Neutral Citation Number: [2023] EWHC 2202 (Ch)

Case No: CH-2023-000027

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 04/09/2023

Before:

SIR PAUL MORGAN

- -

Between:

SAFINA BI AZAM — **Appellant**

- and –

MOHAMMED MOLAZAM — **Respondent**

- -
- -

Charles Sinclair (instructed by **Arcadian Law**) for the **Appellant**
J G Mendus Edwards (instructed by **Link Solicitors**) for the **Respondent**

Hearing date: 5 July 2023

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Approved Judgment

This judgment was handed down remotely at 10am on 4 September 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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SIR PAUL MORGAN

Sir Paul Morgan:

Introduction

1. Prior to 7 October 2019, the Respondent, Mr Molazam, was the owner of a house at 236 Odessa Road, London E7 9DY which was subject to a charge in favour of the local housing authority. On 7 October 2019, Mr Molazam transferred the property to the Appellant, Mrs Azam, for an inadequate consideration. On 9 April 2020, Mrs Azam transferred the property to one of her sons, by way of a gift.

2. Mr Molazam brought the present proceedings on 3 August 2020 seeking an order that the transfers of 7 October 2019 and 9 April 2020 be set aside on the ground that the transfer of 7 October 2019 was the result of fraud and undue influence practised on him by Mrs Azam. Both Mrs Azam and her son were named as Defendants in those proceedings. Following a trial in the Central London County Court on 3 to 5 January 2023, HHJ Gerald gave judgment on 10 January 2023 in which he held that Mr Molazam was entitled to have the transfer of 7 December 2019 set aside by reason of undue influence and that if that transfer were set aside, the later transfer by way of gift should also be set aside. On 10 January 2023, the judge made an order to that effect.

3. Mrs Azam now seeks permission to appeal against the order of 10 January 2023. There is no appeal by Mrs Azam's son. It is accepted that there is no need for the son to be a party to this appeal.

4. On 7 February 2023, Miles J ordered a rolled-up hearing of the application for permission to appeal and any permitted appeal.

5. The application for permission to appeal and any permitted appeal came before me on 5 July 2023. Mr Sinclair appeared on behalf of Mrs Azam and Mr Edwards appeared on behalf of Mr Molazam. Both counsel had also appeared in the court below.

6. The judge began his judgment with the comment: "[t]his is a troubling case". I entirely agree. My reasons for agreeing are these: (1) the transaction between Mr Molazam and Mrs Azam was very one-sided and disadvantageous to him; (2) Mr Molazam's evidence as to the transaction was largely unreliable and most of it was rejected by the judge so that he rejected Mr Molazam's case as to fraud or as to pressure by Mrs Azam; (3) the cross-examination of Mrs Azam and her husband (who gave evidence) was very limited and it was not put to Mrs Azam that she had influenced Mr Molazam in relation to the transaction; (4) Mrs Azam's grounds of appeal include a large number of challenges to the judge's findings of fact either on the ground that they were unsupported by the evidence or were procedurally unfair; and (5) in a case where both sides to the transaction gave evidence, the judge appears to have held that there was no actual undue influence but that there was presumed undue influence.

The basic transaction

7. The transaction in question involved the transfer by Mr Molazam to Mrs Azam of his house at 236 Odessa Road ("the property"). Mr Molazam was the sole owner of the property. It was the subject of a charge in favour of the local housing authority, the London Borough of Haringey, where the sum secured by the charge was of the order

of £41,000. The property had suffered some damage in a fire but the judgment under appeal did not contain detailed findings as to the extent of the damage. It was a condition of the transaction between Mr Molazam and Mrs Azam that Mrs Azam would pay off the sum due under the charge in favour of the council and she did so. Thereafter, Mr Molazam transferred the property to Mrs Azam. After the transaction, Mrs Azam or her husband carried out some repairs in relation to the fire damage and they had foreseen the need to do so at the time of the transaction. Mrs Azam did not make any payment direct to Mr Molazam (as distinct from the payment to the council) as consideration for the transfer. There appears to have been an agreement between them that after the transfer, Mr Molazam would be able to use a part of the property for his own use for at least some further time. He was in fact allowed to do so until a difficulty arose in March 2020 and he was then prevented from using a part of that property from that time. At the trial, the parties proceeded on the basis that the value of the property (with vacant possession) at the time of transaction, free of the charge in favour of the local authority, was some £300,000 and it may have been even more than that.

Mr Molazam's pleaded case

8. In his judgment, the judge summarised the claim as pleaded by Mr Molazam. He had pleaded that the transaction involved a loan of £41,000 from Mrs Azam to Mr Molazam to be used to repay the council. Mrs Azam was to be able to rent out the upper floor of the property and to receive the rents from such letting until the loan was repaid; Mr Molazam was to remain entitled to occupy the ground floor of the property. When the loan was repaid, the arrangements would come to an end. It seems to have been implicit in this way of putting the case that Mr Molazam would remain the owner of the property at all times. He then pleaded that Mrs Azam had fraudulently misrepresented to him that the document he signed to give effect to the transaction was a loan agreement. It was also pleaded that Mrs Azam had "overtly" pressured him into signing that document.

9. Mr Molazam's pleaded case differed from what he had told his former solicitors when he first took steps to have the transaction set aside. The judge recorded in his judgment that, on 2 July 2020, Mr Molazam went back to the solicitors who had acted for him in relation to the earlier transaction. He then told them that the arrangement with Mrs Azam was that she would pay off the sum due to the council, he would transfer the property to her and when he was able to pay her back the sum she had paid to the council, she would then transfer the property back to him. The judge noted that this account showed that Mr Molazam had indeed understood that he had transferred the property to Mrs Azam but the judge also observed that this account was not being relied upon by Mr Molazam in these proceedings.

The evidence

10. Mr Molazam gave evidence at the trial and was cross-examined. Mrs Azam and her husband also gave evidence and were cross-examined. I have been provided with a transcript of the evidence. I will not attempt my own summary of that evidence but I will refer to the judge's comments on the evidence and his specific findings of fact. However, since some of those findings of fact are now challenged on this appeal, I will to the extent necessary consider the transcript in order to deal with those challenges.

The judgment

11. The judgment is lengthy and dealt with the evidence and submissions in considerable detail. I have paid close attention to all of the comments and findings of the judge but I will seek to summarise the relevant parts of the judgment to bring out the findings which are of direct relevance to the present appeal.

12. The judge referred to the claim as pleaded by Mr Molazam. He then explained that in closing submissions, counsel for Mr Molazam did not pursue the allegation of fraudulent misrepresentation as to the nature of the transaction. This was said to be because there had been no evidence that Mrs Azam had said anything to Mr Molazam at the time of the execution of the transfer. The judge also commented that it was plain that the solicitors who were involved were the solicitors acting for Molazam and not for Mrs Azam (contrary to an earlier suggestion by Mr Molazam in these proceedings). The judge also noted that counsel for Mr Molazam did not pursue the allegation that Mr Molazam had been "overtly" pressured into executing the transfer because there was no direct evidence of such pressure. The judge commented that it followed that any pleaded claim of actual undue influence was not pursued.

13. The judge then explained that, in closing submissions, the case for Mr Molazam had become a case of presumed undue influence in that Mrs Azam had taken advantage of or exploited the known vulnerability of Mr Molazam by reason of his financial and other vulnerability owing to his liability to the council, coupled with his health difficulties. This was said to be in the context of the "relationship" between the parties and in relation to a transaction which called for an explanation. The result was that the evidential burden shifted to Mrs Azam to establish that Mr Molazam had entered into the transaction of his own free will.

14. The judge then commented on the evidence of the witnesses, Mr Molazam and Mrs Azam and her husband. He referred to the "major sea-change" in Mr Molazam's case. The judge commented that some parts of Mr Molazam's evidence were untenable. The judge also said that caution was called for in considering Mr Molazam's credibility where allegations of fraudulent misrepresentation and overt acts of persuasion were not being pursued and where key elements of his own case were retracted in cross-examination. The judge then directed himself that these comments did not mean that the entirety of Mr Molazam's case should be rejected. The judge then commented on the evidence of Mrs Azam and her husband but, at this point in his judgment, the confined himself to saying that their witness statements were short.

15. The judge then said:

> "As i[s] often the case, when all material evidence is taken into account, a tolerably clear picture emerges as to what was agreed and understood and known by the parties at the relevant times. In this respect, I put considerable emphasis upon the solicitors' conveyancing file from which a clear time-line and picture emerges which will form the basis of my decision."

16. The judge then dealt with the law in relation to undue influence. He cited *Allcard v Skinner* (1887) LR 36 Ch D 145 at 182-183, *Royal Bank of Scotland plc v Etridge (No. 2)* [2002] 2 AC 773, *Macklin v Dowsett* [2004] EWCA Civ 904, *Perwaz v Perwaz* [2018] UKUT 325 (TCC) and *Malik v Sheikh* [2018] 4 WLR 86. In particular,

the judge referred to the parts of those decisions which discussed cases where a vulnerable person had been exploited or taken advantage of.

17. The judge then proceeded to make a number of detailed factual findings before setting out what he described as his "general findings". I will set out his "general findings" in full later in this judgment and at this stage I will summarise the principal matters where the judge made findings which he then picked up in his "general findings".

