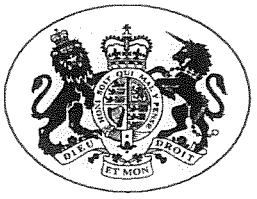


[2017] UKFTT 0001 (PC)

REF/2014/0164
REC/2015/0001

PROPERTY CHAMBER LAND REGISTRATION
FIRST-TIER TRIBUNAL
IN THE MATTER OF A REFERENCE AND AN APPLICATION
UNDER THE LAND REGISTRATION ACT 2002

BETWEEN

BARBARA ANN PHILLIPS

APPLICANT

and

(1) JACQUELINE ANNE SMITH
(2) NATIONAL WESTMINSTER BANK PLC

RESPONDENTS

Property Address: 22 Salter's Hill London SE19 1DZ

Title Number: TGL178119

Before: Judge Owen Rhys

Sitting at: 10 Alfred Place London WC1E 7LR

On: 5th, 6th and 7th September 2016

O R D E R

IT IS ORDERED THAT:

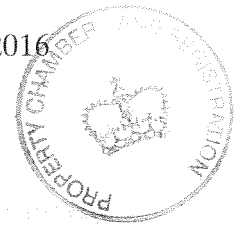
(1) The Chief Land Registrar shall cancel R1's application in Form RX3 dated 8th August 2013.

(2) The Applicant's application under section 108(2) of the Land Registration Act 2002 to set aside the Transfer dated 22nd August 2005 is dismissed on the grounds

that the said document was not validly attested and is therefore void and of no effect.

Dated this 1st day of November 2016

Owen Rhys



BY ORDER OF THE TRIBUNAL

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On: 5th, 6th and 7th September 2016

Applicant representation:	Ms Phillippa Daniels of Counsel instructed by TWM Solicitors
1st Respondent representation:	Mr Andrew Morrell of Counsel (Direct Access)
2nd Respondent representation:	Mr Daniel Gatty of Counsel instructed by Eversheds Solicitors

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D E C I S I O N

THE APPLICATION

1. The First Respondent ("R1") is the registered proprietor of property known as 22 Salter's Hill, Gipsy Hill, London SE19 1DZ under title number TGL178119 ("the

Property"). She became registered as such on 7th September 2005, pursuant to a transfer in form TR1 dated 22nd August 2005 ("the Transfer") made by the Applicant, who was at that date the registered proprietor. On 12th September 2008 R1 remortgaged the Property to the Second Respondent ("R2") and R2's Charge was registered on 24th September 2008 ("the Nat West Charge"). On 3rd May 2013 two restrictions were entered on the Proprietorship Register of the Property in favour of the Applicant ("the Restrictions"), one in Form A and the other in Form II. According to the Applicant's form RX1, the grounds on which the Restrictions were applied for entered were (a) a claimed beneficial interest under a resulting trust, and (b) a claim that the Transfer had been procured by fraudulent misrepresentation. On 8th August 2013 R1 applied in form RX3 to cancel the Restrictions. The Applicant objected on 6th September 2013, and the dispute was referred to the Tribunal on 21st February 2014. The Case Summary records that the two restrictions were applied for "*on the basis that she had a beneficial interest in the Property*".

2. The Applicant's Statement of Case was served on 26th March 2014, and R1's response on 5th April 2014. The Applicant alleged, in essence, that she had been induced to execute the Transfer by R1's fraud, consisting of her representing to the Applicant that the Transfer was "*something to do with mortgage rates*". The "relief" sought by the Applicant at that stage was "*... to be registered as proprietor of the Property and ... rectification of the Register to this effect.*" However, the dispute referred to the Tribunal arose out of R1's application to cancel the Restrictions – there was no separate application to rectify the register itself at that stage. In August 2014 the Applicant applied to stay the Tribunal reference, to allow her to commence proceedings in the County Court for a declaration as to her beneficial interest in the Property, and consequential relief under the Trusts of Land and Appointment of Trustees Act 1996. R1 objected to the application and the Tribunal refused it, and gave case management directions leading up to trial. A final hearing was listed for 4th and 5th December 2014, and the matter came on before a Judge. However, the hearing was not effective. R1, who was acting in person, claimed that she had been "ambushed" by the Applicant, and the Judge took the view that the Applicant had not claimed the right relief. He directed her to serve an Amended Statement of Case to include an application under section 108(2) of the Land Registration Act 2002 ("the 2002 Act") for an order setting aside the Transfer. Consequential directions for

