Case No: CH-2017-000103

Neutral Citation Number: [2018] EWHC 973 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27th April 2018

Before :

Mr Justice Fancourt

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Between :

(1) Sharifa Begum Malik, deceased (by her Estate's court appointed representative, Iqbal Malik)	**Appellant**
- and –	
(1) Abdul Waheed Shiekh	**Respondent**

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Lesley Anderson QC & Lina Mattsson (instructed by Jaffe Porter Crossick LLP) for the **Appellant**
Mark Warwick QC & James Sandham (instructed by Talat Naveed Solicitors) for the **Respondents**

Hearing date: 12, 13 April 2018

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Judgment

Mr Justice Fancourt:

Introduction to the appeal

1. On 29 January 2013, Mrs Sharifa Begum Malik signed two Land Registry Forms TR1, by which she transferred for no consideration properties of which she was at the time the sole registered proprietor, 9 and 35 King Street, Southall, Middlesex ("the Properties"). She transferred them into the names of herself and the Respondent, Mr Abdul Waheed Sheikh, to hold on trust for themselves as tenants in common in equal shares.

2. On 8 February 2013, those TR1s and a Land Registry Form DS1 signed by Mr Sheikh releasing a charge over 18 Cranborne Avenue, Southall, Middlesex were dated and delivered. Mr Sheikh thereby gave up a second charge over 18 Cranborne Avenue and obtained, on the face of it, a half share of the Properties.

3. Prior to the delivery of the TR1s and the DS1, on 7 February 2013, Mr Sheikh had concluded a commercial agreement with Mrs Malik's two sons ("the February 2013 Agreement"), who were referred to in the trial in the lower court as "the Maliks". They played no part in that trial, as parties or as witnesses.

4. Under the February 2013 Agreement, Mr Sheikh gave the Maliks an interest-free loan of £200,000 and agreed to an extended credit facility for the benefit of the Maliks' company, Haji Ismail and Sons Ltd ("HIS"), for trade with Mr Sheikh's own company in Pakistan, Bismillah Fabrics (PVT) Ltd. Mrs Malik was not a party to the February 2013 Agreement nor was it found that she knew of its terms or had a copy of it.

5. 18 Cranborne Avenue was Mrs Malik's and her sons' and their families' home: a large, 8-bedroomed house. It was jointly owned by Mrs Malik and the Maliks. I will refer to it as "the Home".

6. Owing to the prior interest of a chargee, there was a problem with registering the TR1s. On 21 June 2013, Mr Sheikh therefore applied to the Land Registry to register a restriction against the titles of the Properties, to protect his beneficial interest. Mrs Malik's grandson objected on her behalf to entry of the restrictions, essentially on the ground that Mrs Malik had not been advised about transferring ownership of the Properties.

7. The dispute was referred by the Land Registry to the Property Chamber of the First-tier Tribunal ("F-tT") for resolution. Statements of case were exchanged there. However, in June 2014, when the matter was to be tried, the case was transferred by the F-tT to the Central London County Court because by then Mrs Malik had been diagnosed with dementia and lacked capacity to act in the proceedings.

8. The county court gave the proceedings a new case reference and proceeded to appoint, first, Mrs Malik's daughter, Razia Mailk, and then, when Razia Malik later became seriously ill, Mrs Malik's grandson, Iqbal Malik, to act as her litigation friend.

9. No originating process was issued in the county court. Instead, the court directed that the statements of case in the F-tT should stand as the statements of case there and gave further directions for trial. The parties naturally acquiesced in that sensible direction. The trial was eventually heard by HHJ Parfitt in January 2017.

10. At the trial, Mrs Malik (acting by her litigation friend) took the point that the county court had no jurisdiction, since the Land Registration Act 2002 appeared to require new proceedings to be issued if the dispute was to be sent from the F-tT to be heard in a court. Apart from that jurisdictional challenge, Mrs Malik contended that the TR1s did not bind her on grounds of non est factum, misrepresentation and undue influence.

11. HHJ Parfitt handed down a reserved judgment on 6 April 2017. He rejected the contention that the county court had no jurisdiction and upheld the validity of the TR1s, holding however that by reason of the February 2013 Agreement the TR1s only took effect to the extent of giving Mr Sheikh security for the repayment of the loan to the Maliks and the extended credit afforded to HIS and no further.