18. Under the heading "Familial and community background", the judge said that Mr Molazam and Mr and Mrs Azam originated from the same cluster of villages in the Mir Pur region of Pakistan. Mrs Azam was the aunt of Ms Bibi who was Mr Molazam's partner. Ms Bibi was previously married to one of Mrs Azam's son and they had a child who was therefore Mrs Azam's grandson. Mrs Azam gave evidence that she did not know Mr Molazam well but they saw each other at weddings, funerals and such functions. Mr Azam also knew Mr Molazam. Mr Molazam worked at a bakery alongside four or five brothers of Mrs Azam. (I was told that there were in fact three brothers.)

19. Under the heading "Property and related background", the judge said that Mr Molazam had bought the property for £167,000 in 2004. The judge described how Ms Bibi was originally a tenant of Mr Molazam's at the property, living there with her son (Mrs Azam's grandson) but she then began a relationship with Mr Molazam in around 2012 and they had two children together (born in 2014 and 2015).

20. In March 2019, the boiler at the property exploded causing "serious damage" to the property so that the occupants had to vacate. Mr Molazam also suffered burns and eye damage so that he was in hospital for nine days. Mr Molazam appears to have carried out some repairs to the property but he did not complete the necessary repairs. At some point, Mr Molazam moved back into the property and he was living there by September 2019.

21. On 3 May 2019, the council as local housing authority claimed from Mr Molazam the repayment of some £41,000 as overpaid housing benefit. The judge did not have much, if any, documentation to explain what that claim was for but it appears that Mr Molazam and/or Ms Bibi had wrongly claimed housing benefit on the basis that Ms Bibi was a tenant in the property whereas she was the partner of Mr Molazam living with him and their two children (and her first son also). It does not appear that Mr Molazam ever disputed his liability to repay this sum to the council. On 17 July 2019, the council obtained an interim charging order on the property to secure repayment of the sum claimed. Shortly thereafter, the council registered a unilateral notice against the title to the property.

22. Mrs Azam was aware of the fire at the property and of the fact that Mr Molazam was or had been in hospital. Mrs Azam also gave evidence that she knew that Mr Molazam was "in trouble" with the council "for some type of fraud". Mr Azam knew of Mr Molazam's difficulty with the council and he referred to rumours that Mr Molazam might have had to go to prison but that he managed to avoid that because of the position of the children.

23. Under the heading "Impact on Claimant and First Defendant and Azam's knowledge of it", the judge referred to Mr Molazam's evidence that in July 2019 he was scared

and desperate to pay the money he owed to the council but he did not have the money to do so. This caused his health to deteriorate. He was Type 2 diabetic. He had had a heart attack in May 2018. On 2 September 2019, he had a second heart attack. He was taken to hospital and had heart surgery and was discharged on 6 September 2019. His doctor certified that Mr Molazam was not fit for work although Mr Molazam appears to have told the doctor that he felt well enough to return to work and had no chest pains. In particular, the doctor certified that Mr Molazam was not fit for work on 7 October 2019. The judge recorded that there was no other medical evidence as to Mr Molazam's condition or how he might appear to others.

24. The judge held that Mr and Mrs Azam knew that Mr Molazam had had a second heart attack in September 2019, although Mr Molazam did not say this to them. The judge said that, in her evidence, Mrs Azam denied all knowledge of Mr Molazam's heart attack because she appreciated that his relatively poor state of health would not cast her actions in an especially favourable light.

25. Under the heading "Approach to the First Defendant", the judge said that Ms Bibi suggested to Mr Molazam that they approach Mrs Azam for financial assistance. The judge inferred this was because it was thought that Mrs Azam might be in a financial position to assist and might be prepared to do so because of the family connection. This was the first time that Mr Molazam had approached Mrs Azam for financial assistance.

26. The judge then made findings as to the discussions which took place between Mr Molazam and Mr and Mrs Azam. There were three meetings. Mr Molazam, Ms Bibi and Mrs Azam were present at the first meeting which took place in late August or early September 2019. Ms Bibi did not give evidence at the trial. Mr Molazam and Mr and Mrs Azam were present at the second and third meetings which took place in September 2019; the third meeting was a few days before 25 September 2019.

27. At the first meeting, Mrs Azam was told that Mr Molazam needed money. He told her that he had asked his other members of his family but they had refused to help him. He did not tell Mrs Azam what he needed the money for. The judge found that Mr Molazam's state of mind was that he was desperate to pay the money he owed the council because he feared that he would otherwise lose his home and his sole remaining asset and "possibly go to prison". The judge also found that Mrs Azam knew about the debt to the council and the rumours that Mr Molazam might go to prison but she did not mention that to him or Ms Bibi. Ms Bibi asked Mrs Azam to lend them around £45,000. Mrs Azam considered that that was a lot of money which she did not have to spare but she felt awkward about saying "no" straightaway. She said that she could not make that decision without talking to her husband and Mr Molazam then said he wanted to meet Mr Azam.

28. The judge considered Mr Molazam's evidence that Mrs Azam had said at this first meeting: "Shush – I will pay the charges to the local council because you are looking after my grandson". I comment that the reference to the local council is arguably not compatible with the judge's finding that Mr Molazam and Ms Bibi did not tell Mrs Azam what they needed the money for. The judge accepted that words to that effect were said but no agreement was reached. However, he went on to say that it would be wrong to place too much emphasis on what was said because Mrs Azam had left the door open to an outright refusal so that there was no actual agreement or promise. The

judge also held that it was more likely than not that Mr Molazam's proposal at the first meeting was that Mrs Azam would be repaid her loan by receiving the rent from letting the upstairs of the property until the loan was repaid; Mr Molazam could continue to live in the downstairs part of the property. There was also a possibility that Mr Molazam would pay over to Mrs Azam a possible pension lump sum of £20,000.

29. Before the second meeting, Mr Azam told his wife that he was not interested in lending money to Mr Molazam and wanted her to "fob him off". Nonetheless, the second meeting took place. The judge held that, at that meeting, Mr Molazam told Mr and Mrs Azam that he had committed housing benefit fraud, that he was being chased for repayment by the council, that the council was going to take the property away and that, if he could not pay the council, he might even go to jail. The judge found that Mr Molazam's proposal was that Mrs Azam make him a loan. Mr Azam asked how the loan would be repaid. Mr Molazam said that Mr and Mrs Azam should trust him; he swore an oath that he would repay and he said that they could trust him because they were related. The judge held that the proposal was for the loan to be repaid out of the rent from the upstairs of the property and possibly a pension lump sum. Mr Azam said "no" to this proposal and that he would not help Mr Molazam. Mr Molazam persisted in trying to persuade Mr Azam but Mr Azam repeated that he could not help. Mr Molazam then left.

30. The judge held that Mr Molazam did not give up and there was a third meeting. The judge commented that Mr Molazam's proposal at this meeting had "changed quite fundamentally" and he recorded Mrs Azam's evidence as to what was said, as follows:

> "27. This time, [the Claimant] said that he was going to lose the Property anyway, so if we could pay the money off to the council, he would transfer the Property to us; he said that the Property was in bad condition and the council would just take the property and he wouldn't end up with anything (*sic*).
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> 28. After some discussion, which included us being able to see the property, I agreed to the proposal as long as I could raise the money from people.
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> 29. Azam was not happy, but said it was up to me and that he did not want any headaches with this.
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> 30. The agreement involved:
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> > 30.1 I would pay for the remaining repairs required to the Property as a result of the house fire;
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> > 30.2 I would pay the money due to the council which was just over £40,000;
> >
> > 30.3 [The Claimant] would transfer the Property to me;
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> > 30.4 [The Claimant] could continue to use the downstairs front room of the property as and when he required it. I understood that this was, until his childrens (*sic*) school place had been changed, and his situation of living

> with [Ms Bibi] had been sorted out with the council – he was not clear about this, but I understood it had something to do with the housing benefit fraud case.
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> 31. Later that day, I started making phone calls and started raising the money from people asking to borrow from them so that I could use the money to pay [the Claimant]. It took me about a week or two to raise that money.
>
> 32. [The Claimant] stayed in touch with me during this period to get regular updates about how I was getting along raising the money."

31. The judge commented:

> "As with the previous two meetings, there was little further evidence and precious little cross-examination to flesh out these paragraphs to enable a deeper understanding of the course of discussions and negotiations."

32. The judge considered that it was possible to draw some inferences from "these rather spare paragraphs". The first related to the statement that Mr Molazam would lose the property if it was repossessed and sold by the council; the judge commented that there would still have been a surplus payable to Mr Molazam after such a sale. Although the precise value of that surplus was not known, it would have been substantial. Secondly, there must have been some further negotiation relating to the condition of the property and the need for repairs. The judge commented that it was odd to suggest a term that Mrs Azam pay for the repairs if she was to become the outright owner of the property. The judge considered that it was perfectly understandable that Mrs Azam would want to inspect the property to see if the transaction was financially worthwhile. He treated that as showing that Mrs Azam was actively engaged in the negotiation process and that "she was not a mere passive recipient of the Claimant's munificence".

