judge disagreed with that, in a supplemental judgment, saying that the words quoted from the will were used in a new context not constrained by their juxtaposition with household goods and possessions, and that they meant all manuscripts in his ownership. On my wider reading of the clause in the will, this point does not arise.

112. As for the second point, the documents in evidence include some which show how the document came to be in the form in which it stands, but it seems to me that this evidence is legally inadmissible in construing the document. It depends on the terms of the document itself. On the one hand, Sir Malcolm clearly wanted a list to be prepared, for which process he would pay, and he would sign it when it was ready, to confirm the position. So, further steps were envisaged. On the other hand, the document says that he wants Mr Day to have the manuscripts "now" as a lifetime gift, and it speaks of the cataloguing as being intended to eliminate doubt. That suggests that the gift was to take effect immediately, although it ought, as matter of prudence, to be followed up and confirmed by a cataloguing process. The document is of some formality but, if Mr Twigger's submissions are correct, it had no immediate effect. It would therefore have been futile of itself.

113. I prefer Mr Furness' arguments on this point, in agreement with the judge. It does not seem to me to be right to construe the document as inchoate and ineffective without a list having been prepared and signed. That the document, by its own language, was intended to have some immediate effect is shown by the words: "I would now like you to have these papers". I accept the submission that the purpose of the catalogue was to avoid uncertainty. It would of course have been a good idea to have carried out this request. However, it does not seem to me that the terms of the letter show that the catalogue was an integral and necessary part of the process. I also accept the point that, if the list had been essential, the letter which is in formal terms and looks as if it is intended to achieve something, would in fact have done nothing at all.

114. Accordingly, on this point I agree with the judge.

The result of the appeals

115. On the appeal about the five annual money gifts, for the reasons set out above, I hold that the judge was correct and I would dismiss the appeal by the children.

116. On the appeal about the manuscripts, I hold as follows:

i) The manuscripts that were contained in the boxes delivered by Sir Malcolm to Miss Arnold in 1976 were given by him at that time to Miss Arnold and Mr Arnold, and they are not estopped from asserting their ownership of them. In that respect I would allow their appeal.

ii) The terms of clause 6 of Sir Malcolm's will extend to all manuscripts which he owned at the time of his death, including any then on deposit with the RCM. In that respect I find in favour of Mr Day's Respondent's Notice.

iii) The record of gift dated 5 August 1998 took effect despite the absence of a list, and extended to all manuscripts then owned by Sir Malcolm, including those then at the RCM. It could not be fully effective without delivery of the manuscripts, but it became a complete gift, by virtue of *Strong v Bird*, on Sir Malcolm's death when Mr Day became an executor. On this point I would dismiss the children's appeal.

117. In summary, Mr Day is not liable to account to the estate of Sir Malcolm for the £36,000 given to him between 2002 and 2006 in the circumstances already discussed. Miss Arnold and Mr Arnold are the owners of the manuscripts delivered to Miss Arnold in 1976, and of the Fair Field manuscript. The manuscripts removed from Sir Malcolm's flat in 1980 and the three manuscripts delivered by Faber Music remained in Sir Malcolm's ownership but they were given to Mr Day in 1998 by an incomplete gift, perfected on the grant of probate to Mr Day after Sir Malcolm's death, and if they had not been, they would have passed to Mr Day under clause 6 of the will, rather than forming part of the residue under clause 7.

Lord Justice McFarlane

118. I have had the benefit of reading the judgments of Lord Justice Lloyd and of Lord Justice Rix. My Lords disagree over the interpretation of the Enduring Powers of Attorney Act 1985 and its impact upon Mr Day's ability to make the five gifts totalling £36,000 set out at paragraph [15] in Lloyd LJ's judgment. Despite understanding and having respect for the analysis offered by Rix LJ in his judgment, I am clear that the more focussed interpretation described by Lloyd LJ (in particular at paragraphs [33] to [34] and [40] to [41]) is correct.

119. EPAA 1985, section 7(1)(c) is at the centre of this issue and is set out by Lloyd LJ with helpful contours at paragraph [32]. When the sub-section is read as a whole, as it surely must be, its focus is clearly upon 'the scope of the authority conferred by the instrument'. The opening words state that 'the donor may not extend or restrict the scope of the authority conferred by the instrument' after registration and the remaining words of the provision, which follow the word 'and', are simply a consequential list of steps which, following registration, can have no legal effect in relation to altering the scope of the authority of the instrument. There is no indication

within the wording of the single sentence in section 7(1)(c) to the effect that it is to have a more general impact upon the relationship between the individual who is the principal and the individual who holds the EPA in relation to acts and transactions that may be undertaken outside the context of an EPA.

