Hilary Term
[2022] UKPC 13
Privy Council Appeal No 0102 of 2019

JUDGMENT

Sumatee Enal (Respondent) *v* Shakuntala Singh and 3 others (Appellants) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Briggs
Lord Kitchin
Lord Hamblen
Lady Rose
Sir Nicholas Patten

JUDGMENT GIVEN ON
11 April 2022

Heard on 24 February 2022

Appellants (Shakuntala Singh, Kiran Singh, Roshini Singh and Andra Singh)
Oliver Radley-Gardner QC
Ramesh Lawrence Maharaj SC
(Instructed by Sheridans)

Respondent
Ernest H Koylass SC
Debbie Roopchand
Yuklan Koylass
(Instructed by Nera Narine (Trinidad))

SIR NICHOLAS PATTEN:

1. This is an appeal by the defendants against an order of the Court of Appeal dated 12 February 2019 which set aside a deed of conveyance dated 4 January 2006 of two parcels of land at 6-8 High Street, San Fernando ("the 2006 Deed"). The deed is registered as No DE200601475095D001.

2. The land at 6-8 High Street ("the Disputed Property") was acquired by the late Ravidath Ramnarine Maharaj (also called Ravi Maharaj ("Ravi")) and his sister, the first defendant, Shakuntala Singh ("Shakuntala") as joint tenants under a deed of conveyance dated 1 July 1976 together with two other adjoining parcels of land at 2 and 4 High Street, San Fernando ("the 1976 Deed"). The second defendant, Kiran Singh ("Kiran") is her son. The third and fourth defendants, Roshini Singh and Andra Singh, are the daughter and stepdaughter respectively of Shakuntala. Ravi was murdered on 11 January 2006. The claimant, Sumatee Enal, was his common-law wife and is the sole executrix and beneficiary of his estate.

3. Ravi and Shakuntala are the children of Ramnarine Ramphal Maharaj ("Mr Maharaj") who died on 11 July 2006. It is common ground that he was a successful businessman who acquired and developed a large number of properties during the course of his life. It is also not in dispute that on a number of occasions properties were purchased by his children using funds provided by Mr Maharaj and that he retained a power of attorney which enabled him to deal with or dispose of the properties. The Board shall come to the detail of this a little later.

4. The 1976 Deed was a conveyance of the various High Street properties by the liquidator of W S Robertson & Company Ltd to Ravi and Shakuntala as joint tenants in fee simple "at the request and by the direction" of Mr Maharaj who is described in the deed as their agent and who is recorded as having paid the purchase price of $200,000.

5. At the time of the 1976 conveyance Ravi was 34 years old. Although he came to be wealthy through his property and other business interests Ravi had qualified and practised as a doctor. In May 1964 while a medical student living in Canada he had executed a power of attorney in favour of his father ("the 1964 Power of Attorney"). This was revocable unilaterally at any time and did not apply to the three specific properties described in the schedule. Subject to that the 1964 Power of Attorney gave Mr Maharaj wide powers to enforce debts and make payments on behalf of his son as well as a power (contained in clause 4) to sell, charge or dispose of any buildings or lands "belonging to or held by me or in which I have or may hereafter have any estate

or interest … upon such terms, conditions and stipulations as my Attorney shall in his absolute discretion think fit".

6. Clause 6 of the 1964 Power of Attorney authorised the execution on Ravi's behalf of all conveyances "as shall or may be requisite, necessary or expedient for or in relation to all or any of the purposes or matters herein contained".

7. The 1964 Power of Attorney was never revoked by Ravi but it is less clear what, if any, use was made of it in order to convey property held in his name prior to the execution of the 2006 Deed. The trial judge (Ricky Rahim J) made no specific finding about this. The claimant, in her evidence, said that she had been told by Ravi that the purpose of the power of attorney was to enable Mr Maharaj to deal with land purchased in Ravi's name while he was away in Canada. His sister, Shakuntala, had executed a similar power of attorney in favour of her father in 1966 while she was a student in Bombay. Kiran said that he thought that the 1964 Power of Attorney had last been used in the 1970s or 1980s but was not more specific than that.

8. Both Kiran and his mother, Shakuntala, said that they were told in 2005 by Mr Maharaj that he had decided to sell the Disputed Property and that a fair price for them to pay for it was $500,000. The explanation for the sale which they said Mr Maharaj gave to them was that the property had been purchased in Ravi's name but that since then Ravi had become rich and that Mr Maharaj thought that they should purchase it. Kiran said that he was surprised by what his grandfather had said but did not discuss the proposal with Ravi. Mr Maharaj said that he would talk to Ravi. Kiran told the court that he did not think it was appropriate for him to question what his grandfather had decided.

9. The defendants do not dispute that Ravi was not in fact consulted or told about the sale nor did he receive the purchase money. The defendants' evidence was that the $500,000 was taken in cash to the offices of Mr Maharaj's attorney (Dr Seepersad) at the time when the 2006 Deed was executed and was then taken away again by Mr Maharaj. There is some evidence of Mr Maharaj saying that he wished to use the money in order to fund some charitable donations. But its ultimate destination remains unknown.

