Appeal number UT/2017/0153

Keywords: undue influence – relationship of trust and confidence - mistake

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

SALEEM PERWAZ **Appellant**

- and -

NAHID PERWAZ **Respondent**

TRIBUNAL: JUDGE ELIZABETH COOKE

Sitting in public at Royal Courts of Justice, London on 10 and 11 July 2018

Stephen Whitaker of counsel for the Appellant

Teresa Rosen Peacock of counsel for the Respondent

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DECISION

1. This is an appeal by Mr Saleem Perwaz from a decision of the Land Registration Division of the First-tier Tribunal ("the FTT") dated 5 June 2017. The FTT directed the Chief Land Registrar, first, to cancel his application to remove from the title to his property a unilateral notice entered by Nahid Perwaz, his mother and the Respondent to this appeal and, second, to give effect to his mother's application for alteration of the register so as to restore her as registered proprietor of the property.
2. On 30 July 2013 the Respondent transferred the property, 54 Beaulieu Close, Slough, to the Appellant, who immediately executed a declaration of trust to the effect that he held the property as to 25% for his mother and as to 75% for himself. Before the transfer the Appellant held a 25% share in the property. The effect of the transfer and the declaration of trust, taken together, was that he kept a 25% share, purchased a 25% share which he did not pay for on that date but paid for later, and was given a 25% share. Payment for the 25% share was made in October 2013 when the Appellant granted a legal charge to Barclays Plc to secure a loan of £125,000 which he paid to the Respondent.
3. The Respondent says the transfer was made as a result of undue influence (presumed and actual), mistake and misrepresentation. She was successful in the FTT; the judge found that the transaction was vitiated by undue influence, but made no decision on mistake or misrepresentation.
4. I heard the appeal in the Royal Courts of Justice on 10 and 11 July 2018. The Appellant was represented by Mr Stephen Whitaker and the Respondent by Ms Teresa Rosen Peacock, both of counsel, and I am grateful to both for their helpful arguments. My decision was sent to counsel for the parties in draft in September 2018, but is only now able to be handed down after protracted submissions about the form of the order to be made.
5. I allow the appeal because the FTT made an error of law in reaching its conclusion about undue influence, and in the paragraphs that follow I explain my decision. I first summarise the facts found and the conclusions reached by the FTT and then go through the grounds of appeal and also the Respondent's argument that I uphold the decision on a different ground.

The facts found at first instance and the decision of the FTT

6. The appeal was a review and not a re-hearing, and I take the facts to be those found by the FTT.
7. After some initial summary material and an evaluation of the witnesses' demeanour in giving evidence, the decision of the FTT is structured as follows (and, as will appear, the structure is important):
   (a) Paragraphs 17 – 53: Findings of fact in relation to the period up to the Respondent's return from India in April 2013

(b) Paragraphs 54 – 56 headed "Observations"
(c) Paragraphs 57 – 75 The facts from the end of April to August 2013.
(d) Paragraph 76 a list of "troubling features" of the transaction
(e) Paragraphs 77 – 80 Conclusion

8. I now summarise what the judge said in each section of his decision.

Paragraphs 17 – 53: Findings of fact in relation to the period up to the Respondent's return from India in April 2013

9. The Respondent was born in India in 1939. She married Mushtaq Perwaz, her second husband, in 1972 and he died in 1997. He bought 54 Beaulieu Close in 1981 and put it in her sole name.
10. The Respondent has four children. The family has had since at least the 1980s a business selling fruit and vegetables wholesale. The Appellant managed the business after Mushtaq's death, but the Respondent had the controlling shareholding. The judge described her her as a "voluble" and "emphatic" person who did not easily understand technicalities, legal documents or business of any complexity but would, when she felt under pressure, dig her heels in until she was satisfied. There is no suggestion in the FTT's findings that she left matters of business to the Appellant – quite the contrary. The family accountants, Deitch Cooper, in a report quoted later in the decision refer to the Respondent as the "family matriarch" with whom all issues had to be discussed.
11. In 1997 after Mushtaq's death the Respondent gave the Appellant a form of power of attorney. She made a will, appointing him and his brother Sher Ali as her personal representatives and trustees, leaving everything on discretionary trusts for her family. The Appellant took over management of the family business, but the Respondent as majority shareholder and a director took an interest and kept herself informed. The judge said "I have no doubt that on any occasion on which her consent might have been required by virtue of her shareholding, she would have withheld it for as long as necessary until she was satisfied or persuaded."
12. In 2001 the Appellant suggested that he and his wife might move into the property to live with the Respondent. He spent money extending and refurbishing it. There is some uncertainty as to how much he spent; at one stage he told her £90,000, he told the family accountant later that he spent £155,000, and his evidence at the hearing was that it was between £175,000 and £200,000. There is no finding of fact by the FTT as to how much he spent. In 2004 he and his family moved in.
13. In 2010 relationships in the house broke down and there was discussion of a possible sale. A valuation was carried out, with an estate agent suggesting that the house be marketed at £750,000 with offers above £720,000 considered. At the same time consideration was given within the family, and among their financial advisers, to the need to simplify the management of the company. According to Deitch Cooper, the Respondent was at this stage willing to resign as director and sell her shares.