120. As Lloyd LJ has explained (paragraph [22]) the Act is intended to establish a category of agency which will endure and will not be revoked by the subsequent mental incapacity of the principal. It is, in my view, to be seen as a facility rather than a strait-jacket, permitting the agent to continue to act under the terms of the authority contained in the EPA, but not, of itself, preventing the individual who is the agent from continuing to act in another capacity or under a different authority in relation to the same principal as the factual circumstances may justify.

121. In the circumstances I agree with Rix LJ at paragraph [130] below that section 7 relates to the basis on which the EPA endures, but, with respect, differ from my Lord where, at paragraphs [131] and [132], the words in the second part of section 7(1)(c) are given a wide and general meaning so as to have an impact beyond the definition of the scope of the EPA instrument.

122. Section 7(2) plainly contemplates that even after the date of registration of an EPA the mental capacity of the donor may fluctuate. The purpose of section 7 is to establish the scope of the authority granted under the EPA with clarity from the date of registration onwards 'whether or not the donor is for the time being mentally incapable' (section 7(2)). The circumstances found by the judge in the present case to the effect that, in relation to making the five disputed gifts, Sir Malcolm had the necessary mental capacity to authorise payment out of the bank account is therefore a state of affairs, in terms of capacity, which is expressly tolerated by section 7(2).

123. I therefore hold that the judge was correct in his decision in relation to the five annual money gifts, for the reasons given by Lloyd LJ, and I would dismiss the appeal by the children. In common with Rix LJ, I agree with Lloyd LJ with respect to the appeal relating to the manuscripts and would hold that the outcome of this litigation as a whole should be that which is set out in paragraphs [115] to [117].

Lord Justice Rix

124. I am grateful to Lord Justice Lloyd for setting out the material in this appeal. I agree with all he has said, save for his conclusions about the effect of the Enduring Powers of Attorney Act 1985 (the Act). In my judgment the effect of that Act is to render Mr Day accountable to Sir Malcolm's estate for the five gifts totalling £36,000 from Sir Malcolm which Mr Day made to himself, albeit with Sir Malcolm's consent, by means of the mechanism of drawing cheques on their joint account, in the period following registration on 8 February 2002 of the enduring power of attorney (the "EPA") made by Sir Malcolm in Mr Day's favour. As the judge said, it was apparent from the date of registration that "Sir Malcolm was incapable in general terms of managing his affairs".

125. The essential argument on behalf of Mr Day is that the Act is concerned only with powers under an EPA and did not affect Mr Day's ability, with Sir Malcolm's consent, to use his separate authority under the joint account to make gifts to himself out of funds in the account (which otherwise it was common ground consisted entirely

of Sir Malcolm's property). The essential argument on behalf of the children, Katherine and Robert, is that the Act covered all acts of agency by Mr Day following registration of the EPA and that therefore, pursuant to its section 3(4) and (5), the Act did not permit the gifts in question. It is common ground that section 3(4) and (5) of the Act did not permit those gifts under its own terms. The issue is whether Mr Day can find authority to make the gifts to himself, with Sir Malcolm's consent, outside of the Act.

126. I refer to paragraph [22] above in Lloyd LJ's judgment as to the essential purpose of the Act. It provides a mechanism by which the common law rule, by which the authority of an agent comes to an end at once if the principal ceases to be of full capacity, is replaced by a carefully regulated regime which covers the creation of the EPA, its scope, its registration in the event of incipient mental incapacity, and the power of the Court to supervise and, if necessary, curtail or supplement the powers of the attorney.

127. The Act is of course primarily concerned with what can be done, and what are the limits of the attorney's powers, under the EPA, whether before or after registration. However, the question which has arisen in this case is as to the effect of registration on other possible sources of fiduciary authority.

128. It is explicit in the Act that registration of an EPA is a watershed. A move to registration does not necessarily mean that the donor lacks mental capacity, but the Act places a duty on the attorney to approach the Court for the purposes of applying for registration, as the heading to section 4 puts it, "in event of actual or impending incapacity of donor". The significance of registration is highlighted by the attorney's obligation to give notice of his impending application to the Court for registration to the persons set out in Schedule 1 to the Act, viz. to the donor and to the donor's family members. The donor's family members are told that they may object to registration. When the application for registration comes before the Court, the Court "shall" register the EPA unless subsections (2) or (4) of section 6 apply (see section 6(1)). Subsection (4) is concerned with grounds of objection, for which the reader is referred to subsection (5). Subsection (5) permits a notice of objection on certain specified grounds, inter alia that in subsection (5)(c) "that the application is premature because the donor is not yet becoming mentally incapable". If a ground of objection is established to the satisfaction of the Court, then registration shall be refused.