10. What is also common ground is that since the date of its purchase in 1976 the day-to-day management of the Disputed Property was carried out by Ravi without any interference from his father. The property remained undeveloped and seems to have been used for parking although there were plans at the time of Ravi's death to develop it as a shopping mall. But the property (together with 2-4 High Street) had been

tenanted and this had led to a dispute between Shakuntala and Ravi who, in the words of Shakuntala's witness statement, had collected the rents from the tenants and treated the property as his own. Her complaint was that while Ravi had received all of the income from the properties, she had continued to pay or contribute to the rates and other outgoings. Ravi's response was that he had paid many of the outgoings including the cost of repairing and maintaining the properties.

11. The dispute was resolved in High Court proceedings which Shakuntala brought against Ravi seeking the partition or sale of the properties comprised in the 1976 Deed. It appears from her reply and defence to counterclaim in the proceedings that Shakuntala had obtained approval from the Town and Country Planning Division of the local authority for the sub-division of the property into two lots and on 19 May 1992 Ravi and Shakuntala executed a deed of partition under which the Disputed Property was conveyed to Ravi to his own use in fee simple. Mr Maharaj was not made a party to these proceedings and appears to have raised no objection to the partition of the property into two lots in separate ownership.

12. The 2006 Deed is a conveyance of the Disputed Property to the defendants as joint tenants by Mr Maharaj for a stated consideration of $550,000 although as will be mentioned later the evidence of Kiran at the trial was that the defendants paid only $500,000 for the property. Mr Maharaj is recorded in the deed as acting in his capacity as Ravi's attorney and the deed recites both the 1992 deed of partition and the 1964 Power of Attorney. The 2006 Deed was prepared by Dr Seepersad who gave evidence at the trial. The instructions for the conveyance were given in December 2005 at a meeting with Mr Maharaj who was accompanied by Shakuntala and Kiran. Dr Seepersad was supplied with a copy of the 1964 Power of Attorney. He said that he told Mr Maharaj that he should contact Ravi about the sale because the purchase money would have to be paid to him. Mr Maharaj agreed to do so. In fact, as indicated earlier, neither of these things was done. Dr Seepersad confirmed in cross-examination that his assumption was that Ravi and not his father was the beneficial owner of the Disputed Property which is consistent with his advice that the purchase money should be paid to Ravi.

13. Dr Seepersad prepared the 2006 Deed and it was approved and executed by Mr Maharaj at a meeting in Dr Seepersad's Chambers on 4 January 2006. Ravi was murdered only a week after this and sometime later the defendants asserted title to the Disputed Property and the claimant became aware of the 2006 Deed. In her statement of case in the present proceedings she challenged the sale on a number of grounds. She alleged that the 2006 Deed was a forgery; alternatively that the conveyance of the Disputed Property to the defendants was a gift and that the purchase price had never been paid; and that in any event the purchase price was a

gross undervalue and the sale amounted to a breach of fiduciary duty by Mr Maharaj to his son or a fraudulent exercise of the 1964 Power of Attorney in which the defendants were knowing participants. Damages were also claimed against the defendants for conspiracy to injure Ravi by fraudulently depriving him of the Disputed Property.

14. In addition the claimant also alleged that the 2006 Deed had been executed by Mr Maharaj as a result of the undue influence of the defendants. At the time of the conveyance Mr Maharaj was over 90 years old, was living with Shakuntala, and was alleged to be completely dependent on her and Kiran for his everyday needs. The particulars of undue influence in the statement of case include an allegation that Mr Maharaj was not of sound mind and was unable to appreciate what he was doing; and that Shakuntala and Kiran exercised complete control over him evidenced by the fact that he had on 19 July 2004 given to Kiran a general power of attorney over his property and affairs.

15. The trial of the action took place before Ricky Rahim J in October 2012 and during the course of the trial most of the allegations of forgery and conspiracy were either abandoned or not pursued. The principal ground on which the claimant invited the judge to set aside the 2006 Deed was undue influence. It was not possible for her to establish an allegation of actual undue influence but the claimant relied on presumed undue influence which was to be inferred from the trust and confidence which Mr Maharaj had placed in Shakuntala and Kiran in relation to his affairs coupled with what was said to be the suspicious nature of the transaction which called for an explanation in the light of the conveyance at a gross undervalue. The claimant provided evidence from an expert valuer who considered that the true value of the Disputed Property was in the region of $5.5m at the time of the 2006 Deed.

16. The other issue which emerged at the trial and was addressed in the evidence concerned the beneficial ownership of the Disputed Property. In the Court of Appeal the claimant contended that this had not been an issue raised in the defence and that the trial judge ought not to have permitted it to be relied upon. But the Court of Appeal held that it had been a live issue at the trial and that the judge had been correct to deal with it. On the substantive issue the defendants relied on the payment by Mr Maharaj of the purchase price in 1976 to establish a resulting trust in his favour. Although the Disputed Property was conveyed into the names of his two children so as to engage the presumption of advancement, this was said to be far weaker in the case of a transfer of property to an adult child and was in any event rebutted by the other relevant surrounding circumstances.