service by R1 of an Amended Statement of Case and for evidence were also given. The Applicant served an Amended Statement of Case on 19th December 2014. The relief sought was (a) an order under section 108(2) setting aside the Transfer; and (b) directions to the Land Registry to maintain the Restrictions in the register.

3. On 20th May 2015 the Tribunal made an order for specific disclosure of the conveyancing file of R1's solicitors, because (as the reasons state) he considered that R1 had failed to comply with her disclosure obligations. The firm which acted for her at the time of the Transfer was a firm known as MTC Law ("MTC"), which is no longer in existence. R1 had already disclosed some of the documents in the file but others had not been disclosed. R1 was also ordered to disclose certain bank statements. There was a Case Management Conference on 1st October 2015, attended by Counsel for the Applicant and R1 in person. This was necessitated because the Applicant alleged that R1 had not given disclosure in accordance with the previous order. A modified order for specific disclosure of the MTC file was made, permitting her to redact the conveyancing file so as to remove all references to other properties which were also being dealt with by MTC at the same time. The case was re-listed for hearing for 3 days commencing on 29th February 2016. On 25th February 2016 a further order was made by consent. The hearing was vacated. An order was made for the joinder of R2 as a potentially affected party. By this stage, what was said to be the entire and unredacted MTC file had been received by the Applicant from R1's former solicitors (McMillan Williams) and she was ordered to provide R2 with copies. Further directions were given. The case was re-listed for hearing for 3 days commencing on 5th September 2016. Although no further directions were given in this regard, R2 served a Statement of Case and the Applicant served a Reply prior to the hearing, and the Tribunal gave the parties permission to rely on these documents. An employee of R2, Ms Lewis, also made a witness statement for which permission was given.

4. I heard this case over three days. All three parties were represented by Counsel. The Applicant gave evidence, and also called her son Richard John Phillips, her daughter Kelly Burgess, and a neighbour, Ms Kim Keeley. R1 gave evidence, as did her husband Nicholas Smith, and her daughter Shelley Friend. R2 called a loans officer, Ms Lewis, to produce the documents on the file relating to its charge over the

Property. All these witnesses were cross-examined on their statements. In addition, the Applicant relied on a witness statements from Patricia Goodman, and R1 on the statement of the Applicant's ex-husband. These witnesses did not attend the hearing and necessarily less weight is attached to their evidence.

THE PARTIES' RESPECTIVE CASES

5. Although the precise nature of the relief sought by the Applicant's case has evolved during the course of these proceedings, her underlying case on the facts has been consistent throughout. She originally applied for two different forms of restriction on the title to the Property, to protect both an equitable right to rescind the TR1, and a claimed subsisting beneficial interest in the Property. This is how the critical factual event is pleaded at paragraph 13 of the Amended Statement of Case (amendments underlined): "*On 22 August 2005 [R1] visited the Applicant at the Property and asked the Applicant to sign a document. [R1] was agitated and claimed that the document had to be signed on that date. The Applicant was about to go out and did not read the document but asked [R1] what it was for. [R1] told the Applicant that it was nothing to worry about, but was something to do with mortgage rates. Relying on [R1's] explanation the Applicant signed the document. The Applicant and [R1] were alone in the house when the Applicant signed the document and the Applicant's signature was not witnessed.*" In the same pleading the Applicant alleges that she reposed trust and confidence in R1 at the date of the Transfer. She therefore claimed to be entitled to set aside the Transfer in equity, on the basis of fraudulent misrepresentation or undue influence. Alternatively, she claimed a beneficial interest in the Property by virtue of a resulting trust. The claimed relief, as it was eventually put in the Amended Statement of Case, was as follows: (a) to set aside the Transfer; (b) to direct the Registrar to maintain the restriction on the register pending the alteration of the register to reflect rescission; further or alternatively (c) to direct the Registrar to maintain the restriction on the register to protect the claimed beneficial interest. As against R2, the Applicant's primary case is that her right to set aside the Transfer took effect as an overriding interest, protected under Schedule 3 paragraph 2 LRA 2002 by her actual occupation of the Property at the date of the Nat West Charge. As remarked previously, there was not at the date of the hearing any application to the Land Registry to give effect to any order that might be made under section 108(2) LRA 2002. If the Transfer were set aside, an application would be required for alteration of