129. Thus the premise of registration is that the donor is suffering actual or incipient mental incapacity. Those are the very circumstances in which the common law contemplates the cessation of any existing authority of a donor's agent. The purpose of the Act is of course to enable the donor to create a power of attorney which will endure into a period beyond which the common law would not allow. That is what the Act's long title says: "An Act to enable powers of attorney to be created which will survive any subsequent mental incapacity of the donor and to make provision in connection with such powers". The Act creates circumstances under which, subject to a carefully regulated regime and to the oversight of the Court, and to a public process of registration, the donor is, upon registration, to be regarded as no longer competent to give, restrict, or enhance authority to an agent. The watershed of registration remains as long as registration survives, even if the donor's mental capacity should change for the better or, as the Act says, "whether or not the donor is for the time being mentally incapable" (section 7(2)).

130. It is moreover implicit in the whole structure of the Act that neither the donor nor the attorney can, after registration, alter the basis upon which his authority endures. Thus the donor cannot revoke his EPA without the Court's sanction (section 7(1)(a)); the attorney cannot disclaim his power without notice to the Court (section 7(1)(b)); and in any event the donor cannot extend or restrict the scope of authority conferred by the EPA (section 7(1)(c)). It is said that this refers *only* to the EPA and does not cover any other means by which the donor might have in the past granted authority to his attorney. Nevertheless it seems to me to be implicit in the whole structure of the Act that the donor could not seek to create another agency in the future or to give a new power of attorney, whether in the form contemplated by the Act, or in any other form. And if that is so of the future, it seems to me to follow for the past as well, that is to say that a previous authority granted could not be maintained into this new regulated world as though there had not been a Court supervised registration. In any event this reflects the underlying structure of the common law which is to remove from a principal who lacks mental capacity his power to maintain or create authority in another person to act for him.

131. It is in these circumstances that one contemplates the scope of the second part of section 7(1)(c) of the Act. I set out that subsection in full for convenience:

> "(1) The effect of registration of an instrument under section 6 is that –
>
> …
>
> (c) the donor may not extend or restrict the scope of the authority conferred by the instrument and no instruction or consent given by him after registration shall, in the case of a consent, confer any right, and, in the case of an instruction, impose or confer any obligation or right or create any liability of the attorney or other persons having notice of the instruction or consent."

132. As Lloyd LJ helpfully shows at paragraph [32] above, for present purposes it is useful to concentrate on the words "and no consent given by him after registration shall … confer any right … on … the attorney …". Those words in their general width seem to me to cover the situation in issue in this appeal. It is common ground that Mr Day could not, despite being the joint holder of the joint account, make a gift to himself of the £36,000 in question without Sir Malcolm's actual consent. Therefore, Mr Day has to be able to rely, in the new circumstances following registration, on Sir Malcolm's subsequent consent being effective. The subsection, however, tells us that Sir Malcolm's consent is not to be effective. Although the subsection as a whole may be written with the EPA in mind, what this entirely general language tells us is that the donor's consent cannot confer any right on the attorney. I do not see why the general language should be limited so as not to apply to the circumstances in question in this appeal. To limit the language would seriously impair the structure and regime of the Act. A purposive interpretation would strongly suggest its applicability.

133. Moreover, such an interpretation suggests the appropriate response, as it seems to me, in a double way. First, it would prevent the danger of an agent taking advantage of his principal in circumstances for which the Act is designed to provide. I do not say that Mr Day took advantage of Sir Malcolm. The judge found consent, and that Sir

Malcolm was, although generally incapable, nevertheless able to consent to such transactions. Nevertheless, the dangers of such a situation are plain to see, and have led to litigation in which a court has had to determine the facts of consent, retrospectively, after death, in an unhappy litigious situation. Secondly, the Act itself provides for such a case, where the donor wishes to give his attorney a gift, but not one which falls within the general, but limited, scope of an attorney's power to make a gift to himself out of his donor's property. Under the Act's regime, the Court, that is to say a court particularly suited for such situations, may determine consent contemporaneously and in advance of the issues arising, which is much preferable.