12. In relation to the undue influence allegations, he held that the Maliks acted as Mr Sheikh's agents for the purpose of obtaining her agreement to sign the TR1s but that there was no evidence of a relationship in which Mrs Malik reposed trust and confidence in them, and that the transaction involving the TR1s was not such as to call for an explanation, given a long history of use of family properties to secure borrowing of HIS. He also held that had he been able to decide those two issues differently, so as to give rise to a presumption of undue influence, Mr Sheikh would have failed in seeking to rebut that presumption, given the absence of any satisfactory independent advice for Mrs Malik at the time of the transaction.

13. Mrs Malik appealed, with permission of Snowden J, against the Judge's decisions on jurisdiction and undue influence. There is no cross-appeal against the decision on whether Mr Sheikh would have rebutted a presumption of undue influence.

14. Sadly, before the hearing of the appeal, Mrs Malik passed away. It is believed that she might have died intestate, but that is not yet clear. Mr Iqbal Malik obtained an order to represent her estate on the hearing of the appeal and so he is, technically, the Appellant.

The defence of undue influence

15. I shall deal first with the substantive questions on the undue influence appeal.

16. Ms Anderson QC, who appeared with Ms Mattsson for the Appellant, accepts that the Judge correctly directed himself on the law, based on the decision of the House of Lords in Royal Bank of Scotland plc v Etridge (No.2) [2001] UKHL 44; [2002] 2 AC 773. Save for certain categories of relationship where undue influence is presumed without more (which is not this case), a presumption of undue influence arises where the person seeking to set the disposition aside (A) proves that he or she was subject to influence by the party seeking to uphold the disposition (B) or by those acting for B (X), and that the disposition itself is of a kind or is on terms that call for explanation by B (that is to say, it is not explained by the ordinary motives that would lead someone in those circumstances to enter into such a transaction). Where the presumption applies, the onus rests on B to show that there was in fact no undue influence on A that led to the disposition. A relationship of influence is often established by proving that A reposes trust and confidence in B (or X), either generally or in relation to the subject-matter of the transaction, but a relationship of influence does not depend on proof that A reposed trust and confidence in B. It may arise where, e.g., there is a position of dependency and vulnerability of A as compared

with domination or control of B or X: see Etridge , at [11], per Lord Nicholls of Birkenhead.

17. Ms Anderson accepts that her appeal is therefore advanced on the basis that the Judge wrongly evaluated the facts on the questions that he was required to decide. She did not shrink from putting her case high in opening the appeal. She submitted that the Judge simply and obviously reached the wrong conclusion on the basis of the evidence that he heard and which he set out in his judgment. She accepted that she could not succeed by arguing simply that the Judge did not give enough weight to certain facts or gave too much to others, but had to establish either that the Judge had wholly failed to consider material facts, or took into account immaterial facts, or alternatively that the decision was unjustified by the evidence, in the sense that it was a decision to which no reasonable judge could have come. This concession was, in my judgment, rightly made, in view of the judgment of the Court of Appeal in Assicurazioni Generali SpA v Arab Insurance Group [2003] 1 WLR 577 at [16], per Clarke LJ, recently affirmed by the Court of Appeal in Estrada v Al-Juffali [2016] EWCA Civ 176; [2017] Fam 35 at 88, per Lord Dyson MR, on which the Respondent relies as raising a "high hurdle" that the Appellant has to surmount.

18. On the issue of a relationship of influence, the Judge held that, giving the fullest allowance for Mrs Malik's difficulties with written English, her age (nearly 79) and her relative infirmity, there was insufficient evidence for him to conclude that the relationship between her and the Maliks was one in which she reposed trust and confidence in them. In so deciding, it is clear that the Judge had in mind in particular the absence of any evidence on behalf of Mrs Malik about how her financial affairs were managed, including the income from the Properties. He also referred to the position about the beneficial ownership of the Properties being unclear. It is clear that the Judge also had in mind the absence of any medical evidence to support a conclusion that Mrs Malik was losing her mental capacity at the time. No permission for such evidence had been sought before the trial. At trial, the Judge refused permission to rely on the medical report that was used in 2014 to establish that Mrs Malik then had dementia and no contractual capacity. There is no appeal against that case management decision. He also referred to the absence of any other evidence to establish that Mrs Malik was an essentially vulnerable person. Mrs Malik had 6 daughters as well as her 2 sons, the Maliks, but no evidence was called from them or from others who knew her.