14. In August 2011 the relationship between the Appellant and the Respondent improved. It was agreed that the Appellant and his family would stay at the property and re-furbish some additional rooms. The judge rejected the Respondent's evidence that the Appellant talked her into this.
15. In June 2012 it was agreed that the Respondent would hold her shareholding in the business as nominee for the Appellant, and transfer the shares once the tax position was sorted out. The Appellant also bought his brothers' shares and so was in control of the company.
16. On 15 June 2012 the Respondent made a new will; Mr Datoo of Deitch Cooper (who also advised the Appellant), got in touch with a Mr Anstey of Hunt & Coombs about it on that date. The FTT's decision at paragraph 31 says that Mr Datoo prepared the will. The new will gave fixed proportions of the Respondent's estate to her children and to charity. In a memorandum of wishes of the same date she acknowledged that the Appellant was a 25% owner of the property as a result of the monies he had invested in it. The judge found that whilst it was not clear that this could be justified on the figures, it did represent her understanding and intention. He found that the Appellant had no involvement in the preparation of the memorandum and was not aware of it. He rejected the Respondent's evidence that the Appellant was only to be repaid his expenditure on the property.
17. After that there were further discussions between the Respondent and her accountant – now Mr Shah of Deitch Cooper, as Mr Datoo had suffered a stroke. Mr Shah was in contact with Mr Anstey. The Respondent executed a new will on 12 October 2012. In it she confirmed that the Appellant had a 25% share in the property and gave him an option to purchase the whole property on her death, with the benefit of a 15% discount to reflect their joint occupation. The suggestion of that discount came from Mr Anstey, who thought that the practice of HMRC in connection with probate valuation should be followed in relation to this sale. The judge remarked that it was not clear why he did so; favourable as this arrangement was to the Appellant, it was not his idea. On the same date the Respondent executed a declaration of trust which said that she held the property as to 75% for herself and as to 25% for the Appellant.
18. Next the judge recounts that in January 2013 the Respondent asked the Appellant to start the process of buying the property from her. At his request she contacted Deitch Cooper, and then the Appellant phoned Mr Shah, who told him he might be able to buy either all or half of the property. Figures were provided, and it was suggested that he could raise the finance to buy 50% of the property only. The accountant's figures ignore the fact that he already owned 25% of the property but credits him with having made a payment already towards the extension of the house.
19. The purchase price produced by Mr Shah was £122,500, working on the basis of a valuation of £700,000, a 15% discount, and a contribution already made of £175,000.

£
700,000
-105,000 (discount suggested by the financial adviser)
595,000 x ½ =

£297,500
-175,000
£122,500

20. These are the figures provided by Mr Shah. They do not emanate from the Appellant. They start from a valuation of £700,000 rather than the £750,000 mentioned earlier by Bairstow Eves.
21. The Respondent was at this stage in India. The judge found that the Appellant telephoned her and put these figures to her, but that she probably did not understand or retain the information at that stage. He did not give her the figures for a 100% purchase. He used the £700,000 valuation because, he said in evidence, it was the more plausible. The judge also found that the Appellant showed his mother the figures when she got back from India, but that at this stage she "did not regard herself as committed to a transaction on this basis".

Paragraphs 54 – 56 headed "Observations"

22. I set out these paragraphs almost in full:

> *55.At this stage it is worth making some observations. I have no doubt that Nahid relied on Saleem to put the transaction together on a basis which was fair to them both, and to deal with the professionals who had to be involved. His position was not easy, His mother found decisions difficult, and tended to drag her feet. She was easily confused, as I saw in the witness box. She was not familiar with this kind of transaction. All this meant that he needed to get her to understand and commit, without overburdening her. She will have relied upon him to do that too. In the circumstances, I consider that Saleem was plainly in a relationship of influence over his mother in relation at least to this transaction. It is troubling, therefore that he selected the lower valuation of the two available to him and did not disclose the existence of the higher, even when his mother suggested that the property might be worth more than £700,000. It was not fair to her not to do that, whether or not he thought his view on valuation was correct and, whatever his motivation, it meant that he took an unfair advantage of her.*
>
> *55. A discount of 15% has been applied to the total figure, … certainly not at Saleem's suggestion. … I do not see how any unfairness in this is to be laid at Saleem's door, however, since it was entirely the idea of the accountants.*
>
> *56. Saleem is treated as having paid £175,000 already. There is no clear evidence that he had actually paid any such sum. However,*

> *Nahid accepted by deed that he had a quarter share which, on these figures, came to the same thing. That deed has not been set aside. She made it independently of Saleem."*

5 23. I pause to interject that while £175,000 is indeed 25% of £700,000, on these figures a quarter share and £175,000 do not come to the same thing. The accountant has calculated the quarter share after deduction of a 15% discount; a quarter of [700,000 less the 15% discount] is a quarter of 595,000, which comes to £148,750. Therefore the £175,000 pays for rather more than a 10 quarter share and leaves the Appellant paying only £122,500 for another quarter.

24. However, again, none of this is down to the Appellant. He apparently did not know that his mother had already declared that he was a 25% owner of the property and therefore he had no way of knowing that these calculations were 15 not consistent with the then beneficial ownership of the property.

Paragraphs 57 – 75 The facts from the end of April to August 2013.

25. These paragraphs relate the events from the Respondent's return from India in April 2013 to the date of the transfer, 30 July 2013.