the register, to restore the Applicant's name as proprietor and, depending on the extent of any order made against R2, the removal of the Nat West Charge from the Charges Register. I shall consider these procedural issues in more detail at the appropriate juncture.

6. R1's case is simple. She denies that the circumstances of the execution of the Transfer, and claims that the Applicant signed it voluntarily, in full knowledge of its contents, and in the presence of a witness. She denies that there is any right to set aside the Transfer. R2's case is essentially that the Applicant has lost the right to set aside the Transfer – even if the factual allegations against R1 are established – due to delay and laches. Accordingly, even though the Applicant was in actual occupation of the Property at the date of the Nat West Charge, she had no "interest" in the Property capable of being protected. In fact, the case on the law is somewhat more elaborate than this summary can convey, and I shall explain the legal issues more fully in due course. Before reaching the law, however, I shall set out the relevant history of the Property, identifying the controversial factual issues, but largely basing this summary on facts that are either undisputed, or apparent from the documentation. Where the facts are disputed, I shall so indicate.

THE BACKGROUND

7. The Applicant was born in 1941, and has 5 children, including R1, the oldest, who was born in 1964. The Applicant has occupied the Property since 1967, initially as the wife of Richard Philips, who was the tenant of Lambeth Council. They divorced in 1978, and the Applicant took over the tenancy. R1 resided in the Property until 1984, having had her first child (Robert) whilst living there. In 2000 the Applicant purchased the Property from Lambeth Council under the right to buy legislation. There is a dispute as to whether the purchase was suggested by R1 or whether the Applicant initiated it. At all events, the Property was purchased for £33,200, which included the tenant's discount which stood at the maximum of 60%. The Property was purchased with the aid of a mortgage from Ocwen Loans (subsequently iGroup Loans ("iGroup"). This much is agreed. However, the Applicant and R1 do not agree either on the circumstances of the purchase, nor the terms agreed between them at the time. The Applicant says that R1 dealt with all the legal and other arrangements for

the purchase, including the mortgage. It was she who had suggested that the Applicant should buy the Property, and that she would arrange the mortgage because she had "connections". It was agreed that the Applicant would buy the Property, that R1 would contribute one-half of the mortgage repayments, that the Applicant would live there for life rent-free, and that she would make a will leaving the Property to R1 on her death.. R1 says that she did not carry out the arrangements for the purchase and mortgage – although she accepts that at the time she was working as a legal secretary for Dhama & Douglas, the firm of solicitors which carried out the conveyancing on the purchase. She says that she agreed to pay the mortgage, against a payment of £150 per month from the Applicant by way of rent, and that the Property would be transferred to her outright after 3 years. The purchase was completed on 31st July 2000, and the Applicant was registered as sole proprietor, but subject to a charge to iGroup securing a total loan of £42,115. This was a repayment mortgage. There was a balance remaining after purchase of £7,776.50, but the Applicant says that she only received £1200 of this sum, and claims that R1 received the difference, which she denies.