19. The Judge made various findings about Mrs Malik in paragraph 62 of his judgment. He found that she had previously been an active participant in the family's business (conducted through HIS). She had been willing to grant security over her property to support borrowing by HIS. She had had a conversation with Mr Sheikh in the months before the transaction, encouraging him to support her sons and continue the business relationship with HIS, even though she was no longer active in the business. In October 2012, the Maliks and Mrs Malik had jointly charged the Home, by way of second charge to Mr Sheikh, on a temporary basis to support a loan facility and extended credit that had been negotiated in principle between the Maliks and Mr Sheikh on 16 July 2012. The second charge over the Home was challenged too in these proceedings and the Judge found that there was no undue influence or coercion involved and that Mrs Malik (who was taken to see a solicitor acting for her)

effectively acted of her free will in joining in the charge. There is no appeal against that part of the Judge's decision.

20. There was no challenge made by Mrs Malik or by the Appellant at any stage to the validity of charges granted by Mrs Malik to Habib Allied International Bank ("Habib International") over the Properties. These were granted in the morning of the same day on which the TR1s were signed in the afternoon. This was a different transaction that arose as a result of re-financing HIS's debt and loan facilities. HIS was in financial difficulties and required more extensive facilities. HIS's bankers prior to January 2013 were Habib Bank AG Zurich, who held security over the Home and the Properties. Habib International became the new bankers and lenders in January 2013 and therefore new charges in favour of that bank were required to be executed over the Home and the Properties. Those charges were a replacement of the existing charges in favour of Habib Bank AG Zurich.

21. That transaction was however linked to the transaction involving the TR1s in two ways. First, it had not proved possible to grant security to Mr Sheikh over an industrial property already charged to Barclays Bank, in place of the temporary second charge on the Home, and so the TR1 transaction was intended by the Maliks to provide Mr Sheikh with alternative security. Second, it was the Company's financial difficulties that required the facility from Mr Sheikh as well as the facility from Habib International. The TR1 transaction was clearly driven by HIS's financial needs.

22. Given that no undue influence was used to persuade Mrs Malik to execute the charge in favour of Mr Sheikh over the Home or (on the basis that no challenge has been raised) the charges over the Properties in favour of Habib International, it might be thought to be difficult for the Appellant to establish a presumption of undue influence in relation to the transaction involving the TR1s. However, the nature and circumstances of that transaction are different, and the question must be separately addressed in relation to it.

23. The Appellant submits that this was a clear case where the age of Mrs Malik, in combination with her relative infirmity, her immobility, her inability to read English, her lack of involvement with HIS since 2008 and her knowledge of HIS matters therefore being dependent on her sons, the Maliks, with whose families she shared the Home, created an obvious vulnerability on her part as against them and their financial requirements. The Maliks were active businessmen, whose interests were aligned with HIS. HIS needed funds and had to provide security for them. Set against that, the Judge did find that although Mrs Malik was no longer involved with HIS she was still able to talk to others (including Mr Sheikh) about her sons' business affairs. It is important also to bear in mind that the Judge considered that, if financial dependence or vulnerability was being alleged, specific evidence to that effect on behalf of Mrs Malik could and should have been given.

The nature of the transaction

24. In my judgment, however, the important matter to address first in this case is the nature of the transaction in question. If, in substance, it was no more than a continuation of the practice of Mrs Malik and other family members giving security over property they owned to support lending to the Company, it would be difficult to distinguish the TR1s transaction from the contemporaneous charges over the

Properties to Habib International and the temporary charge over the Home granted by the Maliks and Mrs Malik to Mr Sheikh.

25. The Judge concluded that "the nature of the transaction – properly understood – was [not] one which requires an explanation in the context of this family". He referred to "the wider transaction" as being the grant of charges to Habib International and the TR1s, which were signed on the same day, 29 January 2013. By that, it is clear that he meant that there had been a history of "family property" being used as security for lending to the Company and that the "wider transaction" was only more of the same, and therefore not such as to cause eyebrows to be raised. He was also aware that an essential additional part of the wider transaction was the release of Mr Sheikh's charge over the Home.

26. In evaluating the transaction, the Judge noted that protection was afforded to Mrs Malik by the terms of the February 2013 Agreement between Mr Sheikh and the Maliks. This was that the transfers were by way of security for the loan and credit; that the security interest would lapse altogether on Mr Sheikh's death, albeit that his interest would revert to the Maliks, and that his interest was personal and would not survive his death. The Judge considered that the obligations in the February 2013 Agreement were enforceable by Mrs Malik because of her rights in the Properties.