26. During April and May there were emails between Mr Shah and Mr Eley, a 20 mortgage broker. Mr Eley was trying to arrange a mortgage on the basis that the property would be held in joint names but only the Appellant's finances would be taken into consideration in applying for the loan. The judge notes the "further troubling feature" that the Respondent's share in the property was going to be encumbered with the loan taken out to buy a share from her. She 25 and the Appellant would both be liable on the mortgage, and there was no provision for the Appellant to give her an indemnity.

27. At his paragraph 60 the judge records a meeting on 5 June 2013 between the Appellant, his wife, and Mr Eley; Mr Eley's notes record that the Appellant was purchasing a 25% share. There is also a handwritten note to the effect that 30 a 75/25% trust was to be set up, although the judge notes that it was not clear whether that point was noted on the same date as the rest of the record of the meeting. He makes no explicit finding on that but he says that this is the first mention of the possibility of a 75/25% trust. So I take it that he thought that the note did record what was said at that meeting, but it is not clear why he 35 thought that. He observes that the 75/25% trust was not mentioned to the Respondent at this stage. It remains the Appellant's case that this note was added later, and that the 75/25% trust was not discussed at the meeting of 5 June and therefore was not being concealed from the Respondent. Mr Eley was not at the hearing before the FTT and therefore could not be asked about 40 his note.

28. The next date mentioned in the judgment is 19 July, when a Mr Bhaloo of Deitch Cooper got in touch with Mr Eley after the Respondent had called him. Mr Eley said to Mr Bhaloo at this point that it was not possible to arrange a mortgage while the Respondent remained a legal owner, because of her age.

There is mention of a meeting to take place on 24 July, but the judge found either that there was no such meeting or that the Respondent was not present at it.

29. The judge then says that Mr Eley records a meeting with the Appellant and the Respondent on 29 July at the offices of Wayne Leighton, solicitors, but that neither party recalls that meeting. Nor, the judge found, did Mr Ziman; the decision does not say who Mr Ziman was, but it becomes clear later that he was a solicitor at Wayne Leighton.
30. Therefore, the judge said at his paragraph 64, "it follows that the earliest point at which Nahid can have been told that she was going to transfer legal title, and that she was not going to get any money straight away" was 29 July and that it may have been only minutes before the meeting on 30 July at which the transaction was completed. I am not sure why the judge thought that that "follows", but I think that he drew that conclusion because he did not accept that she was present at a meeting on 24th or 29th July.
31. The judge records Mr Ziman's evidence that the Appellant told him on 29 July that his mother wished to give him an additional 25%. He notes that this is consistent with the Appellant's evidence that she told him a few days before that she was going to give him 25% in her will, and that he persuaded her to make it now as they were going to see solicitors anyway. The judge then says (at his paragraph 66) "I have already rejected this account however"; that may be a reference to the conclusion he drew at paragraph 64, but why he rejected the Appellant's account is not explained.
32. The judge records Mr Ziman's evidence that he prepared a transfer of the property and a declaration of trust whereby the Appellant would declare himself trustee of the property as to 25% for the Respondent and 75% for himself. He said that on 30th July the Appellant and Respondent met him at his offices, he explained the transfer and declaration to her, and they executed the documents in his presence; his attendance note records a meeting of 20 minutes.
33. The transfer was expressed to be for no consideration, which of course is odd since the deal was that the Appellant was going to buy a share; the judge comments (at paragraph 76(5) "Mr Ziman may possibly have convinced himself that this was a legitimate was of avoiding stamp duty". He records (at his paragraph 72) the Appellant's acceptance in his evidence that on the terms of the document, which recorded no consideration for the transaction, "Nahid would have to trust him to pay her; but he had."
34. The judge records and accepts the Respondent's evidence that she did not understand what was happening at that meeting. She thought she was signing papers to enable the Appellant to get a mortgage. She did not understand that she was transferring the property to him before he had paid for the share he was purchasing. She accepted that he could be 75% owner but she did not think she was actually selling there and then because there was no mention of money or payment. "She felt under pressure. She had been fasting and just

wanted to get home". She was expecting to receive something like £600,000 for the share the Appellant was purchasing. Mr Ziman mentioned that she would have to change her will because she no longer owned the property, and she responded in alarm that of course she did, it would only belong to the Appellant once he had paid her.

35. The judge therefore rejected the Appellant's evidence that the Respondent understood and was happy with the transaction. He also rejected Mr Ziman's evidence that she appeared to understand and not to be under any pressure.

Paragraph 76 a list of "troubling features" of the transaction

36. At paragraph 76 the judge said that the transaction had a number of troubling features, as follows:
    1) The Appellant's failure to tell the Respondent about the higher valuation of £750,000;
    2) The Respondent's losing the protection of having her name on the title, and her having little time to consider this;
    3) The absence of payment on the day of the transfer because no mortgage had been arranged, and the Respondent's confusion about the nature of the transaction;
    4) The Respondent's right to occupy being left unprotected.
    5) The possible confusion caused by the statement on the transfer that it was for no consideration, and the absence of any record of the Respondent's right to be paid;
    6) The declaration of trust being made by the Appellant, which gave the impression that the whole beneficial interest had been transferred to him.
    7) The absence of any indication that the Appellant already owned 25% of the property.
    8) The Appellant taking 75% rather than 50% of the property as if the Respondent had suddenly decided to give him 25% for nothing. This, the judge said, was unlike her previous behaviour, and inconsistent with her obligation as a Muslim to treat her children equally. The judge concluded that it was

> "not a voluntary gift but something which was sprung on Nahid at the meeting, for no good reason that I can see, and inadequately explained. I am satisfied that Nahid will not have intended Saleem to have acquired 75% of the Property without paying for it in full."