17. The judge therefore had to decide whether the 1976 Deed operated as a gift of the entire legal and beneficial interest in the High Street properties to Ravi and Shakuntala or whether the effect of the transaction was that they held the legal estate as trustees for their father. He came to the conclusion that the presumption of advancement had been rebutted largely on account of the continued existence of the 1964 Power of Attorney which neutralised any assumption or inference that the High Street properties (including the Disputed Property) had been purchased in order to provide financial assistance to the children. At para 26 the judge said:

> "It is a common feature of the parent child relationship, particularly in respect of parents who can readily afford it. Standing on their own, this fact together with the non involvement of Maharaj in the dealing with the property for over 30 years may well lead one to the conclusion that Maharaj intended the property to be a gift to his son at a time when he was just beginning his independent journey along adulthood."

18. But he went on:

> "27. However the court is not satisfied that the presumption of advancement ought not to be set aside. The power of attorney has weighed heavily in the court's consideration. The obvious and overwhelming question remains that of the intention of a man whose business it is to purchase real estate developing a practice whereby he uses his funds to purchase property but permits the conveyance of those properties unto his children. Not only does he so do but additionally, he ensures that those children execute and register powers of attorney in his favour in respect of those properties. This in the court's view is demonstrative of a clear and unambiguous intention by that man to maintain a level of control over those properties that is not merely illusory as the powers of attorney contain the power to sell. In so doing the man is exerting the absolute and ultimate rights of ownership over the property, that of the ability to dispose of same. The fact that the power of attorney is revocable does not weigh heavily against this finding in these circumstances. The fact of revocability may have been of more weight should this have been a case of a man transferring a single property which he purchased into the name of his child but

> the evidence shows that Maharaj was an astute land owner with several high end properties and had cultivated a practice of so doing while maintaining ultimate control.
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> 28. Furthermore, it is clear from the cross examination of the claimant that Maharaj had provided at least one other property at 37-39 High Street San Fernando (at which site Ravi and the claimant constructed a mall) as an absolute gift to Ravi. In addition Maharaj also funded Ravi's medical studies which he pursued in Canada. These appear to have clearly been gifts from a father to a son. That appears to the court however not to have been the case with respect to the disputed property."

19. Having decided that Mr Maharaj remained the beneficial owner of the Disputed Property at the time of the 2006 conveyance it was strictly unnecessary for him to have gone on to decide the issue of undue influence. It is common ground before the Board that the claimant has no locus to challenge the 2006 Deed unless the Disputed Property forms part of Ravi's estate or she has a claim to the property as a beneficiary under the will of Mr Maharaj. But the only beneficiaries of Mr Maharaj's estate are Shakuntala and Kiran.

20. The judge rejected the claim of undue influence. He held that the evidence that Mr Maharaj lived with Shakuntala and trusted her and her children to look after him was insufficient in itself to establish a relationship under which Mr Maharaj generally reposed trust and confidence in the defendants in respect of the management of his affairs. He also rejected the allegation that at the time of the 2006 Deed Mr Maharaj was beholden to his daughter for his general care and support or that he was confused, of weak mind and suggestible. In relation to the ability of Mr Maharaj to look after his financial affairs the judge said (at para 63):

> "The evidence on the part of the claimant has failed to prove that Maharaj had reposed trust and confidence in any of the defendants in relation to the management of his financial affairs. While the court accepts that it will very often be difficult for a claimant to pass muster when it comes to this type of proof owing to circumstances, it is nevertheless the duty of the claimant to prove same and the claimant's evidence in this case is devoid of such proof."

21. On the issue of whether the 2006 sale was a suspicious transaction calling for an explanation the judge based his assessment on the Disputed Property being in the beneficial ownership of Mr Maharaj. There was he said nothing inherently suspicious in a grandfather selling his own land at an under value to his children or grandchildren. But this analysis clearly has no application if the judge was wrong about the issue of beneficial ownership.

22. The claimant appealed to the Court of Appeal on both issues and the appeal succeeded on both grounds. The leading judgment was given by Mendonça JA.

23. On the issue of beneficial ownership the Court of Appeal considered that the judge had treated the 1964 Power of Attorney and its continued existence at the time of the 2006 Deed as a crucial piece of evidence which operated to rebut the presumption of advancement. The power of attorney (see clause 4) extended to property in which Ravi had a beneficial interest and therefore it applied equally to any property which had been bought by Mr Maharaj and conveyed to Ravi as a gift. Its existence was not therefore inconsistent with an intention by Mr Maharaj to make a gift of the property comprised in the 1976 Deed. It was at best neutral and not determinative of the issue of beneficial ownership.