8. From completion, the Applicant made monthly payments by direct debit to iGroup as to 50% of the instalments. From October 2002 her bank statements show that she discharged the entire monthly instalments, although R1 claims that she continued to contribute by making cash payments to the Applicant of £150 per month. The Applicant borrowed a further sum of £5000 from iGroup in 2001, and an additional sum of £15,000 in 2003. This was secured by a second charge over the Property in favour of the new lender, London Mortgage Company ("LMC"). Part of this advance was used to discharge the additional borrowing of £5,000 made in 2001. She says that the monies were used to for home improvements and for paying off credit card debts. R1 says that there were no home improvements. She also denies that she was informed of these loans. That is how matters stood until September 2005. In September 2005 solicitors acting for R1, namely MTC, submitted a form AP1 to the Land Registry for registration of R1 as proprietor of the Property, based on the Transfer which was enclosed with the application. R1 was registered on 7th September 2005. As to the Transfer itself, there is of course a dispute as to its validity. However, leaving that central dispute to one side, the documents within the MTC file provide a detailed picture of the events leading up to R1's registration,

which, the Applicant contends, must be understood in order to provide the context for the impugned Transfer.

9. Before I turn to the contents of the MTC file, I should note that the Applicant expresses serious doubts as to the completeness of this file, and its integrity. Since this dispute began, the Applicant has attempted to obtain sight of the file. It is, I think, fair to characterise R1's position as unwilling to co-operate in obtaining the release of the file. Eventually, the Tribunal ordered disclosure of the full unredacted file, and the "original" file was handed to the Applicant's solicitors by McMillan Williams, a firm of solicitors then acting for R1, on 21st October 2015. However, a number of queries were immediately raised by the Applicant's solicitors regarding the integrity of the file. The file consists of a green folder, with no references or client details written upon it. The documents are not in order, some correspondence is hole-punched and some is not. McMillan Williams informed the Applicant's solicitors that the file was in that form when handed over to them by R1. It appears that R1 herself collected the file from MTC on 1st December 2014, and then gave it to McMillanWilliams when she instructed them. I shall consider this matter further in due course, but observe at this stage that the file is not organised in any consistent way, includes documents which cannot possibly have been included in the 2005 conveyancing file (being dated 2013) and exclude documents that one would expect to see in such a file. However, the material that the file does contain provides a fairly detailed account of the transaction.

THE TRANSFER AND REMORTGAGE OF THE PROPERTY

10. The chronology set out below derives from the documents in the MTC file.
    a. On 18th May R1 obtained a mortgage illustration from Heritage Mortgages Ltd, a firm of brokers. The amount of loan required was £130,000, based on a valuation of the Property at £230,000. This was to be a Buy to Let mortgage from Southern Pacific Mortgage Ltd ("Southern Pacific") on an interest-only basis. It was noted that *"The number of investment properties that you currently have (including this one) is 3, generating an approximate monthly income of £1100. You had 1 default, totalling £3,483.00, which was satisfied 1 month ago."*

b. On 2nd June R1 sent a fax to "Claire" at MTC to act for her. The note is written on the letterhead of "Aston Rothbury & Co Ltd" who were R1's employers. The note states that "*My mother has already given permission to obtain the title documents/redemption statements*". The recipient of the fax was Claire Shearmur.

c. On the same day Simon Hall of MTC wrote to R1 confirming that the firm had been instructed to advise her in respect of three transactions, namely: (1) Transfer and Refinance of the Property; (2) Refinance of 37 Ladbrook Road, South Norwood, London SE25 6QE ("Ladbrook Road"); and (3) refinance of 53 Hillcrest Road, Bromley, Kent BR1 4RX ("Hillcrest"). I may say that there is no documentation in the file relating to these other properties, other than the final completion statement.

d. There is a copy letter dated 15th June in the MTC file. It is addressed to the Applicant at the Property and reads as follows: "*We act for Jacqueline Friend, as beneficial owner of the Property, in the transfer of the property into her sole name and her refinance of the same. We are instructed that the legal title to the Property is currently registered in your name and that you hold the same on trust for Ms Friend, although the trust deed evidencing the same has been lost. If the transaction is not to be by way of vesting the Property in the beneficial owner, the transfer would amount to a gift of the same to Ms Friend. Due to the fact that the deed has been lost, we must accordingly advise you to take independent legal advice from another firm of solicitors prior to the execution of the transfer deed in order that you fully understand the effect and long-term implications of entering into the transfer deed. We look forward to hearing from you as to whether you hold the property on trust for Ms Friend or from your solicitors that they have provided you with legal advice as to the execution of the transfer deed.*" MTC never received a reply to this letter, which the Applicant says she never received.