37. The function of that list of troubling features was, the judge says in his following paragraph, to establish that the transaction called for explanation.

Paragraphs 77 – 80 Conclusion

38. Paragraph 77 reads as follows:

> *I have been helpfully referred to the relevant law and do not need to recite it here. I am satisfied on the balance of probability that Saleem was in a relationship of influence over Nahid in relation to this*

transaction. In view of the features mentioned above it cries out for a satisfactory explanation. There is none. Nothing that Saleem has said or that has been said on his behalf comes close to overcoming the presumption that the transaction was occasioned by undue influence on his part. I would go further: I regard the circumstances in which Nahid came to execute the transfer and declaration of trust as themselves amounting to the exercise of actual undue influence on Saleem's part.

39. Paragraphs 78 – 80 set out the consequence of that finding in terms of the direction to the registrar. The judge said "I would set aside the Transfer from Nahid to Saleem dated 30th July 2013 and direct the register be altered accordingly". I take it that that is to be construed as an order setting aside the transfer pursuant to the tribunal's jurisdiction under section 108 of the Land Registration Act 2002, although no application appears to have been made under that section. The judge's order directs the registrar to cancel the application made by Saleem (that is, the Appellant, but the Respondent at first instance) to cancel the notice entered on the register by Nahid to protect her interest. She was not seeking to set aside the charge, and the order goes on to direct the registrar to alter the register in accordance with her application, so as to restore her as registered proprietor, on condition that she first discharge the charge.

The grounds of appeal

40. The Appellant had permission to appeal on four grounds, of which the first is by far the most important.

Ground 1: Finding of presumed undue influence based on a relationship of influence in the particular transaction is wrong

The ground and the Respondent's response

41. What is said is this. For a presumption of undue influence to arise the Respondent had to prove two things; first, a relationship of trust and confidence and second the fact that the transaction called for explanation. In his grounds of appeal Mr Whitaker points out that the judge appears to have found a relationship of trust and confidence in the transaction itself.
42. To re-cap, at his paragraph 54 the judge said "I have no doubt that Nahid relied on Saleem to put the transaction together on a basis that was fair to them both..." and "I consider that Saleem was plainly in a relationship of influence over his mother in relation at least to this transaction". At his paragraph 77 the judge said "I am satisfied on the balance of probability that Saleem was in a relationship of influence over Nahid in relation to this transaction."
43. It is argued for the Appellant that this is not satisfactory because the requirement is for such a relationship to pre-date the transaction. The grounds of appeal cite *Royal Bank of Scotland plc v Etridge and others No 2* [2001] UKHL 44 at paragraphs 8 to 14 and *Snell's Equity*, 33rd edition, at 8-031.

44. The grounds of appeal did not include any challenge to the finding that the transaction called for explanation and therefore leave was not given to appeal that aspect of the decision; accordingly I need not comment on Mr Whitaker's observations on the judge's paragraph 76.

The arguments for the Respondent

45. In response to this ground Ms Peacock made three arguments. I address the first and second briefly here, and then go on under the next heading to deal with the third and most important argument.

46. Ms Peacock's first argument is that the relationship referred to in the judge's paragraph 54 *did* precede the transaction, because it arose in their dealings with each other from 1997 onwards (her skeleton argument paragraph 14).

47. That cannot be what the judge intended. It is very clear from his findings of fact about the period prior to January 2013 that there was no relationship of influence between the parties. His findings describe a variable, perhaps even stormy relationship, which had some serious ups and downs. There were times when they lived happily together and times when they did not. There is no finding that the Respondent generally relied upon the Appellant; there is no mention of trust until her evidence, in paragraph 50, that she trusted him in connection with the valuation of the property, which he was dealing with while she was in India in February and March 2013. On the contrary the Respondent, as the judge described her prior to January 2013, was the matriarch to whom things had to be explained and who would dig her heels in until she was satisfied. She is not portrayed by the judge as a pliable or trusting person.

48. I have given careful thought to the judge's words at his paragraph 54, where he said "I consider that Saleem was plainly in a relationship of influence over his mother *in relation at least to this transaction*" (the emphasis is mine). Did he mean "at least in the transaction and probably earlier too"? In my judgment that is not what he meant. In view of the findings already made, the words "at least" here indicate a contrast with what has gone before, as in "I have not had any breakfast but at least now I am having lunch."

49. I have also considered whether the judge meant that there was a relationship of influence established during the period from January to April 2013, or at least from April 2013 onwards (as Ms Peacock suggests at paragraph 15 of her skeleton argument) which therefore preceded the impugned transaction in July 2013.

50. I do not think that this is a correct reading of the judge's decision. In his paragraph 54 he is describing a transaction that is already in progress. One of the "troubling features" of the transaction, listed later at paragraph 76, is the Appellant's failure to disclose the higher valuation in March 2013 while the Respondent was in India. The transaction is not simply the time when the documents were executed in July; it is a course of dealing which the judge at paragraph 54 is already describing. He is, as he says, finding a relationship of influence in relation to – and not preceding – the transaction, which he

describes as a process extending from January to July 2013 and completed on 30th July. The judge's finding at paragraph 54 is repeated at his paragraph 77 ("Saleem was in a relationship of influence over Nahid in relation to this transaction"); the relationship of influence exists only in the transaction and does not precede it.