24. The Court of Appeal was also unpersuaded by the other facts and matters relied on by the judge. The non-revocation of the 1964 Power of Attorney was held to be equally consistent with simple inertia or a belief on the part of Ravi that after 40 years the power was unlikely to be used in a way that was detrimental to him. In relation to the properties at 37-39 High Street (which it seems to have been common ground at the trial had been purchased by Mr Maharaj in Ravi's name with the intention that they should belong to Ravi beneficially) Mendonça JA said this:

> "59. The Trial Judge stated in that paragraph that 37-39 High Street San Fernando was clearly a gift to Ravi from Mr Maharaj., He, however, does not refer to the fact that that property is also within the ambit of the power of attorney. He therefore does not address the issue that if the intention of Mr Maharaj was that properties bought by him and conveyed to Ravi were to be held on trust is evident by his having a power of attorney over the properties, why is that not true of 37-39 High Street San Fernando. Before the Trial Judge could say the existence of the power of attorney was indicative of Mr Maharaj's intention not to make a gift of the Disputed Lands to Ravi, he had to consider that the power of attorney applied to lands which Mr Maharaj intended for Ravi to take

> beneficially. The Trial Judge did not do so and in my view failed to properly analyse the entirety of the evidence.
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> 60. Further, no one has suggested that Ravi did not own other properties which he acquired from his own means and were vested in his name. There could be no suggestion that the beneficial interest in such properties belonged to anyone other than Ravi. Yet, the power of attorney applied to those properties as well. This too is suggestive of the fact that the existence of the power of attorney could not be probative of whether or not property in Ravi's name that fell within the scope of the power of attorney was held on trust."

25. The evidence of subsequent conduct was also, the Court of Appeal held, consistent with Mr Maharaj having intended that the property comprised in the 1976 Deed should belong beneficially to Ravi and Shakuntala. The outgoings have been paid by them; they (or at least Ravi) collected the rents; and the dispute between Ravi and Shakuntala which led to the partition proceedings was itself indicative that both of them regarded the property as theirs. Neither of them seems to have thought it necessary or appropriate to involve their father in the dispute and his non-participation in the proceedings is also consistent with the issues relating to the property not being regarded as something of concern for him.

26. The Court of Appeal was rightly conscious of the caution that needs to be exercised by an appellate tribunal when considering challenges to the decision of the trial judge. A series of decisions both of the Board and of the Supreme Court of the United Kingdom have emphasised the obvious (indeed almost unique) advantages usually enjoyed by the trial judge in making his or her primary findings of fact having heard and assessed the witnesses at first hand. In his judgment Mendonça JA referred to the decision of the Board in *Beacon Insurance Co Ltd v Maharaj Bookstore Ltd* [2014] UKPC 21; [2014] 4 All ER 418, para 12 where Lord Hodge said:

> "It has often been said that the appeal court must be satisfied that the judge at first instance has gone 'plainly wrong'. See, for example, Lord Macmillan in *Thomas v Thomas* at p 491 and Lord Hope of Craighead in *Thomson v Kvaerner Govan Ltd* 2004 SC (HL) 1, paras 16-19. This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: *Piggott Brothers & Co Ltd v Jackson* [1992] ICR 85, Lord Donaldson at p 92. Rather it directs the appellate

> court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence: *Choo Kok Beng v Choo Kok Hoe* [1984] 2 MLJ 165, PC, Lord Roskill at pp 168-169."

27. Similar statements of principle are to be found in the recent United Kingdom authorities: see *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 WLR 1911; *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477.

28. In the present case the issue for the trial judge was whether Ravi or his father was the beneficial owner of the Disputed Property. There was no direct evidence as to the intentions of Mr Maharaj at the time of the purchase in 1976 or for that matter thereafter. The question whether the 1976 Deed operated to confer both legal and beneficial ownership on Ravi and Shakuntala was therefore essentially a matter of inference from the judge's findings of primary fact none of which were in dispute on the appeal. Aside from the operation of the presumption of advancement or resulting trust the judge had to consider which of the two possible analyses of beneficial ownership was dictated by or was most consistent with the inferences to be drawn from the terms of the 1976 Deed and the evidence of the parties' conduct both before and after the purchase.

29. In considering what inferences could and should properly be drawn the Court of Appeal had to proceed cautiously paying due regard to the evaluation made by the trial judge. But it needed at the same time to be realistic about the advantages that were in fact possessed by the judge given the issues to be resolved in the particular case. If a judge has made a material error in his assessment of these issues then the appellate court is duty-bound to interfere. The position was made clear by the Board in a later passage in the judgment of Lord Hodge in *Beacon Insurance Co Ltd* at para 17:

> "17. Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or reliability of witnesses, who have given oral evidence, and of the weight to be attached to their evidence, an appellate court may have to be similarly

> cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole. *In re B (A Child)* (above) Lord Neuberger at para 60 acknowledged that the advantages that a trial judge has over an appellate court in matters of evaluation will vary from case to case. The form, oral or written, of the evidence which formed the basis on which the trial judge made findings of primary fact and whether that evidence was disputed are important variables. As Lord Bridge of Harwich stated in *Whitehouse v Jordan* [1981] 1 WLR 246, 269-270:
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> > '[T]he importance of the part played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, at one end, a straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly ever interfere, to, at the other end, an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision.'
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> See also Lord Fraser of Tullybelton, at p 263G-H; *Saunders v Adderley* [1999] 1 WLR 884 (PC), Sir John Balcombe at p 889E; and *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2003] 1 WLR 577 (CA), Clarke LJ at paras 12-17. Where the honesty of a witness is a central issue in the case, one is close to the former end of the spectrum as the advantage which the trial judge has had in assessing the credibility and reliability of oral evidence is not available to the appellate court. Where a trial judge is able to make his findings of fact based entirely or almost entirely on undisputed documents, one will be close to the latter end of the spectrum."