33. The judge held that an inspection of the property, by Mr Azam, must have taken place. There was no clear evidence as to the state of the property or the likely cost of repairs. There was no evidence that anyone obtained a valuation of the property but the judge held that Mr Azam understood that the property was of considerable value. The judge went on to hold that Mr and Mrs Azam would have regarded the property as being worth in the region of £300,000 to £400,000 in its partially repaired condition. I comment that the judge did not consider whether the apparent agreement that Mr Molazam could continue to live in the property should be taken into account in considering the value of the transaction to Mrs Azam.

34. The judge made further findings as to Mrs Azam's state of mind, as follows:

> "Further, it in my judgment is inconceivable that the First Defendant did not first satisfy herself that the Property was of value and the extant repair costs not unreasonable before proceeding with the transaction, not least because sooner or later she would have to repay the people who sourced the £45,000. She would also need to know how much money she needed on top of that sum to complete the repairs, a pre-requisite, it seems, to letting out the Property. As I say elsewhere, she is a woman within the community of considerable respect, power and influence. Albeit illiterate, in my judgment she is well able to understand the

> relatively straight-forward matters in issue, and struck me as being canny. After all, her husband trusted her enough to make the decision to proceed against his own better instincts, from which it follows that he too regarded her as well-capable of assessing and then carrying out the transaction so was indeed a woman who does know something about property and business."

35. The judge specifically rejected Mrs Azam's evidence as set out in paragraph 30.4 of her witness statement which I have quoted above. Instead, he held that it was agreed that Mr Molazam would be able to continue living on the ground floor of the property.

36. The judge then made further findings or comments on the agreement which was reached as a result of the third meeting. He said:

> "74. She would therefore have understood that when the Claimant said that he would end up with nothing if the council took the Property, he was not just wrong but delusional. That, of course, is a strong word but used advisedly, because there was and is no rational or other reason or evidence as to why or how the Claimant could possibly have thought and said such a thing – unless, of course, and which in my judgment was the case, it reflected the heightened level of his vulnerability owing to the predicament he had gotten himself into by his benefits fraud coupled with his then fragile health condition and fear of going to prison. That of course is consistent with him repeatedly going back to the First Defendant (and her husband) in apparent desperation pleading for the money. The impression given is that the Claimant was literally begging for the money with ever increasing desperation and intensity for fear of losing his home and going to prison.
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> 75. Another reason for referring to evidence of negotiations as I have above is because, as I understood the First Defendant's counsel's submissions, there was no evidence of any negotiations or counter-offers or proposals coming from the First Defendant. When properly understood, it is necessarily implicit in the paragraphs of her witness statement referred to above that there were negotiations, although it is right to say, on the evidence, the proposal to transfer the Property in return for paying off the council debt emanated from the Claimant not the First Defendant. However, the requirement that the Property be first inspected to assess its condition and no doubt evaluate the amount required to complete the fire damage repairs does appear to have come from the First Defendant or her husband. In other words, it would be wrong to characterise, as her counsel sought to do, her as a purely passive recipient of a "too good to refuse" offer. There was a negotiation and discussions, an element of which was requiring inspection.
>
> 76. I should say here that even if there was no evidence of negotiation, or "toing and froing" between the parties, silence can speak volumes. Here, the First Defendant's (and her husband's) position during the first two meetings plainly caused the Claimant to return with a completely new, and extremely disadvantageous, from his perspective, proposal. The First Defendant (and her husband) would have and in my judgment did readily understand that the initial offer or request for a loan with continued occupation of his home until repayment of loan from renting out the upper floor was replaced with an offer to gift the Claimant's home (outright, if the First Defendant's evidence were accepted, which it is not) with a continued right of partial occupation of the ground floor in

> return for paying off the council as well as, in the second proposal, completion of and paying for extant fire damage repairs.
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> 77. That sea-change of itself was a marker of the state of vulnerability, panic and distress he had gotten himself into having been apparently rebuffed by the First Defendant and her husband vide his and Ms Bibi's repeatedly contacting them, there being no other evidence as to why in such a short period of time he shifted from asking for a loan to "gifting" his home to the First Defendant for £41,000 odd. Thus, whilst I accept that it was not any part of the First Defendant or her husband's thought process that stonewalling or refusing the Claimant's offers would bring about a "new improved" one, that was its practical effect. I should also say here that these observations would apply equally if I had found, which I have not, that there was no pre-transfer inspection of the Property by the First Defendant (and her husband)."

37. The judge then made findings as to Mr Molazam's instructions to his solicitors, Nasim & Co and what occurred in relation to the transaction. On 25 September 2019, Mr Molazam instructed the solicitors to act for him. He told them he wanted them to secure the removal of the council's charge and unilateral notice on the property and the then wished to gift the property "to his sister" who would pay off the council's charge. He wanted completion "ASAP". On 27 September 2019, Mrs Azam transferred £45,000 to the solicitors. On the same day, Mr Molazam attended the solicitors' office to sign the transfer form, the TR1. He told the solicitors that once he had gifted the property "to his sister", his sister would become the new owner of the property and he would not be able to have any right to the property after that. Also on 27 September 2019, Mrs Azam attended the solicitors' office and signed the TR1. On 3 October 2019, the solicitors repaid the sum of £1,185.45 to Mrs Azam being the balance of her payment of £45,000 remaining after paying off the council's charge and fees and disbursements. The TR1 was eventually dated 7 October 2019 and the solicitors completed an application form to the Land Registry, an AP1, stating that the value of the property was £300,000; the source of that figure was not established by the evidence.

38. The judge then set out his "General findings" in the following terms:

> "*General findings*
>
> 89. In my judgment, it is right to infer and find that the First Defendant was of some stature, power, influence and respect within the Mir Pur community, at any rate within her own family and friends, otherwise she would not have been able to raise the relatively large sum of £45,000 within a relatively short period of time. That would tend to justify, or explain why, Ms Bibi encouraged the Claimant to approach the First Defendant – not her husband – for the money. The fact that it was the First Defendant, not her husband, who was approached and that, as he stated in evidence, he left it up to her to decide whether to help the Claimant, and therefor Ms Bibi and their grandson, out tends to reinforce that conclusion and that even within the immediate family of the First Defendant and her husband, it is she who is the force to be reckoned with.
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> 90. As already noted, it was Azam's view that the deal was "dodgy", so he did not want to get involved but was content to leave it up to his wife to make the

decision albeit that it appears that he did go to view the Property to ascertain the nature and extent of outstanding repairs and also himself carried out, or assisted in the carrying out of, those repairs. One of the reasons he did not want to get involved in it was because he does not do "dodgy stuff". Another was because he did not want to run the risk of getting embroiled in precisely the sort of litigation which his wife is now involved in, in respect of which, he said, he has had to sell her jewellery to help fund it (at which point in time, the First Defendant, sitting in the well of the court, was visibly distressed and teared-up). At this stage of the cross-examination, he made clear, albeit that he was not prepared to put a number on it, that he well understood that this was a profitable transaction.

91. In my judgment, and without over-reading it, this part of Azam's evidence was revealing. I infer and find that he did not want to get involved partly because he regarded the Claimant as dishonest and unreliable because of the benefits fraud and his general reputation within the community; and partly because he did not want to run the risk of getting embroiled in litigation, implicitly because he recognised that the Claimant was in a desperate, vulnerable position partly due to his (and Ms Bibi's) own benefit fraud-induced debts and also because of his very poor general health and emotional state so that if he were to get involved he would be taking advantage of the Claimant. Rather, he was content to sit back and allow his wife to take the decision and, therefore, the potential rap. In that regard, and so as to attempt to protect her, he has sought to suggest that, as a woman, understanding the true nature and value of the transaction would be beyond her. As already stated, that was demonstrably untrue because he was content to let her make the decisions, no doubt utilising her position with the Mir Pur community and their family and friends to raise the funds.

92. In my judgment, it is quite plain that the First Defendant was prepared to take advantage of the Claimant's vulnerability, or weakness. It is inconceivable that she did not know and understand her husband's concerns as just stated, yet she was prepared to take the risk. Whilst there is no evidence of specific proposals coming from her, or her husband, it is more likely than not that there were such proposals coming from her, or her husband, specifically in relation to the need to inspect the Property to establish its conditions and the costs of outstanding repairs to ensure viability. Those findings are consistent with, and supported, by her attitude when it was put to her in cross-examination that she had taken advantage of the Claimant. Her response was to the effect that "he came to me: I did not go to him; he agreed to transfer the Property to me in return for me paying his debts; I was not stuck in the position of losing my house – he was; I did not take advantage of him – he needed the money to avoid losing his house and I saved him from going to prison".

93. Considering the purely financial aspects of these comments (which ignores that the focus is upon the taking advantage of the Claimant's vulnerability), if the First Defendant was right and the Claimant had no rights of any substance to occupy the Property, he would be losing the house either way, so the First Defendant was not saving him from losing the house at all because it would be hers not his. Further, if the Property was repossessed and sold by the council, the Claimant would have received its net equity of upwards of £300,0000; if transferred to the First Defendant, he would receive nothing from her. The First

> Defendant's cited comments are therefore at odds with actualité and what she understood at the time, from which it follows that the transaction caused the Claimant major financial loss so saving him nothing apart from his fear of going to prison."