27. I respectfully consider that the Judge was wrong in material respects in his evaluation of the effect of the TR1s and the February 2013 Agreement.

28. First, the February 2013 Agreement was no part of what was agreed between Mrs Malik and Mr Sheikh. By the date on which Mrs Malik signed the TR1s (after which she had no further involvement), the February 2013 Agreement had not even been drafted. It is common ground that the first draft was dated 31 January 2013. The TR1s were later dated 8 February 2013 by Mr Caplan, HIS's solicitor, who wrongly claimed to have witnessed Mrs Malik's signature.

29. Second, the February 2013 Agreement excludes the operation of the Contracts (Rights of Third Parties) Act 1999. Mrs Malik therefore cannot have taken any benefit under that Agreement, nor can she enforce its terms directly.

30. Third, the TR1s are unqualified transfers of the freehold of the Properties, to be held by Mr Sheikh and Mrs Malik as tenants in common in equal shares.

31. Fourth, although equity would act to prevent Mr Sheikh from asserting any greater interest than that of a mortgagee, the intervention of equity would require either the Maliks, or someone else with knowledge of the specific terms of the February 2013 Agreement, to intervene to protect Mrs Malik's rights.

32. Fifth, as regards the position after Mr Sheikh's death, the February 2013 Agreement gave the Maliks (not Mrs Malik) a specifically enforceable right to compel the transfer of Mr Sheikh's half share of the Properties to them, but his interest in the Properties would remain with his estate unless and until the Maliks took steps to enforce their rights in that regard.

33. In these respects, therefore, the Judge has significantly understated the degree to which Mrs Malik was potentially prejudiced by the transaction. Mr Warwick submitted that from the outset it was clear that Mr Sheikh's interest in the Properties was taken by way of security only. In my judgment this would have been far from clear so far as Mrs Malik was concerned at the time. There is no basis on which Mrs

Malik, or anyone acting for her, could have known the true position unless someone told them about the February 2013 Agreement.

34. Notably, Mr Sheikh, who did know about the February 2013 Agreement, applied to the Land Registry to enter a restriction on the title to the Properties to protect his beneficial interest under a trust of land and subsequently pleaded his case in the F-tT (and in the county court) on the basis that he had a one-half share of the beneficial interest in the Property, not on the basis that he was a chargee. I was told that it was the Judge who raised the "in substance a mortgage" point.

35. I accept that the position would have been somewhat different if Mrs Malik had been a party to the February 2013 Agreement; but she was not, and there is no finding that she was given a copy of it or was told about it. Following the signing of the TR1s, Mrs Malik was therefore left at risk, without the ability to protect her ownership of the Properties unless it suited the Maliks to assist her in that regard. I refer below to circumstances in which her best interests and those of the Maliks might not have coincided.

36. The reason the Judge gave for holding that the transaction did not require an explanation was that the Properties were already charged to secure HIS's indebtedness to the bank and that the Home was previously charged to Mr Sheikh. He considered that "following the signing of the TR1s the overall position was similar – or potentially better in that the family home was less at risk". In other words, the transaction did not leave Mrs Malik in any worse position.

37. In my judgment, the position was as follows.

    a. Before the transaction, the Home was charged to the bank and to Mr Sheikh. It is therefore true to say that the Home was at risk in relation to repayment of debt owed to the bank and to Mr Sheikh. There was other security for the bank debt but no other security for the debt to Mr Sheikh.

    b. The Home was jointly owned by the Maliks and Mrs Malik. In the event that the Company could not pay its debts, redemption of the charge in favour of Mr Sheikh was therefore a matter for the Maliks and Mrs Malik jointly, and the Maliks had an equal or greater interest in redeeming the charge.

    c. As a result of the TR1s transaction, half of Mrs Malik's beneficial interest in the Properties vested in Mr Sheikh, who would prima facie be entitled to realise that interest in the event of the Maliks' or the Company's default. Even if his interest in the Properties was limited to that of a mortgagee, it was up to Mrs Malik to redeem his 'charge' over the Properties if she wanted to recover ownership of them.

    d. In the event of Mr Sheikh's death, the Maliks would be able to enforce a transfer to them of his beneficial one-half share. Even if that interest in their hands remained a mortgage security, the Maliks might have no incentive to repay the debts.

    e. At or before the expiry of the initial 4-year term of the loan and credit facility, it might suit HIS and the Maliks for the terms to be renegotiated or the term to be extended (the Termination Date in the February 2013 Agreement was 30 June 2017 or such later date as the parties might agree).