30. The Court of Appeal directed itself in accordance with these authorities.

31. These principles were also directly relevant to the decision of the Court of Appeal on the issue of undue influence. The claimant challenged the judge's decision that she had not proved the existence of a relationship of trust and confidence or influence between Mr Maharaj and at least Shakuntala or Kiran in the period leading up to the execution of the 2006 Deed. The Court of Appeal accepted that the judge

was entitled to find that Mr Maharaj was not confused or weak minded and was not completely reliant on the directions of Kiran, his care giver. But in his judgment (at para 87) Mendonça JA said that one need not be feeble and totally reliant for one's care in order to be in a relationship of influence. The Court of Appeal accepted the claimant's argument that the trial judge had failed to take into account the power of attorney which Mr Maharaj had given to Kiran:

> "89. It is fair to say that in the face of such powers that the boast of Kiran to the appellant that he was the boss of all Mr Maharaj's business was not without merit. Be that as it may, the power of attorney in favour of Kiran is strong evidence that a relationship existed between Mr Maharaj and Kiran whereby Mr Maharaj had come to repose substantial trust and confidence in Kiran. The power of attorney given by Mr Maharaj to Kiran was not considered by the Trial Judge when he came to the consideration whether there was a relationship of influence between Mr Maharaj and the respondents. In failing to do so, in my judgment, the Trial Judge overlooked a very material aspect of the evidence and his finding on this issue cannot stand. In my judgment, it is reasonable to infer from the existence of the power of attorney that having reposed such trust and confidence in Kiran that there existed a relationship of influence at least between Mr Maharaj and Kiran. But, that is not to disregard the evidence that he was reliant also on the Second Respondent for his care and normal living activity. I think it is clear on the totality of the evidence that there existed a relationship of influence between Mr Maharaj and the Second Respondent."

32. If Ravi was the beneficial owner of the Disputed Property at the time of the 2006 Deed and a material relationship of trust and confidence subsisted between Mr Maharaj and Kiran then undue influence will be presumed unless the defendants are able to justify the transaction. As mentioned earlier the judge approached the question of whether the 2006 sale called for an explanation on the premise that it was a sale by Mr Maharaj of his own property. But a sale by him of Ravi's property at a significant undervalue would have been a clear breach of fiduciary duty in circumstances where Ravi did not wish to sell the disputed property, had not been consulted about the sale, and never even received the purchase price. Mr Radley-Gardner QC realistically accepted that it was difficult to justify the transaction if the judge was wrong about beneficial ownership.

33. The central issue on this appeal therefore is whether the Court of Appeal was (a) entitled and (b) right to interfere with the judge's decision on beneficial ownership and was also entitled to reverse his finding that no relationship of trust and confidence or dependence had been established on the evidence between Mr Maharaj and one or more of the defendants.

Beneficial ownership

34. Where a property has been purchased and conveyed into the name of someone other than the person who has paid the purchase price the traditional starting point in equity has been to presume that the property is held on trust by the named transferee in favour of the person who has paid for it. Equity is said to lean against a gift unless there is evidence of surrounding and other circumstances which indicates that this was what the payer intended. In the absence of evidence of an agreement or declaration to that effect at the time of the transfer the ascertainment of the payer's true intentions will be largely a matter of drawing inferences from the objective facts relevant to the transaction.

35. One such fact which is a feature of the present case will be that the property has been transferred into the name of a child of the payer. In such circumstances there is a presumption of advancement in favour of the child which, unless rebutted, will displace the presumption of a resulting trust. Although much criticised as based on outdated assumptions about the relative status of children to parents and of wives to husbands the presumption of advancement continues to form a relevant part of the court's inquiry as to the intended legal consequences of the transaction. It has not been suggested by either party to this appeal that the Board should adopt some different starting point. The most obvious one would be to presume that in the absence of an express declaration to the contrary beneficial and legal ownership are the same so that the onus would lie on the party alleging some different arrangement to prove that the parties to the conveyance did not have this intention. This is now the position under English law in cases of jointly owned domestic property: see *Stack v Dowden* [2007] UKHL 17; [2007] 2 AC 412. But it has not yet come to be applied in cases such as the present one involving transfers of non-domestic property between or at the expense of connected persons.

36. On this appeal Mr Radley-Gardner QC accepts that the transfer of the various High Street properties to Ravi and Shakuntala by the 1976 Deed did raise a presumption of advancement in their favour which his clients must rebut in order to establish beneficial ownership by Mr Maharaj of the Disputed Property. The presumption of advancement is, he submits, a relatively weak one particularly where

the child was an adult at the time of the transfer: see *Laskar v Laskar* [2008] EWCA Civ 347; [2008] 1 WLR 2695, para 20 per Neuberger LJ.