39. The judge then asked himself whether Mr Molazam had established undue influence, and he said:

> "**Has the Claimant established undue influence?**
>
> 94. In my judgment, for the reasons stated, when entering into the transfer, which it is accepted calls for explanation, the First Defendant exploited or took advantage of the vulnerability of the Claimant so that the Claimant has established that the transfer is to be presumed to have been entered into by undue influence. In short, the First Defendant, a respected and influential person within the Mir Pur community and her extended family, knew that the Claimant was vulnerable by reason of his health, having only recently been released from hospital, having had his second heart attack against the background of still being off sick after the March 2019 boiler explosion from which he had still not fully recovered, and by reason of his financial situation, owing to the housing benefits fraud, and also his fears of losing his house (which had been his family home), his freedom (if the benefits fraud was not repaid) and of being left with nothing (which, as she knew, was not and could not have been true). It is immaterial whether or not there was any misconduct on the part of the First Defendant: none is alleged."

40. The judge's actual finding in this paragraph is that Mr Molazam had established that undue influence was to be "presumed". The judge did not remind himself at this point that a presumption of undue influence is an evidential presumption which may be rebutted by the evidence of the defendant and that, in a case where both parties had given evidence, the ultimate question for the court is, considering all of the evidence, whether the transaction was brought about as a result of undue influence. Having said this, I will later in this judgment consider whether the judge meant to find, on all the evidence, that there had been actual undue influence and, if so, whether such a finding would have been open to him.

41. The next passage in the judgment is headed "What of the solicitors' advice?". In this passage, the judged considered whether the presumption of undue influence or "adverse inference" (as the judge described it) was rebutted by the involvement of Mr Molazam's solicitors. The judge considered whether it had been proved:

> " … that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justify the Court in holding that the gift was the result of a free exercise of the donor's will."

The judge took this test from *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127 at 133. He then quoted from further authorities which referred to circumstances where a donor understood what he was doing but yet was not "emancipated" from the effect of undue influence.

42. The judge then considered the facts as to the involvement of the solicitors and he held that they made no attempt to understand, analyse or advise on the key elements of the transaction, they did not obtain full instructions from Mr Molazam and they did not give informed advice to him. The judge held that, in those circumstances, the involvement of the solicitors did not rebut the presumption of undue influence and he said: "it does not establish that the Claimant entered into the transaction of his own free will, duly emancipated."

The appeal

43. There are three grounds of appeal, as follows:

> "1. The Learned Judge was wrong in that he misdirected himself as to principles required to establish a presumption of undue influence.
>
> 2. The Learned Judge was wrong to conclude that the evidential burden had been met to establish a presumption of undue influence in respect of the transfer of the Property.
>
> 3. The Learned Judge erred in making findings of fact having either: a. wholly failed to consider material facts; b. taken into account immaterial facts; and/or c. that those findings were unjustified by the evidence, in that they were findings to which no reasonable judge could have come."

The appeal on fact

44. There was no dispute as to the principles to be applied by an appeal court when it is asked to interfere with a trial judge's findings of fact. The appeal court may only do so where a critical finding of fact is unsupported by the evidence or where the decision is one which no reasonable judge could have reached. I was referred to *Haringey LBC v Ahmed & Ahmed* [2017] EWCA Civ 1861 at [29]-[31] which contains a summary of the relevant authorities.

45. In addition to challenging certain findings of fact of the trial judge on the above basis, Mr Sinclair counsel for Mrs Azam also challenges certain findings on a further basis, namely, that the judge made findings where he did not accept the evidence of Mrs Azam on a matter on which Mrs Azam had not been cross-examined. In that respect, the general rule is that "it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted": see per Lord Herschell LC in *Browne v Dunn* (1893) 6 R 67 at 71. This general rule was applied in *Markhem Corpn v Zipher Ltd* [2005] RPC 31.

46. On the challenge based on the alleged lack of cross-examination, Mr Sinclair cited the decision of the Privy Council in *Chen v Ng* [2017] UKPC 27. In that case, the trial judge disbelieved a witness on a certain matter. The witness's credibility on that matter had been challenged in the course of the trial. The trial judge gave two reasons for disbelieving the witness but those two reasons had not been put to the witness. Lord Neuberger and Lord Mance, giving the judgment of the Privy Council, pointed

out that the challenge in that case was more nuanced than the normal type of challenge based on the general rule referred to above. They stated that whether the challenge should succeed should depend on whether the trial, viewed overall, was fair: see at [54]. At [55], Lord Neuberger and Lord Mance explained:

> "At a relatively high level of generality, in such a case an appellate court should have in mind two conflicting principles: the need for finality and minimising costs in litigation, on the one hand, and the even more important requirement of a fair trial, on the other. Specific factors to be taken into account would include the importance of the relevant issue both absolutely and in the context of the case; the closeness of the grounds to the points which were put to the witness; the reasonableness of the grounds not having been put, including the amount of time available for cross-examination and the amount of material to be put to the witness; whether the ground had been raised or touched on in speeches to the court, witness statements or other relevant places; and, in some cases, the plausibility of the notion that the witness might have satisfactorily answered the grounds."

47. As the Privy Council pointed out, *Chen v Ng* was not the usual sort of case where the general principle is invoked. I did ask myself whether the "specific factors" identified in that case would apply in the same way in a case where a judge makes a specific finding which is directly contrary to the evidence of a witness who was not challenged on that matter. In such a case, it might be more straightforward to hold that such a finding would be procedurally unfair without needing to address the specific factors identified in *Chen v Ng*. Nonetheless, Mr Sinclair relied on this passage in *Chen v Ng* on the basis that that this passage applied not only in the more nuanced type of case such as *Chen v Ng* but also in any case where the general rule, described above, was invoked.

48. Mr Sinclair challenged a large number of the judge's findings of fact. The challenges can be grouped under six headings and there were several findings of fact challenged within some of the groups. I asked Mr Edwards, counsel for Mr Molazam, to take me to any place in the transcript where there was evidence to support these findings or where any questions were asked of Mrs Azam about this topic. He took me to one passage in the transcript for that purpose. Nonetheless I have read the evidence and, in particular, the cross-examination of Mr and Mrs Azam. As a general comment, it is right to say that the cross-examination of Mr and Mrs Azam was brief and the case for undue influence was not really put to them. What was put was that they knew that the transaction was very advantageous to them.

49. The heading for the first group of challenges refers to Mrs Azam's standing. In this group, five facts were challenged. Three of these challenges were to findings made by the judge that Mrs Azam had "influence" within her family, and her community. Some of those findings appear in the passages I have quoted from the judge's judgment above.

50. These findings about Mrs Azam's "influence" within her family and her community might not matter if all that the judge was saying was that Mrs Azam was in a position

to raise £45,000 within a short time to enable her to enter into the transaction proposed by Mr Molazam. However, it is likely that the judge saw these findings as to "influence" as being relevant to the question whether Mr Molazam had established that there was a presumption of undue influence in the present case.

51. Of the three findings about "influence" which are challenged, the most specific and arguably the most important finding is in [89] of the judgment, under the heading "General findings", where the judge inferred that Mrs Azam had some stature, power, influence and respect within the Mir Pur community, or at any rate within her own family and friends. This finding is expressed as an inference and appears to be based only on the fact that she was able to raise £45,000 within a relatively short period of time. Mrs Azam gave evidence which was not challenged that she obtained the money from her brothers and sisters and a younger son and "a little bit of money … from different people". Based on that evidence, it would have been open to the judge to infer that Mrs Azam was on good terms with her brothers and sisters and her younger son. Based on the evidence that she obtained a little bit of money from different people, it would have been open to the judge to infer that Mrs Azam had connections, probably within her community, which would allow her to ask them for a loan of a small sum.

52. The judge's findings in [89] of the judgment included a finding that Ms Bibi suggested that Mr Molazam should approach Mrs Azam to obtain the money he needed was because of her position whereby she was in a position to provide the necessary loan. That finding is not challenged by Mrs Azam.

53. Apart from the above evidence about Mrs Azam's ability to raise £45,000, there was no evidence of any kind as to her position in her community and whether she was a woman of considerable respect, power and influence. It was not put to her or to Mr Azam in cross-examination that that was the position.

54. I consider that the judge's findings went well beyond the evidence or any permissible inference from the evidence and that it would be unfair to make this finding or to use it as carrying weight in this case where it is alleged that Mrs Azam practised undue influence in relation to Mr Molazam. I would therefore give permission to appeal in relation to those findings of fact and would substitute a finding that Mrs Azam was on good terms with her brothers and sisters and her younger son and was in a position to borrow small sums from friends in her community. That more limited finding does not involve any finding as to "influence". It is right to note that the judge's findings as to "influence" did not explicitly contain a finding that Mrs Azam had practised any such influence over Mr Molazam in relation to this transaction. I add that it was not put to Mrs Azam in cross-examination that she had practised any influence over Mr Molazam.