51. Second, Ms Peacock says that there are cases in which the pre-existing relationship of trust and confidence can be discerned from the transaction itself (as was the case in *Credit Lyonnais Bank NV v Burch* [1997] 1 All ER 144, to which I revert below). I reject that argument, because the judge's express findings of fact about the relationship as it existed before January 2013 make it clear that there was no such relationship at that time.

52. Third, Ms Peacock says that there is authority for the proposition that the relationship need not pre-exist the transaction but can arise in the transaction itself. I have to deal with that now at some length.

The law: discussion and conclusion

53. Ms Peacock argues that there are authorities, in particular the decision in *Macklin v Dowsett* [2004] EWCA 904, that indicate that a presumption of undue influence may arise where the requisite relationship exists only during the transaction itself, provided of course that the transaction calls for explanation. That was not the Respondent's case at first instance (as is clear from the judge's paragraph 4). It was argued before the FTT that her relationship with the Appellant prior to the transaction was one of trust and confidence, as evidenced by her appointing him trustee of her will and granting him power of attorney, accommodating his family, and giving him control of the family company. The judge rejected those arguments. Moreover, *Macklin* was not cited to the judge at first instance and no argument was made to him that the relationship could arise only in the transaction itself. On what basis the judge decided that it could, therefore, I am not able to say because he did not set out the law that he regarded as relevant.

54. In considering Ms Peacock's argument I begin with the decision in *Royal Bank of Scotland v Etridge and others No 2* [2001] UKHL 44, which is the starting point for the law on presumed undue influence. Lord Nicholls explained at paragraph 7 and following that the doctrine of undue influence is equity's response to the rigours of the common law doctrine of duress. Undue influence is a form of pressure that is less severe than duress but nevertheless renders a transaction voidable. It is identified by two forms of conduct:

> "[8] The first comprises overt acts of improper pressure or coercion such as unlawful threats. Today there is much overlap with the principle of duress as this principle has subsequently developed. The second form arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage."

55. Those two forms of conduct are the basis of actual and presumed undue influence respectively. Undue influence describes one form of conduct, of

course; but it can be proved either directly by proving "improper pressure or coercion such as unlawful threats", or by the claimant raising an evidential presumption by establishing both the relationship of influence and that the transaction calls for explanation.

56. As to the requisite relationship, *Snell's Equity* puts it like this at 8-031:

> "The essential question is whether … the alleged influencer, "is in a position to influence [B] into effecting the transaction of which complaint is later made". It is not necessary for B to show that the relationship was one of domination, but clearly the finding of a relationship of influence should not be made on slim grounds, and a mere inequality of bargaining power between B and the alleged influencer cannot suffice.
>
> A relationship of influence can be established by proof that B "placed trust and confidence in the other party in relation to the management of [B's] financial affairs", but it would be a mistake to think that B must prove such trust and confidence existed specifically in relation to financial affairs, or that the only relevant relationships are ones of trust and confidence. The question is one of influence, and a relationship of influence may be proved by, for example, evidence of B's dependence or vulnerability.[fn 182] Conversely, closeness or mutual trust between the parties will not, by itself, suffice.

57. I have omitted the footnotes from that quotation but have noted the position of footnote 182 for reference later.
58. The two elements that have to be proved for the presumption to arise are generally regarded as sequential. Notice the word "then" in the words of Lord Nicholls quoted above. There must be a relationship of influence, and then a transaction that calls for explanation. The term "relationship" itself denotes something that continued over time.
59. It has been argued for the Respondent that the two elements need not be sequential, and that in the case of *Macklin v Dowsett* [2004] EWCA Civ 904 the Court of Appeal found that the relationship of trust and confidence arose in the transaction itself. Ms Peacock says that that decision has been followed and has found its way into the mainstream of the law. Moreover she seeks to persuade me that there are three type of presumed undue influence case: those where the requisite relationship arises before the transaction, those where it arises in the transaction itself, and hybrid cases where trust and confidence are seen both before and during the transaction.
60. The facts of *Macklin v Dowsett* are as follows. Mr Dowsett had lived all his life on land that he owned. His bungalow was demolished after being condemned by the local council, and in 1994 he obtained planning permission to build a replacement. He had to commence building within five years to keep the planning permission alive. Meanwhile he lived in a caravan on the land. In 1996 he sold the land to the Macklins (William, Mary and Stuart) for £18,250

(which the Court of Appeal noted was a possible undervaluation) together with an inalienable life tenancy (he was 51). Mr Dowsett used most of the sale proceeds to pay his mortgage and other debts. Time passed. Mr Dowsett did not have the funds to build a bungalow. One month before the planning permission was due to expire, the Macklins paid for foundations to be laid, and Mr Dowsett granted them an option to require the surrender of his life tenancy for the sum of £5,000 if the bungalow was not completed within three years. At the end of the three years, with no building works done, the Macklins sought to enforce the option. Mr Dowsett refused to surrender his life tenancy and the Macklins took proceedings to enforce their option. Mr Dowsett's defence was that the option should be set aside on the basis of undue influence. He failed in the High Court and appealed successfully to the Court of Appeal.