37. In terms of the evidence admissible on the question of what the parties intended to achieve by the transaction reference was made to the decision of the House of Lords in *Shephard v Cartwright* [1955] AC 431 where Viscount Simmonds adopted the principle that the acts or declarations of the parties subsequent to the transaction are admissible as evidence only against the party who made them and not in his or her favour. In the judgment of the Board in *Antoni v Antoni* [2007] UKPC 10, para 20 Lord Scott of Foscote relied upon this principle to exclude subsequent denials by the transferor of the transferee's beneficial ownership. But the more modern approach has been to treat evidence of the subsequent conduct of the parties as generally admissible and to leave the court to assess the weight to be given to it having regard to the time when and the circumstances in which it occurred. In *Lavelle v Lavelle* [2004] EWCA Civ 223, para 19 Lord Phillips of Worth Maltravers MR said:

> "In these cases equity searches for the subjective intention of the transferor. It seems to me that it is not satisfactory to apply rigid rules of law to the evidence that is admissible to rebut the presumption of advancement. Plainly, self-serving statements or conduct of a transferor, who may long after the transaction be regretting earlier generosity, carry little or no weight. But words or conduct more proximate to the transaction itself should be given the significance that they naturally bear as part of the overall picture. Where the transferee is an adult, the words or conduct of the transferor will carry more weight if the transferee is aware of them and makes no protest or challenge to them."

38. This seems to the Board to be the correct approach and the defendants in this case were content to proceed on that basis.

39. A number of matters were relied on as having rebutted the presumption of advancement in this case;

(i) at the time of the 1976 conveyance Ravi was 34 years old;

(ii) Mr Maharaj was a property developer who regularly bought properties sometimes in his own name but often in the names of Ravi and Shakuntala. The

defendants say that it is unrealistic to assume that he made a gift of every property purchased in his children's name;

(iii) the 1964 Power of Attorney and the power-of-attorney granted by Shakuntala indicate that Mr Maharaj wished to retain all relevant powers over the properties acquired in their names. When properties were to be specifically exempted from this regime they were set out in the schedule to the power of attorney;

(iv) Shakuntala gave evidence at the trial that she did not believe that the Disputed Property and the other High Street properties contained in the 1976 conveyance were hers;

(v) the powers of attorney were unilaterally revocable but were never revoked; and

(vi) there had been gifts of property by Mr Maharaj to Ravi such as the property at 37-39 High Street, San Fernando but when gifts were intended that was made clear.

40. In concentrating on the judge's treatment of the significance of the 1964 Power of Attorney the Court of Appeal went wrong, it is said, by effectively ignoring the other parts of the judge's reasoning. This includes his reference to 37-39 High Street which the judge (at para 28) said was clearly a gift to Ravi. The receipt of rent by Ravi from the Disputed Property and the payment of taxes are said to prove no more than that Mr Maharaj was content for that to happen. There is also no evidence, it is said, that Mr Maharaj knew about the partition action in 1992 although this is difficult to reconcile with the express reference to the deed of partition in the recitals to the 2006 Deed. The Court of Appeal is also said to have been wrong to attach no weight to Shakuntala's evidence. She was clear that Mr Maharaj might sell the Disputed Property at any moment as the judge had found was his practice.

41. The defendants' primary submission, however, was that the Court of Appeal was wrong to embark on the process of re-evaluating the evidence. It could only do so if the judge's conclusion was rationally insupportable.

42. The Board is not persuaded by these criticisms of the approach which was taken by the Court of Appeal. It seems to the Board that they properly directed themselves in accordance with the approach to a trial judge's findings of fact set out by the Board in

Beacon Insurance Co Ltd in the passages the Board has quoted. The only issue is whether they fell into error in deciding that the judge's treatment of the evidence was plainly wrong.

43. It is reasonably clear from what the judge says in para 26 of his judgment that his starting point was to accept that the purchase of the property in Ravi's name by his father was consistent with what a wealthy man such as Mr Maharaj would do to assist his children notwithstanding that by then Ravi and Shakuntala were adults. This is a case where to use the judge's own words Mr Maharaj could readily afford it. His subsequent non-dealing with the Disputed Property for over 30 years up to 2006 was therefore prima facie consistent with the conveyance being a gift.

44. What the judge said had weighed heavily against this was the 1964 Power of Attorney. In the judge's view this amounted to evidence that Mr Maharaj continued or wished to continue to exert absolute ownership over the Disputed Property.

45. The Court of Appeal were right to regard this as a flawed analysis largely for the reasons which they gave. Clause 4 of the 1964 Power of Attorney extends in terms to any property of which Ravi was the beneficial owner. It would therefore have included the property at 37-39 High Street which the judge accepted was beneficially owned by him. There is nothing therefore in the execution of the 1964 Power of Attorney which is itself determinative of beneficial ownership. Whether the property to which it extends is or is not beneficially owned by Ravi has to be determined by the other relevant surrounding evidence.

46. So one turns to consider what other evidence there was to rebut the presumption of advancement or the judge's prima facie view that the 1976 Deed was consistent with an intention on the part of Mr Maharaj to benefit his children. The only other evidence relied on in terms by the judge was the transfer to Ravi of 37-39 High Street which he had developed as a shopping mall. This is a valuable property which it seems to have been common ground belonged to Ravi absolutely. That was the claimant's evidence at trial. But there was no specific evidence as to why the transfer of that property had operated as a gift beyond the fact that Ravi had developed the land and the other members of the family had accepted that it was his.