55. The next finding challenged under this head is the finding that Mrs Azam regarded herself as being related to Mr Molazam. The judge's actual finding included the finding that this relationship was "not as part of her immediate family … but as part of the wider extended family or community". The judge also said that this finding was "of little significance". Elsewhere in the judgment the judge had made findings, which are not challenged, as to the family relationship between Mrs Azam and Ms Bibi and Ms Bibi's son who was Mrs Azam's grandson and also about the relevant community. The judge had also made a finding, which is not challenged, that Mrs Azam said that

she would pay the money owed to the council because of the position of her grandson. Further, the finding which is challenged, as to how Mrs Azam regarded herself, may not matter and, in any event, the judge regarded it as being of little significance. I consider that the judge was entitled to make the finding which he made and I agree that it is of little significance overall.

56. The next finding which is challenged under this head is whether, as far as Mrs Azam was concerned, she was Mr Molazam's last hope of raising the money which he sought. In view of the other findings as to the three meetings between the parties and the fact that Mr Molazam had tried and failed to obtain the money elsewhere, I consider that the judge's basic finding that Mrs Azam was Mr Molazam's last hope was justified. The judge went on to find that Mrs Azam knew that to be so. I consider that further finding was justified. Mrs Azam knew all of the facts which persuaded the judge that she was the last hope and he was entitled to infer that she knew that. Insofar as it is argued that it would be procedurally unfair to make the finding as to Mrs Azam's knowledge when that point was not put to her, it is right that the matter was not put to Mrs Azam in that way in cross-examination. However, it was common ground that Mrs Azam knew that Mr Molazam had tried and failed to obtain the money elsewhere and he was very persistent in seeking to obtain it from Mrs Azam. I do not think it was procedurally unfair for the judge to make the finding which he did in this respect.

57. The heading of the next group of challenges refers to the Further Criticism of Mrs Azam. There are three specific challenges to the findings or comments of the judge. The first relates to the comment that Mrs Azam's witness statement was very short. I consider it was open to the judge to make that comment.

58. The second challenge under this head is that the judge was wrong to say that Mrs Azam was disingenuous when instead of an outright refusal at the first meeting to lend the money to Mr Molazam she said that she needed to talk to her husband about that. I consider that the judge was entitled to make that comment.

59. The third challenge under this head relates to the judge's finding that Mrs Azam said at the first meeting that she would pay the charges to the local council because they were looking after her grandson. I found this finding somewhat surprising given that the judge had found that Mrs Azam had not agreed to lend the money. There is also the detail that the other evidence suggested that Mrs Azam was not told at the first meeting that money was owed "to the council". Nonetheless, the judge's finding is based on his acceptance of Mr Molazam's direct evidence on this point. It was put to Mrs Azam in cross-examination that she had made that statement and she denied it so there was no procedural unfairness in this respect. In any case, the judge said that it would be wrong to place too much emphasis on this point and I cannot see that he regarded this point as relevant when he came to make his general findings and to reach his ultimate conclusion. Similarly, I do not regard this finding as relevant to the outcome of the case.

60. The heading of the next group of challenges refers to Mr Molazam's health vulnerability. The judge found that Mr Molazam's health, specifically his heart conditions and his earlier injuries, made him a vulnerable person. The judge pointed out that he did not have any expert evidence or other evidence as to Mr Molazam's prognosis or his actual health or as to his mental acuity or how he might appear to

others. I consider that the judge was entitled to make his findings as to Mr Molazam's health on the material which he had.

61. The heading of the next challenge refers to Mrs Azam's knowledge of Mr Molazam's health "vulnerability". The essential point which is made is that Mrs Azam had denied that she knew about Mr Molazam's heart condition and she was not challenged on that point in cross-examination. More specifically, the judge made his finding that Mrs Azam did know about his heart condition because she would have known either because one of her brothers, who worked with Mr Molazam, would have told her or because the parties were members of the small Mir Pur community. The judge also referred to a comment by Mr Azam in his witness statement to the effect that at the relevant time Mr Molazam did not appear to be very sick which the judge said showed that Mr Azam knew all along about Mr Molazam's health issues. None of these specific matters were put to Mr or Mrs Azam in cross-examination.

62. Mr Sinclair also pointed out that the judge not only found that Mrs Azam knew of Mr Molazam's health condition but he went on to criticise her denial of such knowledge as showing that she appreciated that his poor state of health would cast her actions in an unfavourable light.

63. I consider that it was procedurally unfair to find that Mrs Azam knew of Mr Molazam's heart condition when she denied it and she was not cross-examined about her knowledge. Further, the judge's specific reasons for finding that she did have relevant knowledge were not put to her or to Mr Azam. Further, I consider that the judge was not justified in interpreting Mr Azam's comment in his witness statement as showing that he did in fact know of Mr Molazam's state of health at the relevant time. Mr Azam's comment is readily explicable by the fact that when he made his witness statement he knew that Mr Molazam's pleaded case was that he was vulnerable on account of his health and Mr Azam was simply stating that that was not how it appeared to him at the relevant time.

64. On the question of Mrs Azam's knowledge of Mr Molazam's heart condition, Mr Edwards referred me to a passage in the transcript of the evidence of Mr Azam where he referred to something which Mr Molazam had said about how he was "expecting to die". It is not clear to me whether Mr Azam was referring to something which Mr Molazam had said in the course of his evidence at the trial or whether Mr Azam was referring to something Mr Molazam might have said at the time of the transaction. When the judge made his findings as to Mrs Azam's knowledge of Mr Molazam's heart condition, he did not refer to this evidence from Mr Azam and he did not rely upon it to support his finding of knowledge. In view of the facts that the evidence is not clear and the judge did not rely upon it, I do not think that I should now find that the judge's finding of knowledge can be supported by it.

65. I will therefore give permission to appeal in relation to the judge's finding as to Mrs Azam's knowledge of Mr Molazam's heart condition and will consider the matter on the basis that that finding was not made.

66. The heading of the next group of challenges refers to Mr Molazam's financial vulnerability. This challenge is to the judge's finding that Mr Molazam was financially vulnerable by reason of the debt owed to the council as a result of the housing benefits fraud, the fear of losing the property, the fear of being sent to prison

and of being left with nothing. It is said that these findings were not open to the judge because they were contrary to Mr Molazam's own evidence.

67. I consider that the findings were open to the judge on the basis of all of the evidence at the trial. It is correct that Mr Molazam's case was based on other matters such as alleged fraudulent misrepresentation as to the nature of the transaction. The judge was entitled to reject much of Mr Molazam's evidence but he also correctly directed himself that he was not obliged to reject everything that Mr Molazam said. Based on the parts of Mr Molazam's evidence which he did not reject and based on the evidence from Mr and Mrs Azam, the judge was entitled to make the findings which he did in this respect. It was not an easy task for the judge in view of the very unsatisfactory nature of Mr Molazam's evidence but the judge was bound to try to make sense of all of the evidence and that was what he tried to do.

68. The heading of the last group of challenges refers to Negotiations. The central finding which is challenged is where the judge held that Mrs Azam was "actively engaged in the assessment and negotiation process to enable her to decide whether to accept the Claimant's proposal: she was not a mere passive recipient of the Claimant's munificence."

69. In relation to the third meeting when Mr Molazam made his proposal to transfer the property to Mrs Azam, the judge quoted from Mrs Azam's witness statement and it appears that he accepted most of what she had there stated, apart from what was said in paragraph 30.4 of the witness statement in relation to Mr Molazam's future use of the property. I note that Mrs Azam said that there was "some discussion" at the third meeting. She said that the discussion included Mr and Mrs Azam being able to see the property and that it was agreed that Mrs Azam would pay for the repairs to the property.

70. The judge then commented that there was little further evidence and precious little cross-examination to flesh out these paragraphs and to enable a deeper understanding of the course of discussions and negotiations. Nonetheless, the judge went on to draw a number of inferences. He inferred that there must have been further negotiations between the parties regarding the condition of the property and its repair. So far as material to this ground of challenge, he referred to Mrs Azam's evidence of a discussion about an inspection and the agreement about repairs. I doubt if the judge needed to draw an inference in this respect as he had Mrs Azam's direct evidence about a discussion and an agreement. If he drew an inference that the discussions were detailed and protracted then I do not consider that that inference was open to him. Based on Mrs Azam's evidence and the inherent probabilities there was no basis to infer that the discussions were either detailed or protracted.

71. The judge also said that Mrs Azam was actively engaged in an assessment of the proposal. I consider that the judge was entitled to find that Mrs Azam did form enough of an assessment to satisfy her that it was appropriate for her to agree to Mr Molazam's proposal.

72. In so far as the finding which is challenged suggests more by way of negotiation and assessment than is described by me above, then I do not consider that the judge was entitled to make such a finding. The judge's finding suggests a degree of active involvement as distinct from simply agreeing to Mr Molazam's proposal following

some brief discussion about an inspection and repairs. There was no evidence of that degree of active involvement and the same was not put to Mrs Azam in cross-examination. I consider that the right response to this head of challenge is not to reverse the judge's finding but rather to read the judge's finding in a limited way consistent with the actual evidence which was given on this point.

73. The upshot of my consideration of these various challenges to the judge's findings of fact or comments is that I will read the finding about Mrs Azam's active assessment and negotiation as limited to what the evidence showed was the position in those respects. I will give permission to appeal in relation to the finding as to Mrs Azam's influence in the community and as to Mrs Azam's knowledge of Mr Molazam's heart condition and I will consider the relevance of there being no such findings when I consider the appeal generally. Apart from those matters, I will refuse permission to appeal in relation to the other challenges to the judge's findings of fact and comments, on the ground that Mrs Azam does not have a real prospect of success in relation to those challenges.