134. Thus, section 8(2)(d) and (e) provide specifically for such a situation. Section 8 deals with the "Functions of court with respect to registered power", as its heading states. Section 8 reads in relevant part as follows (it is not set out above):

> "(1) Where an instrument has been registered under section 6, the court shall have the following functions with respect to the power and the donor of and the attorney appointed to act under the power.
>
> (2) The court may –
>
> (a) determine any question as to the meaning or effect of the instrument;
>
> (b) give directions with respect to –
>
> (i) the management or disposal by the attorney of the property and affairs of the donor;
>
> (ii) the rendering of accounts by the attorney and the production of the records kept by him for the purpose;
>
> (iii) the remuneration or expenses of the attorney, whether or not in default of or in accordance with any provision made by the instrument, including directions for the repayment of excessive or the payment of additional remuneration;
>
> (c) require the attorney to furnish information or produce documents or things in his possession as attorney;
>
> (d) give any consent or authorisations to act which the attorney would have to obtain from a mentally capable donor;
>
> (e) authorise the attorney to act so as to benefit himself or other persons than the donor otherwise than in accordance with section 3(4) and (5) (but subject to any conditions or restrictions contained in the instrument);
>
> (f) relieve the attorney wholly or partly from any liability which he has or may have incurred on account of any breach of his duties as attorney."

135. It seems to me that these provisions, and in particular subsections (2)(d) and/or (e), the latter of which makes specific reference to section 3(4) and (5), are intended to cover just such issues as have arisen in this case: where an attorney has, after registration, and thus when a donor cannot give his attorney a consent which goes beyond the EPA, good reason for approaching the Court for its consent and authorisation to act in a way not otherwise authorised but for which "a mentally capable donor" could give consent.

136. Moreover, since ex hypothesi Sir Malcolm's specific consent, if it could be given, was needed for the gifts in question, even though Mr Day was the joint account holder, it seems to me to follow that, even though the drawing of a cheque on the account was the *mechanism* of the transfer, the gifts required both Sir Malcolm's general authority to operate the account to pay away money (for only Sir Malcolm's money was in the account) and, in relation to transfers by way of gift to Mr Day, required Sir Malcolm's *specific consent*. If one asks what entitled Mr Day to make the transfers in question to himself from the account, the answer cannot be found in the mere opening or operation of the account, but has to be founded in Sir Malcolm's consent on each relevant occasion. In such circumstances, it seems to me to be beside the point to say that the gifts were made "under the direct authority of Sir Malcolm and under the authority of the bank mandate, not by virtue of the power of attorney" (Judge Purle at paragraph [64] of the gifts judgment). Of course Mr Day was acting under the authority of Sir Malcolm and by means of the mechanism of the bank mandate: he needed both. But that is not to say that he was not acting as Sir Malcolm's attorney, and I do not regard the judge's conclusion to the contrary as a finding of fact binding on this court. Indeed, following registration I do not see in what other capacity Mr Day could have been acting. I would accept Mr Twigger's submissions to that effect (see under paragraph [36] above). But be that as it may, Mr Day was Sir Malcolm's attorney under a registered EPA and as such I consider that section 7(1)(c) prevented him from using Sir Malcolm's consent to the gifts in question when he was told by that subsection, coupled with section 3(4) and (5), that he could not do so, unless he obtained consent or authorisation from the Court. It was not even as though the consents in question preceded the registration of the EPA.

137. I do not regard the Law Commission's report as pointing in any other direction. Paragraph 4.70 (cited above at paragraph [27]) is concerned with the different question of a donor after registration being able to "run his own affairs to the extent that he is actually able to run them". It is not concerned with additional consents outside the regime of the Act. Thus the illustrations of the donor running his own affairs are revealing. The report continues: "For example, if the donor after registration has sufficient capacity to do his shopping or run his bank account he should be able to do so independently of the attorney". That is not this case: Sir Malcolm was not, so to speak, doing his own shopping, he was not running his own bank account, and he was not acting independently of Mr Day, who was consulting advisers about the tax planning in question and operating the bank account.

138. I also have in mind paragraph 4.75, where the report reads:

> "Thus, although the donor might still be sufficiently capable to vary the attorney's authority or give sensible detailed instructions as to how the attorney should manage his affairs, it would no longer be safe to allow such variation or instructions to have legal effect. We

> accordingly recommend that once the EPA has been registered the donor should not be able to vary the scope of the attorney's authority under the power. *Furthermore, any instructions or consents that that donor might give should have no legal effect.* The attorney and third parties should therefore ignore them." [Emphasis added]

That, it seems to me, is in accordance with what I have sought to explain above and demonstrates that it was the Law Commission's intention, by the latter part of section 7(1)(c), to produce a general bar, after registration, on the attorney acting upon the donor's instructions or consents outside the EPA itself.

139. I would therefore respectfully differ from paragraph [115] of Lloyd LJ's judgment above, and would allow the children's appeal in this respect as well.