61. Much of the argument in the Court of Appeal was focused on the nature of the transaction. As to the relationship between the parties, Auld LJ said:

> "…the judge was entitled, as he did, to consider the making of the 1999 agreement against the backcloth of the relationship between the parties that was defined by the terms of the 1996 agreement, in which their respective interests were, as he said, adverse to one another.
>
> 25. There may well be circumstances in which such a contractual relationship does not tell the whole story and where some other aspect develops so as to colour the overall relationship as to make it one of ascendancy and dependency. There may equally be circumstances in which a court may approach the matter first through the transaction itself and its apparent inexplicability, by asking what relationship, if any, could have given rise to it.
>
> 26. The candidate answer here is the fact that just before entering into the 1999 agreement, Mr Dowsett was potentially on the brink of losing the valuable planning permission for construction of the bungalow on the land, for want of commencing construction within the five-year period. It is plain from his evidence that he was in no firm financial position to save the permission by instructing a builder even to start work on the footings, still less to complete the building.
>
> …
>
> 28. The Macklins knew, just before they proposed the option agreement to him, that he had not the means to save the planning permission himself by making a start on the construction of the footings. Why else did they do it in his stead? Plainly to preserve and enhance the commercial value of their own future interest in the property and, notionally at any rate, to preserve for him the somewhat theoretical opportunity to support that aim by building the bungalow himself. The terms that they proposed — and that he accepted in the 1999 agreement — clearly signalled their doubt that he would make it

and their wish to drive a hard bargain in the likely event that he would not. It seems to me that the additional factor in this first element of undue influence to be established is, in the circumstances, the financial disparity in the parties' bargaining positions just before entering into the option agreement, a disparity of which the Macklins were all too well aware and which was, at least, vulnerable to exploitation by them. In the circumstances, I consider that the Deputy Judge wrongly found that Mr Dowsett had not established, on at least a prima facie basis, some relationship of ascendancy and dependency between them at the material time.

62. In *Turkey v Awadh* [2005] EWCA Civ 382 Buxton LJ said:

> 10. There may, however, be cases where the relationship arises because of the actual circumstances of the transaction itself. Such was the recent case in this court of *Macklin v Dowsett* …

63. Applying the law to the facts of the case, he continued:

> 17. To the extent that it is relevant in understanding the application of some parts of some of the authorities to these facts, it will be seen that the grounds upon which the judge held the relationship to be one of trust and confidence were somewhat of a hybrid nature. He did not rely solely on the fact that Khalid was the father of Aziza, but more upon the fact that that relationship had caused Khalid to give advice in the past. Nor did he rely solely on the way in which the transaction itself was dealt with, as in *Macklin v Dowsett* : he set out a series of indicia which led him to a conclusion which, as I have said, is not challenged.

64. Accordingly the Court of Appeal in *Turkey v Awadh* approved the decision at first instance about the relationship of trust and confidence precisely because it was not limited to the transaction itself. Nevertheless the appeal failed, because it was also held that the judge had been entitled to find that the transaction did not call for explanation.
65. In *Thompson v Foy* Lewison J referred very briefly to *Turkey v Awadh*:

> "Second, the requisite trust and confidence can arise in the course of the impugned transaction itself: *Turkey v Awadh* [2005] 2 P. & C.R. 29 (§ 11)

66. In *Turkey v Awadh* the relationship was not found only in the transaction itself, as the quotation above makes clear, and the case did not establish any proposition that the relationship of influence can be confined to the transaction itself; the only possible authority for that is *Macklin v Dowsett*. Moreover, in *Thompson v Foy* the High Court found that the requisite relationship was not made out and that there was no presumption of undue influence, and therefore anything said about *Turkey v Awadh* or, by implication, about *Macklin* is

obiter. The decision in *Macklin* is referred to in Gloster LJ's summary of counsel's argument in *Crossfield v Jackson* [2014] EWCA 1548 but the findings of the Court of Appeal make no use of any such proposition.

67. In any event, I am by no means convinced that that was what the Court of Appeal decided in *Macklin*. Auld LJ laid considerable stress upon the position that obtained as a result of the sale by Mr Dowsett in 1996, his consequent dependent position, and his financial insecurity. The relationship certainly existed before the grant of the option in 1999, although it was perhaps better described as one of vulnerability rather than one of trust (see the description of the requisite relationship in *Snell's* Equity quoted at my paragraph 57 above). Mr Dowsett had parted with his property for what was probably an undervalue and was at risk of having to live in a caravan for the rest of his life if he lost the planning permission. He was vulnerable to exploitation by the Macklins. He then entered into a transaction that called for explanation. In my judgment the relationship preceded the transaction, and the requirement of sequence was met.

68. *Snell's Equity* discusses the decision very briefly in footnote 182 to paragraph 8-031 (quoted at my paragraph 57) above:

> "See e.g. *Etridge* [2002] 2 A.C. 773 (HL) at [11] per Lord Nicholls; *Beech v Birmingham CC* [2014] EWCA Civ 830 at [59] per Etherton C: "[t]he principle is not confined, however, to cases of abuse of trust and confidence. It also includes, for example, cases where a vulnerable person has been exploited". An unusual example is provided by *Macklin v Dowsett* [2004] EWCA Civ 904. The parties' only relationship was contractual, and arose from the impugned transaction itself, but Auld L.J. at [28] found that a relationship of influence existed as a result of the "financial disparity in the parties' bargaining positions just before entering the option agreement, a disparity of which [A1 and A2] were only too well aware and which was, at least, vulnerable to exploitation by them". It may be that B's protection could more easily have been analysed as based on the unconscionable transactions doctrine: see para.8-040.