74. Before I consider the other grounds of appeal, I will deal with the legal principles in relation to undue influence. In view of the judge's finding that Mrs Azam had taken advantage of Mr Molazam's vulnerability I will also consider the principles which apply to unconscionable bargains.

Undue influence: the principles

75. Both sides took the relevant principles as to undue influence from the speech of Lord Nicholls in *Royal Bank of Scotland plc v Etridge (No.2)* [2002] AC 773 ("*Etridge*"). At [6]-[14], Lord Nicholls summarised the principles, so far as relevant to the appeal before me, in these terms.

> "**Undue influence**
>
> 6. The issues raised by these appeals make it necessary to go back to first principles. Undue influence is one of the grounds of relief developed by the courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused. In everyday life people constantly seek to influence the decisions of others. They seek to persuade those with whom they are dealing to enter into transactions, whether great or small. The law has set limits to the means properly employable for this purpose. To this end the common law developed a principle of duress. Originally this was narrow in its scope, restricted to the more blatant forms of physical coercion, such as personal violence.
>
> 7. Here, as elsewhere in the law, equity supplemented the common law. Equity extended the reach of the law to other unacceptable forms of persuasion. The law will investigate the manner in which the intention to enter into the transaction was secured: "how the intention was produced", in the oft repeated words of Lord Eldon LC, from as long ago as 1807 (*Huguenin v Baseley 14 Ves 273, 300*). If the intention was produced by an unacceptable means, the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or "undue" influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will. It is

impossible to be more precise or definitive. The circumstances in which one person acquires influence over another, and the manner in which influence may be exercised, vary too widely to permit of any more specific criterion.

8. Equity identified broadly two forms of unacceptable conduct. 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. An example from the 19th century, when much of this law developed, is a case where an impoverished father prevailed upon his inexperienced children to charge their reversionary interests under their parents' marriage settlement with payment of his mortgage debts: see *Bainbrigge v Browne (1881) 18 Ch D 188*.

9. In cases of this latter nature the influence one person has over another provides scope for misuse without any specific overt acts of persuasion. The relationship between two individuals may be such that, without more, one of them is disposed to agree a course of action proposed by the other. Typically this occurs when one person places trust in another to look after his affairs and interests, and the latter betrays this trust by preferring his own interests. He abuses the influence he has acquired. In *Allcard v Skinner (1887) 36 Ch D 145*, a case well known to every law student, Lindley LJ, at p 181, described this class of cases as those in which it was the duty of one party to advise the other or to manage his property for him. In *Zamet v Hyman [1961] 1 WLR 1442, 1444-1445 Lord Evershed MR* referred to relationships where one party owed the other an obligation of candour and protection.

10. The law has long recognised the need to prevent abuse of influence in these "relationship" cases despite the absence of evidence of overt acts of persuasive conduct. The types of relationship, such as parent and child, in which this principle falls to be applied cannot be listed exhaustively. Relationships are infinitely various. Sir Guenter Treitel QC has rightly noted that the question is whether one party has reposed sufficient trust and confidence in the other, rather than whether the relationship between the parties belongs to a particular type: see Treitel, The Law of Contract, 10th ed (1999), pp 380-381. For example, the relation of banker and customer will not normally meet this criterion, but exceptionally it may: see *National Westminster Bank plc v Morgan [1985] AC 686, 707-709*.

11. Even this test is not comprehensive. The principle is not confined to cases of abuse of trust and confidence. It also includes, for instance, cases where a vulnerable person has been exploited. Indeed, there is no single touchstone for determining whether the principle is applicable. Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other. None of these descriptions is perfect. None is all embracing. Each has its proper place.

> 12. In *CIBC Mortgages plc v Pitt [1994] 1 AC 200* your Lordships' House decided that in cases of undue influence disadvantage is not a necessary ingredient of the cause of action. It is not essential that the transaction should be disadvantageous to the pressurised or influenced person, either in financial terms or in any other way. However, in the nature of things, questions of undue influence will not usually arise, and the exercise of undue influence is unlikely to occur, where the transaction is innocuous. The issue is likely to arise only when, in some respect, the transaction was disadvantageous either from the outset or as matters turned out.
>
> **Burden of proof and presumptions**
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> 13. Whether a transaction was brought about by the exercise of undue influence is a question of fact. Here, as elsewhere, the general principle is that he who asserts a wrong has been committed must prove it. The burden of proving an allegation of undue influence rests upon the person who claims to have been wronged. This is the general rule. The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case.
>
> 14. Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. In other words, proof of these two facts is prima facie evidence that the defendant abused the influence he acquired in the parties' relationship. He preferred his own interests. He did not behave fairly to the other. So the evidential burden then shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn."

76. In *Etridge*, Lord Nicholls referred at [11], to a case "where a vulnerable person has been exploited". In *Etridge* itself, there is no elaboration as to that type of case nor as to what is meant by "exploitation". In Enonchong on Duress, Undue Influence and Unconscionable Dealing (2023), cases of vulnerability are discussed as follows:

> **"Complainant's vulnerability**
>
> As Lord Nicholls made clear in *Etridge*, a relationship of influence is not confined to cases where one party reposes trust and confidence in another. It extends to other cases where one party has ascendancy, domination or control over the other party due to reliance, dependence or vulnerability of the other party. Therefore, in determining whether there was a relationship of influence, it would be wrong for the court to confine itself to the question whether there was evidence of trust and confidence in financial matters and thereby ignoring evidence of the complainant's vulnerability. [A footnote refers to *Malik v Sheikh* [2018] EWHC 973 (Ch at [50].]

> However, it is not enough simply to show that one party was under some disability such as chronic intoxication. What is required is affirmative proof that one party had influence over the other in the relationship. [Footnotes refer to *Irvani v Irvani* [200] 1 Lloyd's Rep 412, *Enal v Singh* [2022] UKPC 13, *Chin v Chin* [2019] EWHC 523 (Ch) and *Sollis v Leyshon* [2018] EWHC 2853 (Ch).]"

77. The judge referred to *Macklin v Dowsett* [2004] EWCA Civ 904. In that case, the Court of Appeal held that that there was a relationship of ascendancy and dependency between the parties. Auld LJ referred at [28] to the financial disparity in the parties' bargaining positions so that one party was, at least, vulnerable to exploitation by the other party. At [10], Auld LJ said:

> "Further and more recent authorities of this Court have underlined the rationale of the doctrine of undue influence as the protection of the vulnerable in dealings with their property and also the lack of any need to show misconduct on the part of the transferee: see *Niersmans v Pesticcio*, unreported, 1 April 2004, per Mummery LJ at paras 1, 2 and 4; and *Jennings v Cairns* [2003] EWCA 1935, per Arden LJ at paras 34, 35 and 40."

78. *Niersmans v Pesticcio* was a case of a deed of gift where the donor had placed trust and confidence in the donee, there was no satisfactory explanation for the gift and the donor did not have independent legal advice. In *Jennings v Cairns*, the relationship was such that it enabled one party to take unfair advantage of the other and the transaction called for an explanation.

79. In *Sheikh v Malik* [2018] 4 WLR 86, referred to in Enonchong at para. 10-044, the judge, Fancourt J, held that there was a relationship of influence and the transaction called for an explanation. At [46], he said that the true nature and effect of the transaction was a matter that was capable of affecting the assessment of whether or not a relationship of influence was shown to exist; a transaction that was seriously and inexplicably detrimental to a disponor was likely to lead to a conclusion that it could only have been the result of a relationship of trust and confidence on the one side and influence on the other side. At [50], he said that a relationship of influence was not confined to a relationship of trust and confidence; he cited *Thompson v Foy* [2009] EWHC 1076 (Ch) at [100] per Lewison J where he had summarised what Lord Nicholls had said in *Etridge* at [11]. Fancourt J held that the principles as to undue influence extended to cases where there was evidence of dependence or vulnerability, citing *Birmingham City Council v Beech* [2014] EWCA Civ 830 at [55] per Sir Terence Etherton C. At [49], Fancourt J held that the complainant in that case was in a vulnerable position as regards the other party and was liable to be taken advantage of.

80. I was referred to the decision of the Upper Tribunal (Tax and Chancery Chamber) in *Perwaz v Perwaz* [2018] UKUT 325 (TCC). That considered whether the relevant relationship of trust and confidence, or the position or dominance or ascendancy, had to exist before the relevant transaction or could arise in the course of the transaction itself. Although Mr Sinclair relied upon this case and submitted that there was no such relationship before the transaction in the present case and that would be fatal to a claim based on a presumption of undue influence, I am not wholly satisfied by the reasoning in *Perwaz* and I would prefer to focus in the present case whether Mr

Molazam did establish a relationship of ascendancy and dominance whether before or in the course of the transaction.

81. Having reviewed the authorities which refer to a case where there is a vulnerable party, I conclude that the relevant question is whether there is a relationship of influence by reason of that vulnerability. Put another way, it is not enough simply to point to the existence of a vulnerability where there is no resulting relationship of influence.