38. Mrs Malik's position was therefore not the same or better as a result of the transaction. Although her home was no longer at risk of default on Mr Sheikh's loan, it was still at risk of the Company's default on the bank's facility. Moreover, half of Mrs Malik's interest in the Properties (the full value of which was estimated to be approximately £1m) was transferred to Mr Sheikh. Recovery of full beneficial ownership was likely to be at best problematic and in reality out of her control and dependent on the Maliks. The transaction therefore left Mrs Malik vulnerable to the interests and control of the Maliks, who were not incentivised to protect her interests.

39. The Judge's conclusion that the position was no different and possibly better can only be justified, so far as Mrs Malik is concerned, if all the property owned by various members of the family is treated as 'family property' without distinction of ownership. This is what the judge appears to have done ("this was family property being used to support a family business in much the same way as had been done for many years previously"). But there was no evidence, as the Judge rightly observed, that the Properties were beneficially owned by HIS or by other members of the family. Although Mrs Malik had over the years been willing to charge her property to secure lending to the Company, that is a different matter from the question of who beneficially owned them. There was no evidence that members of the family treated the property that they owned as being for the benefit of HIS. Nor was there evidence that someone other than Mrs Malik beneficially owned the Properties. The Judge should in my view have considered the matter on the basis that the beneficial ownership of the Properties followed the legal ownership, absent evidence to the contrary.

40. If the transaction is considered in the way that I have analysed it, it is evident that Mrs Malik was potentially significantly disadvantaged by the transaction. Although she was found to have been willing to charge her one-third share of the Home as security for Mr Sheikh's lending in October 2012, and must be assumed to have been willing to replace the charge over the Properties in favour of Habib Bank AG Zurich with a charge in favour of Habib International, the outright transfer of half the beneficial ownership in the Properties to Mr Sheikh is a transaction of a different nature. The Judge himself, in considering whether or not Mr Sheikh had rebutted any presumption of undue influence, referred to the "vital difference" in appearance (to Mr Sheikh) between a charge granted by the Maliks and Mrs Malik jointly over their home and the transaction by Mrs Malik as the sole owner of the Properties (para 97).

41. It is, in my judgment, certainly a transaction that calls for explanation, given that Mrs Malik ceased to be a director of the Company in 2008, is not a shareholder of the Company and was not a party to the February 2013 Agreement.

42. In my judgment, therefore, the Judge was wrong to reach the conclusion that there was nothing about the transaction to require explanation. The nature of the transaction tends to suggest that there might have been abuse of trust and confidence or the exertion of some influence to get Mrs Malik to sign the TR1s. In the circumstances, the explanation based on the February 2013 Agreement was most unsatisfactory, for the reasons that I have explained.

43. In order to succeed on the appeal, the Appellant must still demonstrate that the Judge was wrong in the conclusion that he reached on whether there was evidence of a relationship of influence by the Maliks over Mrs Malik.

Relationship of influence

44. The Appellant's case on influence comes down to the following arguments:

    a. The Judge failed to take into account the true nature and effect of the transaction, because he mischaracterised it;

    b. The Judge plainly reached the wrong evaluative conclusion based on the factors of age, infirmity, immobility and lack of English that he did refer to in his judgment;

    c. The Judge failed to take into account evidence subsequent to the transaction, which strongly suggests that the Maliks were willing to take advantage of Mrs Malik for their purposes.

    I shall deal with each argument in turn.

    (1) Failure to give weight to the nature of the transaction

45. As to the first, the true nature and effect of the transaction is a matter that is capable of affecting the assessment of whether or not a relationship of influence is shown to exist. A transaction that is seriously and inexplicably detrimental to a disponor is plainly likely to lead to a conclusion that it can only have been the result of a relationship of trust and confidence on the one side and influence on the other side. I agree with Ms Anderson QC that there is a connection between the two separate factual assessments, which themselves are aspects of undue influence generally, such that the more disadvantageous and inexplicable the transaction the more easily a relationship of influence will be established to exist.

46. The Judge in his assessment of the relationship between the Maliks and Mrs Malik gave no weight to the true nature of the transaction, when considering whether or not a relationship of trust and confidence was established, because he found nothing surprising or suspicious in the transaction. I respectfully differ from his conclusion and consider that, at the date of the transaction, it strongly called for an explanation of why Mrs Malik at that time and in her circumstances would be gifting half her property to Mr Sheikh, with the ability to protect her own property interests depending on her sons and their interests. It is itself suggestive of influence being exerted by the Maliks.