69. *Snell's Equity* does not regard *Macklin* as establishing the proposition that the requisite relationship can exist only in the impugned transaction. And there are no post-*Etridge* cases in which *Macklin* has been relied upon to support that proposition, despite the words in which *Macklin* was summarised in *Turkey v Awadh*, and the way in which *Turkey v Awadh* was referred to in *Thompson v Foy*.

70. Moreover I am not the slightest bit persuaded that here is a hybrid category of cases as Ms Peacock argues. In *Turkey v Awadh* the decision was correct precisely because the judge did not find the requisite relationship only in the transaction itself. That does not mean that there is a hybrid category. In almost all cases where there is a pre-existing relationship of trust and confidence, that

trust and confidence is still in place during the transaction itself. That is not what gives rise to the presumption and therefore the cases do not focus on it. What is important is that the requisite relationship precedes the impugned transaction.

71. To summarise, I do not regard *Macklin* as authority for the proposition that the requisite relationship of influence will found a presumption of undue influence (along with the fact that the transaction calls for explanation) if it arises only in relation to the transaction itself. The requirements are sequential; there must be a relationship of influence, whether described as one of trust and confidence or one of vulnerability, and then a transaction. The reason for that is that the pre-existing relationship lays the claimant open to influence, so that all that is required for the evidential presumption to arise is a transaction that calls for explanation.

72. By contrast, a claimant who can show that she entered into a transaction that calls for explanation, and that in the course of the transaction (but not beforehand) she reposed trust and confidence in the defendant, does not get the benefit of the presumption. Where the only problematic elements arise in the transaction itself (and by that I mean during a period long enough to encompass anything described as a troubling feature of the transaction – see my paragraph 51 above) the claimant can only succeed in a plea of undue influence if she proves that activities or pressure amounting to undue influence actually happened. To allow the presumption to be raised purely as a result of what happened in the transaction itself would simply lower the bar for the proof of actual undue influence. The evidential presumption arises only where something that was already established prior to the transaction makes the claimant vulnerable at its outset. Only then does the fact that the transaction calls for explanation – which is relatively easy to prove – enable her to take the benefit of the evidential presumption.

73. Ms Peacock suggested that assistance could also be derived from the pre-*Etridge* case of *Credit Lyonnais Bank NV v Burch* [1997] 1 All ER 144; but the relationship of trust and confidence found in *Credit Lyonnais Bank NV v Burch* existed before the impugned transaction:

> " In the present case the excessively onerous nature of the transaction into which she was persuaded to enter, coupled with the fact that she did so at the request of and after discussion with Mr Pelosi, is in my judgment quite enough to justify the inference, which is really irresistible, that the relationship of employer and employee had ripened into something more and that there had come into existence between them a relationship of trust and confidence which he improperly exploited for his own benefit." *Credit Lyonnais Bank NV v Burch* [1997] CLC 95 at 104 *per* Millet LJ.

74. Thus the case is one where the transaction itself was part of the evidence for the pre-existing relationship; but it is important that there is a clear finding that

the relationship was indeed pre-existing. The case is of no assistance to the Respondent.

75. It follows that the decision made in the FTT, on the basis of the relationship of trust and confidence in relation to the transaction itself, was made in error and the appeal has to be upheld. The Upper Tribunal substitutes for the decision of the FTT its own decision that a presumption of undue influence did not arise.

Ground 2: there was no other basis on the facts found (or which ought to have been found) for concluding that there was a relationship of influence between the Respondent and the Applicant, whether as alleged by the Respondent or at all.

76. In effect this ground of appeal says that if the relationship of influence in the transaction itself is not sufficient to raise the presumption of undue influence, there was no basis on which a relationship that satisfied the legal requirements could be found – in other words, there was no pre-existing relationship.

77. That this is correct follows from what I have already found. Not only is there nothing in the facts found by the judge to justify a finding of the requisite relationship prior to the transaction, in any event he did not find such a relationship to have existed before January 2013. In the light of what I have already decided, nothing more needs to be said on this ground.

Ground 3: The findings to the effect that Nahid did not understand or forgot the explanation she was given by Saleem and Mr Ziman do not in law amount to a breach of duty owed by a dominant party under the duty imposed by a relationship of influence unless it can be established that the dominant party was aware of that

78. At the hearing Mr Whitaker conceded that this point was not relevant to undue influence, which does not require a breach of duty. It would have been relevant had the judge found an unconscionable bargain, but no such finding was made and therefore there as no need for him to pursue this ground.

Ground 4: The decision about actual undue influence was against the weight of the evidence

79. The judge's finding on actual undue influence was stated in a single sentence at the end of his paragraph 77, where after finding that the presumption of undue influence had arisen he added "I would go further: I regard the circumstances in which Nahid came to execute the transfer and declaration of trust as themselves amounting to the exercise of actual undue influence on Saleem's part."

80. This very brief finding is difficult to analyse. The judge at his paragraph 76 (summarised above at my paragraph 36) went through what he regarded as the "troubling features" of the transaction. Most of these relate to the legal structure of the transaction and the lack of legal protection for the Respondent, but in the judge's final point he concludes that the gift of a 25% share "was

not a voluntary gift but something which was sprung on Nahid at the meeting, for no good reason that I can see, and inadequately explained."