82. In *Etridge* at [13]-[14], Lord Nicholls described the evidential presumption which arises where a claimant shows that there was a relevant relationship between the parties and the transaction is one which calls for an explanation. In *Etridge* at [219], Lord Scott explained the way in which the evidential presumption operated in a case where the defendant had given evidence, as follows:

> "The presumption of undue influence, whether in a category 2A case, or in a category 2B case, is a rebuttable evidential presumption. It is a presumption which arises if the nature of the relationship between two parties coupled with the nature of the transaction between them is such as justifies, in the absence of any other evidence, an inference that the transaction was procured by the undue influence of one party over the other. This evidential presumption shifts the onus to the dominant party and requires the dominant party, if he is to avoid a finding of undue influence, to adduce some sufficient additional evidence to rebut the presumption. In a case where there has been a full trial, however, the judge must decide on the totality of the evidence before the court whether or not the allegation of undue influence has been proved. In an appropriate case the presumption may carry the complainant home. But it makes no sense to find, on the one hand, that there was no undue influence but, on the other hand, that the presumption applies. If the presumption does, after all the evidence has been heard, still apply, then a finding of undue influence is justified. If, on the other hand, the judge, having heard the evidence, concludes that there was no undue influence, the presumption stands rebutted. A finding of actual undue influence and a finding that there is a presumption of undue influence are not alternatives to one another. The presumption is, I repeat, an evidential presumption. If it applies, and the evidence is not sufficient to rebut it, an allegation of undue influence succeeds."

83. In *Royal Bank of Scotland plc v Chandra* [2010] EWHC 105 (Ch), David Richards J said at [121], consistently with the approach of Lord Scott in *Etridge*:

> " … but when the principal participants have given oral evidence, the issue for the Court is whether on the totality of the evidence, including any appropriate inference, it finds that the transaction was in fact brought about by undue influence."

The decision in *Chandra* was upheld by the Court of Appeal: see [2011] EWCA Civ 192.

Unconscionable bargains: the principles

84. The focus on the position of vulnerable persons in this appeal led to a discussion in the course of argument as to the principles as to unconscionable bargains and the way in which those principles deal with the position of vulnerable persons.

85. Both counsel accepted that the law as to unconscionable bargains was accurately summarised in Chitty on Contracts, 34th ed., at paras. 10.163 to 10.168 from which I derive the following propositions:

i) an earlier equitable principle was reviewed and restated in *Fry v Lane* (1888) 40 Ch D 312 where it was held that the court could set aside a purchase at a considerable undervalue from "a poor and ignorant man" who had received no independent advice;

ii) the doctrine of unconscionable bargains is limited in three ways; the first is that the bargain must be oppressive to the complainant in overall terms; the second that it may only apply when the complainant was suffering from certain types of bargaining weakness; and the third that the other party must have acted unconscionably in the sense of having knowingly taken advantage of the complainant;

iii) the modern cases, in which the relief has been said to be available, have all involved transactions which were substantively unfair in that the complainant was parting with property for much less than it was worth or getting nothing out of the transaction; in one case it was said that: "[t]he resulting transaction has been, not merely hard or improvident, but overreaching and oppressive" so that its terms, together with the conduct of the stronger party, "shock the conscience of the court";

iv) the traditional requirement that the complainant be "poor and ignorant" received a broad interpretation in some of the modern cases; the law can give relief in a wide range of circumstances, provided that one party has been at a serious disadvantage to the other, whether through poverty, or ignorance, or lack of advice, or otherwise, so that circumstances existed of which unfair advantage could be taken; on the other hand, there is little authority supporting the grant of relief where the claimant's "serious disadvantage" consists only of the difficult circumstances, including financial, in which he finds himself;

v) a contract will not be set aside merely because the aggrieved party did not have independent advice and the consideration was inadequate; it must also be shown that the other party engaged in unconscionable conduct or an unconscientious use of power; he must have behaved in a morally reprehensible manner, which affects his conscience; if there has been no equitable fraud, victimisation, taking advantage, overreaching or other unconscionable conduct, relief will not be granted;

vi) in *Boustany v Piggott* (1995) 69 P&CR 298, at 303, Lord Templeman, delivering the judgment of the Privy Council, agreed in general terms with the submissions of counsel for the appellant: (1) there must be unconscionability in the sense that objectionable terms have been imposed on the weaker party in a reprehensible manner; (2) *unconscionability* refers not only to the

unreasonable terms but to the behaviour of the stronger party, which must be morally culpable or reprehensible; (3) unequal bargaining power or objectively unreasonable terms are no basis for interference in equity in the absence of unconscionable or extortionate abuse where, exceptionally and as a matter of common fairness, "it is unfair that the strong should be allowed to push the weak to the wall"; (4) a contract will not be set aside as unconscionable in the absence of actual or constructive fraud or other unconscionable conduct; and (5) the weaker party must show unconscionable conduct, in that the stronger party took unconscientious advantage of the weaker party's disabling condition or circumstances;

vii) although it is necessary to show that the objectionable terms had been imposed in a morally objectionable manner, impropriety might be inferred from the terms of the transaction itself in the absence of an innocent explanation.

86. Although not cited to me, the principles as to unconscionable bargains were summarised by Lord Hodge (with whom Lords Reed, Lloyd-Jones and Kitchin agreed) in *Times Travel (UK) Ltd v Pakistan International Airlines Corpn* [2023] AC 101 at [24] where he said:

> "Similarly, the equitable doctrine of unconscionable bargains has been applied where B is at a serious disadvantage relative to A through "poverty, or ignorance, or lack of advice or otherwise" so that circumstances existed of which unfair advantage could be taken; A exploited B's weakness in a morally culpable manner; and the resulting transaction was not merely hard or improvident but overreaching and oppressive: *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd [1983] 1 WLR 87, 94–95*, per Peter Millett QC, sitting as a deputy High Court judge. See also *Snell's Equity*, 34th ed (2019), para 8-042). Examples of unconscionable transactions include circumstances in which A knowingly negotiates an agreement with B while B is elderly, unwell and intoxicated (*Blomley v Ryan (1954) 99 CLR 362*) and where a poor, illiterate and unwell person is induced to enter into a disadvantageous transaction without advice and in great haste (*Clark v Malpas (1862) 4 De GF & J 401*). In *Fry v Lane (1888) 40 Ch D 312*, Kay J summarised the then existing case law in these terms (p 322): "where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction." He held that the circumstances of poverty, ignorance and lack of independent advice impose on the purchaser the burden of showing that the purchase was fair, just and reasonable. Unequal bargaining power does not suffice; it is necessary for the claimant to show that unconscientious advantage has been taken of his or her disabling condition or circumstances: *Boustany v Pigott (1993) 69 P & CR 298, 303* per Lord Templeman. Extortionate bargains can be struck down or varied in other circumstances; see, for example, *The Port Caledonia and the Anna [1903] P 184* in which the court drastically reduced a claim for salvage where a ship's captain in an emergency had been forced to accept an extortionate offer from a tug captain for the provision of salvage services. But the rules relating to salvage may depend on specialties of maritime law: *Chitty on Contracts* (above), para 8-048."

87. There is a statement in Chitty on Contracts at para. 10.168 which requires separate mention. Having made the point that impropriety might sometimes be inferred from

the terms of the transaction itself, in the absence of an innocent explanation, the editors of Chitty added:

> "The same point may be made another way. If the transaction is manifestly oppressive, it seems that the defendant may be found guilty of "unconscionable conduct" within the meaning of the doctrine if he did no more than consciously take advantage of the claimant's willingness to enter it."

88. Chitty cites *Evans v Llewellin* (1787) 1 Cox Eq Cas 333 in support of this statement. That case is considered in detail in Enonchong (cited above) at paras. 17.010-17.011 where it is said:

> "As has been indicated, the older cases used the term fraud to denote impropriety in the defendant's conduct. Fraud in this context is wider than fraud at common law in the sense of fraudulent misrepresentation. It extends to other conduct involving dishonesty which may not at law amount to deceit. As was said in *Evans v Llewellin*, "though there was no actual fraud, it is something like fraud, for an undue advantage was taken of his situation". Impropriety in the defendant's conduct not only covers conduct which falls short of fraud, it also covers conduct which falls short of other vitiating factors such as duress, undue influence or common mistake.
>
> Where there is excessive contractual imbalance and it is shown that the party who is at an advantage surprised the other party into the agreement by haste, this may be considered an improper conduct. In *Evans v Llewellin*, the transaction was executed in haste. The plaintiffs, who were poor and ignorant, were entitled to the estate of their deceased sister, but they were ignorant of this fact. The defendant, the surviving husband of their sister, informed them of their interest in the estate and immediately offered to buy it from them and an agreement was reached at the same time. They sold their interest at an undervalue without legal advice. In effect the plaintiffs, men destitute of money, were suddenly offered a sum of money which in their circumstances was a very important sum and were then called upon to convey an estate (which they have only just discovered that they were entitled to) in prejudice to themselves and to the benefit of a person in affluent circumstances. They were cautioned to take time to consider the matter and seek advice, but they declined. It was held that the transaction was an unconscionable bargain which ought not to stand. Sir Lloyd Kenyon MR said that the position would have been different if the plaintiffs were allowed proper time to consider the agreement. Although the plaintiffs were cautioned to take time to seek advice, that was not enough. The defendant, and his solicitor, "ought to have gone further; they should not have permitted the [plaintiffs] to have made the bargain without going to consult [their] friends; there was not sufficient *locus penitentiae*; there was no person present to give [them] advice; [they were] entirely in their hands, and surprised at this unexpected acquisition of fortune". In stating the principle on which the decision was based the Master of the Rolls put it on the ground that "the party was taken by *surprise*; he had not sufficient time to act with caution, and therefore though there was no actual fraud, it is something like fraud, for an undue advantage was taken of his situation". Consequently, the agreement was set aside as an unconscionable transaction. It is also unconscionable to take advantage of an injured man in hospital. The position with respect to relief for unconscionable dealing contrasts with that of undue

> influence where the mere fact that the complainant would have liked more time to think over the transaction is not sufficient to amount to undue influence."