    (2) Wrong evaluative conclusion

47. As to the second argument, the Judge was greatly influenced by what was not present in evidence. There are repeated references in his judgment to what he would have expected to see to support a case on behalf of Mrs Malik that she was vulnerable and liable to be taken advantage of. These are: more extensive disclosure and evidence to support the proposition that she was vulnerable, such as medical records or evidence from unconnected parties, and evidence of how Mrs Malik managed her finances and

income (para 62(e)); evidence about the financial dealings between the Maliks and Mrs Malik (para 62(g), and evidence about how and to what extent Mrs Malik's six daughters had a say or influence in family matters (para 62(i)). All this led the Judge to the conclusion that there was insufficient evidence of a relationship of trust and confidence (para 62(j)). He also commented that lack of such evidence damaged Mrs Malik's case (para 62(g)). In his final assessment, he treats the allowance that is due for matters such as age, infirmity and language difficulty as being outweighed by the lack of other evidence of the kind previously identified by him.

48. The Judge does not say that he is reaching a factual conclusion adverse to Mrs Malik on matters such as who had ultimate control of the income from the Properties, or who was available for Mrs Malik to turn to for advice when she needed it, or whether she was still mentally alert in 2013. He is instead pointing out that evidence that could have helped Mrs Malik to establish her case on vulnerability was not present. The Judge needed to bear in mind in that regard that the claim of Mrs Malik was prejudiced by the fact that she had lost mental capacity by the time of the trial and so could not give instructions or oral evidence and by the fact that the Maliks were not available to give evidence. Whatever criticism might be made of Mrs Malik's case on the grounds of lack of evidence, Mr Sheikh did not seek to call either of the Maliks, who might have been expected to give highly material evidence. Additional difficulty in presenting Mrs Malik's claim arose from the fact that the first person appointed as her litigation friend, her daughter Razia Malik, was discharged from that role on grounds of illness and was unable to give live evidence at the trial. Despite these considerations, the Judge was influenced more by the absence of evidence than by the evidence that was given.

49. The facts of Mrs Malik's advancing age, physical infirmity and immobility, impending mental degeneration, and inability to read or understand English well did, in my judgment, put her in a vulnerable position, as compared with the position of the Maliks, and liable to be taken advantage of. That this was so is shown by the circumstances in which Mrs Malik signed the charges and the TR1s, as found by the Judge. Her understanding of what was happening depended on what the Maliks said to her in Punjabi, without anyone independent explaining to her what she was signing. The Judge understandably held that these circumstances could not rebut any presumption of undue influence. The Maliks were directors of the Company and healthy and active businessmen, whose livelihoods depended on the Company. Mrs Malik's vulnerability is particularly accentuated where any dealing in relation to or for the benefit of the Company is concerned, because she had ceased to be involved and had no direct interest in the Company. She depended on her sons for information about the Company's position and requirements. She lived with her sons and their families in the Home, but her daughters did not live there.

50. Accordingly, in my judgment, the Judge came to the wrong evidential conclusion on the existence of a relationship of influence between the Maliks and Mrs Malik in January 2013. He asked himself whether there was positive evidence of a relationship of trust and confidence in relation to financial matters, but that is a narrower question than that envisaged by Lord Nicholls of Birkenhead in Etridge: see Thompson v Foy [2009] EWHC 1076 (Ch) at [100], per Lewison J. The principle is not confined to cases where trust and confidence is reposed, either financially or generally, but extends to cases where there is evidence of dependence or vulnerability: Beech v Birmingham City Council [2014] EWCA Civ 830 at [59], per Sir Terence Etherton C,

referring to Etridge. Particularly having regard to the true nature of the transaction, the evidence that was before the Judge proved an evident vulnerability of Mrs Malik in relation to dealings for the benefit of the Company and her sons at that time, when HIS was in financial difficulties and Mrs Malik would not benefit directly from the Company's business.

(3) Failure to consider evidence

51. As to the third argument, the Appellant complains that the Judge did not take into account a document emanating from Companies House, which shows that Mrs Malik was re-appointed a director of HIS, for a period of a few months, in June 2015. This was well after she had become mentally incapable of acting. It is a matter of concern that was not fully investigated, no doubt because the Maliks did not attend the trial. It is said that it shows that the Maliks, as shareholders or directors of the Company, were willing to make use of Mrs Malik, without her consent, in June 2015 for some unknown purpose of benefit to themselves or to HIS. The document is certainly consistent with that conclusion, but it does not logically prove a relationship in January 2013 where the Maliks were influencing Mrs Malik's decisions.