47. If acquiescence is to be regarded as probative of beneficial ownership then some of the other evidence to which the judge attached no weight may be more significant than he thought. In particular it is striking that both Ravi and Shakuntala clearly thought that they were entitled to take the rents from the Disputed Property which led to the partition proceedings in 1992. The terms of the pleadings which the

Board referred to earlier do not indicate that this was regarded by them as a dispute between trustees. Similarly Mr Maharaj took no apparent interest in the Disputed Property until 2005 when he suggested that it should be sold to the defendants. Kiran's evidence that Mr Maharaj explained to him that the property was bought in Ravi's name but should be sold to the defendants because Ravi had subsequently become rich is instructive. The judge thought that it should not be interpreted as a declaration against interest but for Mr Maharaj to have provided a justification for the sale only makes sense if he regarded it as belonging to Ravi. If Mr Maharaj was the beneficial owner he was free to dispose of it as he thought fit. There is also Dr Seepersad's evidence that Mr Maharaj accepted that he must account to Ravi for the purchase price.

48. None of this evidence is inconsistent with the judge's prima facie acceptance that the 1976 Deed operated as a gift for the benefit of Ravi and Shakuntala. The 1964 Power of Attorney had been given years before when Ravi was abroad in Canada as a student and is explicable on that basis. Although there was some very general evidence given about Mr Maharaj's practice of selling properties that had been acquired in the names of his children there was again no specific evidence of any particular property transactions of this kind and it is impossible to be certain as to how frequent a practice this in fact was. Kiran, as the Board has said, could not recall any use being made of the power of attorney since the 1980s.

49. It is not necessary for the Board to conduct its own evaluation of the evidence in order to determine this appeal. The question is whether the intervention by the Court of Appeal in relation to the judge's findings was legitimate. In the view of the Board it clearly was. It is true that Shakuntala said in evidence that she did not believe that the conveyance of the High Street properties to her and Ravi was intended to operate as a gift. But that statement was not based on any particular facts and needs to be treated with extreme caution given her position in the litigation. It is also, as the Court of Appeal pointed out, inconsistent with other parts of her evidence concerning the earlier partition of the High Street properties.

Undue influence

50. As explained earlier the only real issue on this part of the appeal is whether the Court of Appeal was entitled to set aside the judge's conclusion that the claimant had not established a relationship of dependence or trust and confidence between Mr Maharaj and one or more of the defendants. It is perhaps worth stating at the outset that a case based on undue influence is a somewhat indirect way of challenging what seems to have been a breach of fiduciary duty by Mr Maharaj in relation to the sale of

his son's property. But that analysis of Mr Maharaj's conduct was not pursued and it is not suggested that if the claimant can establish the necessary components of undue influence there is any reason why she cannot rely on an allegation of undue influence to defeat the 2006 sale by Ravi's attorney. The only proviso is that Ravi was, as the Court of Appeal found, the beneficial owner of the Disputed Property at the time.

51. It is common ground that the relationship of a child with his or her parent is not one of those in which the law automatically presumes the existence of influence by one party over the other by virtue of the degree of control which is conventionally assumed to exist in the relationship between them: eg parent over child; solicitor over client and doctor over patient. In such cases the presumption operates almost irrebuttably regardless of whether the vulnerable party in fact reposed trust and confidence in the other. But a father is not presumed without more to be dependent on his children.

52. Given that the claimant was not able to adduce evidence confirming the exercise of actual undue influence by Kiran or Shakuntala over Mr Maharaj in relation to the 2006 Deed it was therefore necessary for her to prove that there was at least a relationship of trust and confidence between them in relation to Mr Maharaj's financial and business affairs from which undue influence could be presumed in the light of a transaction between them which was suspicious and could not be readily explained by the relationship between the parties: see *Royal Bank Of Scotland v Etridge (No 2)* [2001] UKHL 44; [2002] 2 AC 773, paras 21-29.

53. As already explained there is really no argument about the second of these conditions being satisfied in the present case. Various criticisms were advanced about the quality of the valuation evidence but the defendants did not call an expert valuer of their own and the judge and the Court of Appeal were entitled to proceed on the basis that the 2006 sale was at a significant undervalue. Since there is no dispute that Ravi was not informed about nor consented to the sale the only realistic inferences which can be drawn about the reasons for Mr Maharaj acting as he did were either that he decided to transfer the Disputed Property at an undervalue in what would have amounted to a deliberate disregard of Ravi's interests or that he was induced into selling the property to the defendants as a result of influence generated by his relationship with them. Although part of the claimant's pleaded case, neither party ultimately contended for the former possibility at the trial nor was an attempt made by the defendants to justify the transaction on the assumption that it belonged beneficially to Ravi. Whilst denying the existence of any undue influence their case was that the property belonged to Mr Maharaj and was his to dispose of; that the claimant therefore had no locus to challenge the 2006 sale; and that in any event she had failed

to establish on the evidence the relationship of trust and confidence necessary to raise a presumption of undue influence on their part.