e. On 27th June Southern Pacific made a mortgage offer to R1 of £130,000 – further to the mortgage illustration from Heritage Mortgage Ltd. This was a Buy to Let mortgage and it was a condition of the advance that the Property was let on an Assured Shorthold tenancy at or prior to completion.

f. The MTC file contains a pro forma telephone attendance note dated 4th July, which purports to record a conversation between the Applicant and Claire

Shearmur in which "*Mrs Phillips confirmed that property held on trust for Ms friend.*"

g. On 27th July Southern Pacific made a revised offer of mortgage – the advance increased from £130,000 to £137,500. The "*Purchase Price*" of the Property was stated to be £230,000.

h. On 28th July Claire Shearmur of MPC sent an urgent fax to the Redemptions department of iGroup stating that she acted for the Applicant, and requesting redemption statements made up to 2nd August. It is common ground that MTC was never instructed to act on behalf of the Applicant and this statement was therefore false.

i. On 1st August iGroup sent a redemption statement valid until 31st August in the amount of £39,504.55.

j. On 2nd August R1 wrote to Claire Shearmur confirming acceptance of the revised Southern Pacific mortgage offer.

k. On 4th August Claire Shearmur wrote to LMC, stating that she acted for the Applicant, and requesting a mortgage redemption statement for 12th August. Again, this statement was false, in that MTC had no instructions to act on behalf of the Applicant.

l. On 4th August Claire Shearmur wrote to R1 enclosing mortgage deeds for execution, relating to Ladbrook Road, Hillcrest Road and the Property.

m. On 9th August LMC provided a redemption statement for 12th August in the amount of £15,376.01.

n. On 15th August Simon Hall of MTC sent a Report on Title to Southern Pacific, asking if the matter could be treated "*as a matter of the utmost urgency.*" The Report refers to a purchase price of £230,000 (the "remortgage" box is not ticked) and states that there are no non-owner occupants.

o. On 16th August there is an attendance note which purports to record a telephone conversation between Claire Shearmur and Matthew Barker of Southern Pacific confirming its understanding that this was a nil value transfer and the purchase price is to be inserted as a valuation of £230,000.

p. On 19th August – a Friday – Simon Hall of MTC gave instructions to his cashier to make CHAPS payments to iGroup and LMC in redemption of their respective charges over the Property. However, it appears from an email sent from R1 to Claire Shearmur on 22nd August (at 11.52) that the payments were

not made on that day. The funds available for repayment appear to have derived from a remortgage of one of R1's other properties.

q. A Stamp duty land tax return, stating that the transfer of the Property was for nil consideration, appears in the file, signed by R1 and bearing the date 22nd August.

r. A copy TR1 – being the Transfer – is in the MTC file, signed by the Applicant and bearing the date 22nd August 2005. On the same day, MTC sent an AP1 form to the Land Registry together with the Transfer, for registration. Registration was effected from 23rd August.

s. On 25th August, Simon Hall wrote to Southern Pacific confirming that *"our Client has now redeemed the mortgages on the Property and following the transfer of this to her by her mother she will proceed with the offer to yourselves as a remortgage."*

t. On 1st September a further revised mortgage offer was made to R1 by Southern Pacifiv by way of remortgage. The advance was unchanged, at £137,500. Two additional conditions (999) were inserted. First, that *"our applicant owns the property and that it is unencumbered."* Secondly *"that the applicant's mother has no interest in the property or in the proceeds of the remortgage."*

u. On 6th September MTC wrote to Southern Pacific confirming the new offer of advance. The letter continues: *"In accordance with Special Condition 50 of the offer we confirm that the tenancy is covered by a satisfactory Assured Shorthold Tenancy Agreement pursuant to the Housing Act 1988..... The applicant's mother has no interest in the property or in the proceeds of the remortgage."*

v. On 7th September MTC wrote to Southern Pacificenclosing the office copy entries for the Property *"showing that the Applicant owns the Property and that it is unencumbered....Kindly confirm by return that the funds may now be released."* By this time, both the charges over the Property, in favour of iGroup and LMC, had been discharged.