89. Assisted by that exposition of the basis of the decision in *Evans v Llewellin*, it seems to me that the statement I have quoted from Chitty at para. 10.168 should not be regarded as laying down a general proposition but instead should be understood as referring to somewhat special circumstances such as those in *Evans v Llewellin* itself.

90. Based on this review of the relevant principles as to unconscionable bargains, I hold that it is not enough for a claimant to show that he was vulnerable, that the transaction was at a considerable undervalue and that the defendant entered into the transaction with knowledge of those facts. The claimant must show some further fact by reference to the conduct or behaviour of the defendant which the court regards as unconscionable.

Discussion

91. The judge held that there was a presumption of undue influence in this case. However, having held that there was such an evidential presumption, he did not go on to ask whether, on all of the evidence including the evidence from Mr and Mrs Azam, the presumption had been rebutted.

92. I will first consider whether the judge was right to hold that there was an evidential presumption of undue influence in this case. In order to raise such a presumption in a case like the present, there had to be a position of ascendancy or dependency or influence on the part of Mrs Azam in relation to Mr Molazam and, in addition, the transaction had to call for an explanation. There was no difficulty with this second requirement.

93. The judge did not in terms hold that there was a position of ascendancy or dependency or influence on the part of Mrs Azam over Mr Molazam. What he held was that Mr Molazam was vulnerable and that Mrs Azam exploited or took advantage of him. Having considered the challenges made on this appeal to the judge's findings of fact, I can hold that the judge was entitled to find that Mr Molazam was vulnerable both financially and by reason of his heart condition. However, my reading of the authorities is that the fact of vulnerability coupled with a disadvantageous transaction does not itself show that the other party has achieved a position of ascendancy or influence over the vulnerable party. Although the judge held that Mrs Azam "exploited or took advantage of" Mr Molazam's vulnerability, the most that can be said against Mrs Azam is that she refused to lend Mr Molazam the money he needed and she accepted his proposal as to the transaction, knowing that it was very advantageous to her. It is not said that she manipulated Mr Molazam into putting forward that proposal or that the refusal of a loan was a ruse to obtain a more favourable proposal from him. Although the judge suggested that Mrs Azam was a woman of "influence", he did not suggest that any such influence was brought to bear on Mr Molazam and, in any event, I have set aside the judge's finding as to her general influence in the community. Further, although the judge held that Mrs Azam had actively assessed and negotiated the transaction with Mr Molazam, I have considered all of the evidence and held that the only permissible finding in that regard is that she discussed with Mr Molazam the question of inspecting and repairing the

property. Even if the judge's finding as to active assessment and negotiation stood, it would not amount to exercising any kind of influence over Mr Molazam.

94. Insofar as the judge was influenced by his finding that Mrs Azam knew of Mr Molazam's heart condition, I have set aside that finding on the grounds it was unsupported by the evidence and was procedurally unfair.

95. The result of the above reasoning is that this is not a case where a presumption of undue influence arose.

96. In any event, the case can be, and I think should be, analysed in another way. Even if there were a presumption of undue influence in this case, such a presumption is an evidential presumption. As was explained by Lord Scott in *Royal Bank of Scotland plc v Etridge (No. 2)* at [219], as applied in *Chandra*, in a case like the present where the party who allegedly practised the undue influence has given evidence and was available to be cross-examined, the ultimate question is whether the complainant has succeeded in establishing that the transaction was brought about by the use of undue influence.

97. I doubt if the judge went on to consider whether, on all the evidence, the evidential presumption had been rebutted. He had said at [6] of his judgment that the pleaded claim of actual undue influence was not pursued. When he made his finding at [94] of his judgment, he concluded that undue influence was to be presumed; he did not explicitly find that there had been undue influence as he needed to do in accordance with the legal position as described by Lord Scott in *Etridge (No. 2)*. The judge did consider whether the presumption of undue influence had been rebutted by reason of the legal advice given to Mr Molazam but he did not explicitly consider whether the presumption had been rebutted by all of the evidence including that given by Mr and Mrs Azam.

98. In case I am wrong in holding that the judge did not make a finding that there actually had been undue influence, I will consider whether such a finding would have been open to him. If he did make such a finding, then his reasoning for it seems to be that contained in [94] of his judgment. That refers to Mr Molazam's vulnerability, both financially and due to his state of health, and Mrs Azam's knowledge of his vulnerability. In view of my earlier findings, the judge's assessment has to be altered by removing the finding that Mrs Azam knew of Mr Molazam's heart condition. The other matters referred to, his fears of losing his home and possibly going to prison, were known to Mrs Azam but were the consequence of Mr Molazam's financial difficulties and were the explanation for his desire to obtain money from Mrs Azam. The judge also referred to the fact that when Mr Molazam said that he would be "left with nothing", Mrs Azam would have known that that was not true. That was based on the fact that even if the council sold the property and paid off the debt due from Mr Molazam to the council, there would be a surplus due to him. The judge had earlier described Mr Molazam's actual belief that he would be left with nothing as "delusional". Mrs Azam was not cross-examined as to what she understood about that. The closest the cross-examination came to exploring that was when she was asked how Mr Molazam would "lose the property". Of course, it the council sold the property, Mr Molazam would lose the property even if there would be a surplus repayable to him.

99. The judge also appears to have left out of his assessment that, on his findings, the transaction with Mrs Azam meant that Mr Molazam did not lose all right or interest in the property. The judge found that Mr Molazam was entitled to continue to live in the ground floor of the property.

100. Taking all matters together, was it open to the judge to find that there had been actual undue influence in this case? I think not. Mrs Azam had not sought to influence Mr Molazam in any way, whether directly or indirectly. She had refused to lend him the money he wanted. He then made his own proposal of the transaction which was later entered into. Mrs Azam did not try to persuade him to make that proposal and she agreed to the proposal as put to her. The most that she did by way of "negotiation" was to raise the question of an inspection in relation to the need for repairs to the property. The judge was right that she entered into a transaction which was very advantageous to her and disadvantageous to Mr Molazam but she did not influence him and he did not act under her influence and lacking his own free will.

101. Mr Molazam had not pleaded that the transaction was an unconscionable bargain and his case was not put that way at the trial. Further, there was no Respondent's Notice raising such an assertion. However, the way in which the judge referred to someone taking advantage of a vulnerable person caused me to consider what the result of such a claim would be. In particular, it occurred to me that if it would not be open to the court to set aside the transaction as an unconscionable bargain, that might throw light on the ability of the court to set it aside as a case of undue influence when Mrs Azam had not in fact influenced Mr Molazam to enter into the transaction.

102. I have summarised the relevant law earlier in this judgment. Both counsel accepted that the transaction in the present case could not be set aside as an unconscionable bargain unless there had been unconscionable conduct on the part of Mrs Azam of the kind considered in the relevant authorities. Having regard to the matters referred to by the judge in particular at [94] of his judgment, I would not consider that Mrs Azam's conduct in this case was unconscionable.

103. In view of the fact that the transaction in this case, albeit one entered into by a vulnerable person, would not be regarded as an unconscionable bargain, that suggests to me that the law of undue influence would not produce a different result in this case where Mr Molazam acted of his own free will and not as a result of any influence, direct or indirect, from Mrs Azam.

The result

104. The result is that I will give Mrs Azam permission to appeal (except on those challenges to findings of fact where I have indicated that I will not grant permission to appeal). I will also allow the appeal.

105. Before concluding my judgment, I think it is right to say that my reading of the evidence and the cross-examination in this case causes me to wonder whether the court was ever given a reliable account from anyone as to what really happened in this case. The judge found that Mr Molazam was "deluded" in relation to one of the reasons which motivated him to propose the transaction. A delusion of that kind is somewhat improbable which might suggest that there was some other reason for the transaction or, possibly, that some other transaction was agreed. However, on appeal,

I must accept the judge's findings of fact save to the extent that I have upheld a challenge to them.

106. Finally, I can well understand that a court, when faced with a badly one-sided transaction, might be tempted to set it aside. The established principles as to undue influence and unconscionable bargains enable the court to set aside a badly one-sided transaction in certain circumstances. But those principles have their limits. Mr Molazam has not brought his case within those limits and I must not stretch the relevant principles beyond their proper bounds.