54. The judge's finding that the claimant had failed to prove that Mr Maharaj reposed trust and confidence in any of the defendants in relation to the management of his financial affairs is shortly expressed: see para 63 of his judgment quoted earlier. The judge makes no reference to the power of attorney which Mr Maharaj had given to his grandson even though it was pleaded by the claimant as one of the matters relied upon in support of the claim of undue influence. In his witness statement Kiran said that as his grandfather grew older he began to give him the responsibility to deal with tenants, businessmen and lawyers. But the power of attorney in fact gave Kiran wide powers to manage and dispose of Mr Maharaja's property and investments.

55. It is difficult to see how the relationship between Mr Maharaj and Kiran embodied in or confirmed by the terms of the power of attorney could not be one in which at some level trust and confidence were reposed in Kiran to deal with his grandfather's financial affairs. As Nourse LJ said in *Goldsworthy v Brickell* [1987] Ch 378, 401C-E:

> "But there are many and various other relationships lacking a recognisable status to which the presumption has been held to apply. In all of these relationships, whether of the first kind or the second, the principle is the same. It is that the degree of trust and confidence is such that the party in whom it is reposed, either because he is or has become an adviser of the other or because he has been entrusted with the management of his affairs or everyday needs or for some other reason, is in a position to influence him into effecting the transaction of which complaint is later made. And with respect to certain arguments which have been advanced in the present case it is here necessary to state the obvious, which is that in cases where functions of this sort constitute the substratum of the relationship, there is no need for any identity of subject matter between the advice which is given or the affairs which are managed on the one hand and the transaction of which complaint is made on the other. Nor, as will be shown, is it necessary for the party in whom the trust and confidence is reposed to dominate the other party in any sense in which that word is generally understood."

56. But the defendants say that the approach taken by the Court of Appeal ignores the fact that the judge had heard the totality of the evidence and had rejected the allegations of physical and mental infirmity which the claimant had made. The power of attorney granted to Kiran was, they say, never exercised and at the trial the claimant's primary submission had been that undue influence had been exercised by Shakuntala. It was never suggested to Kiran in cross-examination that the power of attorney had been used to influence Mr Maharaj's decision to enter into the 2006 sale.

57. These are powerful submissions but in the view of the Board the Court of Appeal was entitled to form the view that the judge had overlooked a highly material piece of evidence when assessing whether the presumption of undue influence was raised by the combination of the relationship between Mr Maharaj and one or more of the defendants and the nature of the transaction which he entered into. The existence of the power of attorney is not of itself sufficient to raise a presumption of undue influence but it is probative of a relationship of trust and confidence which coupled with the highly unusual aspects of the sale that the Board has identified does lay the ground for an inference of undue influence in this case. As already stated neither side in this case was in the end prepared to advance a case that Mr Maharaj had set out deliberately to harm Ravi's interests or that he consciously disregarded them in deciding to sell the Disputed Property at a considerable undervalue without Ravi's knowledge or consent. The evidence of Dr Seepersad is that Mr Maharaj recognised that Ravi had an interest in the Disputed Property and knew that he must therefore account to him for the proceeds of sale. This was never done.

58. In these circumstances the 2006 sale is only explicable in terms of Mr Maharaj being influenced into wishing to benefit the defendants with whom he lived and to whom (in the case of Kiran) he had entrusted much of the day-to-day management of his financial affairs. The power of attorney is confirmation in terms of that relationship but seems to have been effectively ignored by the judge. In his judgment he found that the claimant had not proved the existence of a relationship of trust and confidence without explaining how that finding was consistent with the power of attorney itself. The Board considers that this was a defect in his analysis of the evidence and that the Court of Appeal was entitled to set aside his decision on this point.

59. The power of a court of equity to intervene in these cases is designed to prevent a relationship of influence from being abused. The object of its inquiry is to determine how the intention to enter into the transaction was produced. In *RBS v Etridge* Lord Nicholls of Birkenhead (at para 7) observed that "the circumstances in which one person acquires influence over another, and the manner in which that influence may be exercised, vary too widely to permit of any more specific criterion". The earlier authorities are full of examples of cases where even in the absence of some overt form

of improper pressure or coercion gifts or transfers of property have been set aside. One well-known example is the case of *Allcard v Skinner* (1887) 36 Ch D 145 where an over generous gift of property to a religious order was held to be the product of motives of beneficence created by the relationship between Miss Allcard and the order which she had joined. The nature and scale of the gift or transaction raised an inference that it was induced by the relationship of dependence that had grown up between the parties.

60. In this case the defendants obtained title to a property which belonged to Ravi at a fraction of its true value as a result of a transaction which was concealed from him despite the promises of Mr Maharaj to consult him and to account for the purchase price. When a transaction of this kind which clearly calls for an explanation takes place between persons who are in a relationship of trust and confidence the stage is set, as Lord Nicholls put it in *Etridge* (at para 14) for the court to infer that, in the absence of a satisfactory explanation, it can only have been produced by undue influence. The judge was clearly wrong to ignore the evidence of the power of attorney and to hold that the 2006 sale was not a transaction calling for an explanation.

61. For these reasons the appeal should be dismissed.