w. On 8th September Southern Pacific sent to MTC by CHAPS payment the net advance of £137,500. On the same day there was a client account transfer from R1's client account to that of Aston Rothbury and Co's client account –

both being clients of MTC. The purpose of the transfer was stated to be "*Repayment of loan*".

x. On 8th September R1 executed a charge in favour of Southern Pacific. The document was witnessed by a solicitor at MTC. The charge was registered on 12th September.

y. There is an exchange of emails between R1 and Claire Shearmur on 8th September on receipt of the Southern Pacific funds into MTC's client account. Claire Shearmur enclosed a draft completion statement but said that the *"figure inserted in respect of the Aston Rothbury & Co loan is an estimate ad I await your further instructions in this regard."* R1 responded at 18.17 on the same day as follows: *"Rodney called me at 6pm this evening to confirm the release of the monies to be repaid to Aston Rothbury as he said it was urgent and could not wait until later this evening. .... In order to help Brian I have confirmed to Rodney that you can transfer the amount as stated on the draft completion statement, this being £193,290.98 for Brian's benefit. I will arrange to pay the balance direct to Brian."*

z. The draft completion statement is in the file. It refers to three separate properties – the Property, Ladbrook Road and Hillcrest Road. It records refinancing of these properties as follows: Hillcrest Road £157,500; Ladbrook Road £170,000; and the Property £137,500. All the remortgages are with Southern Pacific. The sum of £193,290.98 is recorded as the repayment of a loan from Aston Rothbury & Co in relation to Hillcrest Road. On Ladbrook Road, a GMAC mortgage was redeemed in the sum of £175,904.69. On the Property, the two charges totalling £54,923.46 were repaid. After the deduction of disbursements and fees, a total of £34,686 was payable to R1.

EVENTS FOLLOWING THE TRANSFER AND REMORTGAGE

11. It is common ground that the Applicant cancelled the direct debits in favour of iGroup and LMC at around the time of the Transfer. She began to pay the sum of £300 per month to R1 from 1st September 2005 onwards. This continued for several years. On 5th August 2008 R1 applied to R2 for a remortgage. She gave her occupation as "Personal Assistant" at Rosenblatt Solicitors. The purpose of the loan was stated to be a "Buy to Let" remortgage. She gave her own name as the contact point for the surveyor. R2's valuer inspected the Property on or about 18th August 2008. On 4th

September 2008 R2 made a remortgage offer of an advance of £159,000 to be secured on the Property (based on R1's estimated valuation of £265,000). This was a 20-year interest only mortgage with monthly payments of £894.98 fixed for 5 years, followed by an increased monthly payment of £1,033.80. R1 accepted the offer, the mortgage account as opened on 11th September 2005 and on 12th September 2008 executed the Nat West Charge.

12. In 2009 R1 fell into arrears and the Applicant began to pay the monthly instalments of £894, which she continued to do until January 2011. In 2010 the Applicant instructed solicitors, Webster Dixon LLP, to advise her with regard to the Transfer and her position generally. On their advice she made an application to the Land Registry for a restriction, but R1 objected and the Applicant did not proceed. She subsequently withdrew instructions from Webster Dixon.

13. On 11th April 2011, having ceased to make the monthly mortgage payments, she wrote to R2 setting out her position. She explained the circumstances of the original purchase of the Property, and said that *"I discovered that [R1] had managed to transfer the property into her name without my knowledge. She came to see me in June 2009 and confessed that she had remortgaged the property, lost her job, and could not keep up withy the interest payments, and said if I don't pay £894.78 monthly I would be evicted."* She said that she had used up her life savings on making the mortgage payments and could no longer afford to do so. R2 responded on 17th May 2011, stating that it could not discuss the mortgage account with her, and asking to see any tenancy agreement relating to the Property. The Applicant replied on 22nd May 2011, stating that "*I cannot give details of tenancy as there is nothing in writing, we had a verbal agreement originally to pay half each mortgage payment - £150 monthly each in 2000, I had a loan in 2002, payments were for £150 month so I increased my direct debit to £300 month which I paid regularly until 2009 when she confessed that hse had taken out a new mortgage on my property and found she couldn't afford the repayments and that I would have to pay the £894.78 monthly or I would be evicted!"*