52. Accordingly, I do not consider that the Judge was wrong to ignore it as a factor.

Conclusion on undue influence appeal

53. Nevertheless, for the reasons I have given in relation to the first and second arguments above, I will allow the appeal. The Judge should have concluded that a relationship of undue influence was to be presumed, arising from evidence of a relationship of influence between Mrs Malik and the Maliks at that particular time and the disadvantageous nature of the transaction into which Mrs Malik entered for their benefit.

54. Since the Judge also held that if undue influence was presumed, Mr Sheikh had failed to rebut it, and there is no appeal from that conclusion, the TR1s transaction is proved to have been tainted by undue influence and must be set aside.

Jurisdictional appeal

55. The second basis on which the appeal was brought was that the decision of the Judge was a nullity. Permission to appeal on this basis was granted to Mrs Malik on the ground that, although it was without any substantive merit, it raised an important procedural question about the power of the First-tier Tribunal (Property Chamber) ("F-tT") to transfer such cases to the County Court.

56. The F-tT, which was correctly seised of the matter pursuant to section 73(7) of the Land Registration Act 2002, eventually directed that the matter should be transferred to the County Court and that the statements of case in the F-tT should stand as statements of case in the County Court. This was done principally on the basis of Mrs

Malik's lack of capacity at that time, with a view to the appointment of a litigation friend to act on her behalf.

57. The F-tT did not, as section 110(1) of the 2002 Act (as amended) permits it to do, direct a party to the F-tT proceedings to commence proceedings in the County Court. That provision, as originally enacted, permitted the Adjudicator to the Land Registry to give such a direction, but it was retained when the jurisdiction to resolve an objection to registration passed from the Adjudicator to the F-tT on 1 July 2013. It is notable that rules 37 to 40 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 provide specific rules for the exercise of this statutory jurisdiction, as the Adjudicator to Her Majesty's Land Registry (Practice and Procedure) Rules 2003 did previously. These rules regulate the decision whether or not to make such a direction, the issue to be raised for determination in court, and what happens to the F-tT proceedings pending and after the court's determination.

58. Rule 6(3)(n) of the same 2013 Rules provides, in general terms, that:

> "In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may-
> ……
> (n) transfer proceedings to another court or tribunal if that other court or tribunal has jurisdiction in relation to the proceedings and
> (i) because of a change of circumstances since the proceedings were started, the Tribunal no longer has jurisdiction in relation to the proceedings; or
> (ii) the Tribunal considers that the other court or tribunal is a more appropriate forum for the determination of the case;….."

The Tribunal, as referred to in the 2013 Rules, is the F-tT.

59. Rule 2 of the 2013 Rules provides that nothing in the 2013 Rules overrides any specific provision that is contained in an enactment conferring jurisdiction on the F-tT.

60. Apart from the generality of rule 6, rule 25 of the 2013 Rules provides that the F-tT may, with the concurrence of the President of the Lands Chamber of the Upper Tribunal, direct that the case be transferred to the Upper Tribunal; but that rule is expressly disapplied in a land registration case: rule 25(4).

61. The exercise of the general power in rule 6(3)(n) is subject only to the transferee tribunal or court having jurisdiction in relation to the proceedings in question. That cannot mean a court or tribunal that is currently seised of the existing proceedings; the only proceedings are (it must be assumed) in the F-tT. It must therefore be referring to jurisdiction generally to entertain cases of the kind of which the F-tT is then seised.

62. One must therefore look to see whether, in relation to the type of proceedings in issue, jurisdiction is conferred on another court or tribunal. In the case of objections to registration under section 73(7) of the 2002 Act, the jurisdiction is arguably conferred on the County Court in two places.

63. First, section 110(1) of the 2002 Act states that the F-tT can direct a party to start proceedings in the High Court or the County Court. That must mean that the County Court has jurisdiction to hear any such proceedings.

64. Second, section 46 of the 2002 Act provides:

> "(1) If it appears to the court that it is necessary or desirable to do so for the purpose of protecting a right or claim in relation to a registered estate or charge, it may make an order requiring the registrar to enter a restriction in the register."

The court for these purposes is the High Court or the County Court: see section 132(3)(a) of the 2002 Act.