81. Of the various "troubling features" this is certainly the strongest candidate for a finding of actual undue influence. But the basis on which the judge reached this conclusion is unclear. It must be based to some extent on his view of Mr Eley's note of the meeting of 5 June 2013 (paragraph27 above); but as Mr Whitaker points out Mr Eley was not available for cross-examination and therefore the significance of the note about a 75/25% trust, and the date on which it was inserted by hand in the document could not be tested.
82. Furthermore, my attention was drawn to a copy of a letter in the trial bundle (that is, the bundle used in the FTT) written by Mr Eley to the Appellant in 2015 in which he sets out his recollection that the Respondent agreed at the meeting of 24 July to make a gift to the appellant of a 25% share. There is no indication in the decision that the judge was aware of this letter, nor of whether, and if so why, he rejected what it says.
83. The judge also based his finding on a rejection of the Appellant's evidence that he discussed the proposed gift with the Respondent some days before 30 July, but the basis on which he rejected that evidence is not clear (see my comment at paragraph 31above).
84. Accordingly, if the judge's remark at the end of his paragraph 77 was intended to be a formal finding that there had been actual undue influence, I find that it is not supported by sufficient findings of fact and the appeal on this ground is upheld. I do not substitute my own judgment on this point; I have not heard the evidence and cannot do so. Accordingly this is not a finding that there was no actual undue influence, but simply a finding that the FTT's decision cannot stand.

The Respondent's argument about mistake

85. The Respondent seeks to uphold the decision of the FTT on a basis that the judge expressly did not decide. She argues that the transaction was vitiated by mistake because, as the judge found, she did not understand that she was transferring the property to her son. Ms Peacock in her skeleton argument describes this as a cross-appeal, which it is not; the judge made no finding on mistake or on misrepresentation and therefore there is nothing to appeal.
86. Be that as it may, the Respondent asks me to uphold the decision on the basis that the transaction was vitiated by mistake. Ms Peacock cites the decision in *Pitt v Holt* [2013] UKSC 26 where the Supreme Court said that the court's equitable jurisdiction to rescind a gift for mistake depends upon there being

    > "… a mistake on behalf of the donor as to the legal effect of the disposition or to an existing fact which is basic to the transaction".

87. This test, Ms Peacock says, is satisfied by the confusions and misunderstandings found by the judge on the Respondent's part.
88. In response Mr Whitaker points out that the transaction was not in fact made for no consideration; the Respondent was paid, at least in part, for 25% of the

value of the property. He argues therefore that the common law rules for the setting aside of a transaction must be followed (citing *Van der Merwe v Goldman* [2016] 4 WLR 71, *per* Morgan J at [31]). Mr Whitaker sought to persuade me that the transaction proceeded from, or amounted to, a contract, which is unsustainable since there is no written agreement on the basis of which the transaction of 30 July took place and therefore there is no way past the provisions of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 which require a contract relating to land to be in writing.

89. Nevertheless consideration was paid, even though there was no legally enforceable obligation to pay it. The Respondent's evidence is that the Appellant told her not to spend the £122,500 because he might need it later, but the judge made no finding as to whether or not that was true, and there is no dispute that that payment was made. It was pointed out in *Van der Merwe* at paragraph 31 that the test is not whether there is a contract but whether there is consideration.

90. If the transaction is subject to the common law rules as to mistake – and there would need to be a proper finding of fact about the consideration before that could be determined – then clearly no decision could be made at this stage. The common law rules are of course very much more strict; there would have to be either a common mistake (which there was not) or a unilateral mistake. Mr Whitaker mentions and dismisses common mistake but makes no mention of unilateral mistake, which would of course have to be explored in detail for any finding to be made. The Appellant's level of awareness of his mother's confusion would become crucial and insufficient findings of fact have been made about that for a decision to be made about unilateral mistake in this appeal.

91. Accordingly it is not possible to take the findings of the judge in the FTT on undue influence and retro-fit them into a decision on mistake. The judge expressly made no finding about mistake and I cannot uphold his decision on that basis.

Conclusion, and the order of the Upper Tribunal

92. The Upper Tribunal has power on allowing an appeal either to remit the matter to the FTT for a re-hearing, or to make any order that the FTT could have made. The parties have been engaged in litigation for a long time now. They need finality, but that it is not presently possible. In allowing the appeal I substitute, for the FTT's decision, the Upper Tribunal's decision that the Respondent's case in presumed undue influence fails. But it is not possible to achieve finality by making a direction to the registrar on that basis,first because I have not substituted the Upper Tribunal's decision for the FTT's decision on actual undue influence (see paragraph 84 above) and second because the FTT failed to make a decision on the Respondent's case on mistake and misrepresentation. Accordingly the Respondent is entitled to a re-hearing on her case in actual undue influence, mistake and misrepresentation.

93. Accordingly the matter is remitted to the FTT for re-hearing on the issues of actual undue influence, mistake and misrepresentation. The Upper Tribunal has made its own decision as regards presumed undue influence. In the course of making submissions on the form of order that I should make the Ms Peacocke for the Respondent made an application for permission to appeal to the Court of Appeal, which I refused – both the application and the refusal were prospective, the application referring to the decision that I was yet to hand down and my refusal to be dated on the same date as this decision. It is of course still open to the Respondent to ask the Court of Appeal for permission to appeal my decision.
94. The Appellant is of course entitled to his costs of the appeal, but I have stayed the costs order pending the resolution of the remitted matters in the FTT.

TRIBUNAL JUDGE: ELIZABETH COOKE

RELEASE DATE: 11 December 2018