65. Accordingly, the County Court has jurisdiction to decide whether a person beneficially interested in a registered estate should be protected by the entry of a restriction and, if so, to direct the Land Registrar to enter one. Rule 38 of the 2013 Rules contemplates that the proceedings might have been started in court without any direction from the F-tT. This subject is therefore in substance the same question as arises where an application to the land registrar to enter a restriction is opposed by the registered proprietor.

66. Accordingly, subject to the effect of rule 2 of the 2013 Rules, the F-tT appears to be given power to transfer a case of this kind to the County Court. Although, where an objection to registration is referred to the F-tT under section 73(7) of the 2002 Act, no proceedings will have been issued in the F-tT (rule 28 of the 2013 Rules), that does not mean that there are no proceedings or prevent the F-tT from determining them. Generally, where existing proceedings are transferred between one court and another, or between a court and a tribunal, new proceedings are not issued; the existing proceedings are given a new reference number and directions to continue them are later given. This is what happened when the County Court at Central London received the case from the F-tT in April 2015. There is therefore no valid objection simply because originating proceedings were not issued in the County Court.

67. The remaining question is whether or not the general power under rule 6 of the 2013 Rules is implicitly excluded, in relation to land registration proceedings, by the terms of section 110(1) of the 2002 Act and the rules made under it in the 2013 Rules (rules 37-40), or expressly by rule 2 of the 2013 Rules.

68. Although it is slightly odd that a general power to transfer proceedings to the court co-exists with an express power to direct the issue of court proceedings, there is nothing necessarily inconsistent between the two powers. In some cases or at certain stages of the proceedings, it may be appropriate to direct court proceedings to decide a particular legal issue, with the proceedings otherwise stayed in the F-tT. In other cases or at other stages, it may be more convenient for the whole of the proceedings to be transferred to be decided by the court. The general power in rule 6 therefore does not "override" the jurisdiction in section 110 of the 2002 Act, within the meaning of rule 2. Nor in my judgment is it implicitly excluded. As there is no inconsistency between the two powers, there is no need to read the general power as impliedly excluded. In this regard, it is notable that where land registration proceedings are excluded from the transfer provisions of the 2013 Rules, there is express provision in the Rules to that effect: rule 25(4) (transfer to Upper Tribunal). The draftsman would therefore probably have excluded land registration proceedings from the general power in rule 6(3)(n) had that been intended.

69. The likely explanation for the parallel powers in relation to land registration proceedings is that, before the jurisdiction of the F-tT deriving from the Tribunals, Courts and Enforcement Act 2007, the Adjudicator had no general power to transfer proceedings that were referred to him. The 2002 Act therefore gave him power to direct one or other of the parties to start court proceedings, where he considered it appropriate to do so. The 2013 Rules could not oust that power, conferred by primary legislation, and so they substantially re-enacted the rules that previously applied to the Adjudicator in that regard. However, by 2013 it was considered appropriate to confer on the F-tT a more general power to transfer proceedings to another suitable court or tribunal, where it was necessary or appropriate to do so.

70. Accordingly, in my judgment, the F-tT did have power to transfer to the County Court Mrs Malik's objection to the registration of a restriction against the registered titles to the Properties, and the County Court at Central London had jurisdiction to hear the proceedings.

71. Mr Warwick had an alternative argument, in case the County Court did not have substantive jurisdiction without some originating process, namely that the absence of any such process was no more than procedural non-compliance with the Civil Procedure Rules, which the County Court could and did correct in the exercise of its discretion under rule 3.10 of those Rules.

72. He referred me to a number of authorities, including a decision of Teare J, LD Commodities Rice Merchandising LLC v Owners and/or Demise Charterers of the Vessel Styliani Z [2015] EWHC 3060 (Admlty); [2015] 2 CLC 617. In that case, an *in personam* claim form that, as issued, was time-barred, was amended to substitute an *in rem* claim within the longer limitation period for such an action, but without re-issuing the claim form. It was held that use of an *in personam* claim form was an error of procedure that could be corrected under CPR Part 3.10, even though no valid proceedings were ever issued. It may be that the ratio of that case can apply to a case where, by mistake, no originating process was issued, at least where no time limit for doing so applies.

73. In view of the conclusion that I have reached about the jurisdiction to transfer, I prefer to express no conclusion on whether an absence of originating process is capable of being remedied under Part 3.10 and if so in what type of case. The issue seems to me to raise quite tricky jurisdictional issues on which I should not venture an unnecessary conclusion.