14. R2 responded on 31st May 2011, stating, among other things, that it would attempt to contact R1 *"to ensure that the account operates satisfactorily. We are not seeking*

payment from you and recognise it is not your debt." Shortly thereafter, R2 placed the Property in an auction with a guide price of £160,000 – it is accepted that this was no more than half its vacant possession value and clearly reflected the continuing occupation of the Applicant. R1 came to hear about this, and immediately re-commenced the monthly instalments under the Nat West Charge.

15. On 3rd May 2013 the Applicant applied obtained the entry of the Restrictions against the title to the Property. R1's application to discharge the Restrictions – which ultimately gave rise to the proceedings in this Tribunal – was made on 8th August 2013.

THE EXECUTION OF THE TRANSFER

The Applicant's case

16. I have already set out (see paragraph 5 above) the Applicant's case as to the circumstances in which she says the Transfer was executed in 2005. More detail is given in her first witness statement dated 16th September 2014. This is what she says at paragraphs 29 to 33:

29. On Monday 22 August 2005 Jackie came to the Property at about lunchtime. I was not expecting her and in fact was about to go out as I was going to a meeting with my former boss Donna Jacobs. I was purchasing her business and she had asked for the price, £5,000, to be paid in cash. I obtained a loan from Nat West for £7,500 and had withdrawn £5,000 of it from my bank in readiness. I asked Kim Keeley, a family friend, to come with me as I was worried about being alone with so much cash on me. Kim lives nearby and was going to walk round to the Property and we were then going to travel together in my car.

30. .Jackie came alone. She threw some documents, which were in a folder, on the coffee table of my living room and asked me to sign them. She was very agitated and said the documents needed to be signed that day. She didn't explain why. When I asked her to leave the papers with me so that I could read them later as I was going out, she said "no mother, you don't need to, it's only about the change in the mortgage rates, it's nothing to worry about. Just sign them, I have to get back to work."

31. Jackie lifted the bottom corners of the papers and said "just sign , there, there, and there". Jackie claims that he daughter Shelley and Jackie's boyfriend

at the time, Nicholas Smith, were present and Nick witnessed my signature. That is not true. There was no one else with us, only Jackie and myself. Shelley would have been about 14 at the time. I did sign but I wasn't given the opportunity to read what I was signing and the documents were not explained to me. Jackie misled me as to the nature of what I was signing. My signature was not witnessed by anyone and Jackie did not sign the documents in my presence. If that is Nick Smith's handwriting on the transfer deed where he purports to have witnessed my signature he must have signed it later.

32. Jackie left bringing the papers with her. She did not leave a copy with me. She was alone with me for no longer than 15/20 minutes.

33. Immediately after Jackie left I followed her out as I was meeting Kim Keeley. As I walked down the front garden path (which is shared with number 24 Salter's Hill) I saw my neighbour Patricia Goodman who commented on Jackie saying "what's wrong with her" or something like that as I gather she just dashed past Patricia and didn't speak to her. Jackie drove away in her car alone.

34. Kim was walking towards the Property and we then got in my car and I drove to Bromley for my meeting with Donna."

She was cross-examined at some length by Counsel for both Respondents but she added nothing of significance to this evidence.

R1's Case

17. R1's case was set out in her Statement of Case dated 5th May 2014, the Appendix to the Statement of Case dated 16th February 2015, the amended Statement of Case dated 15th March 2015 and a Re-Amended Statement of Case dated 13th November 2015. There are no witness statements as such, but the Statements of Case are supported by a statement of truth, she verified them on oath before me and these statements stand as R1's evidence. She was cross-examined by Ms Daniels for the Applicant. The Applicant's version of events was put to her in some detail but she robustly denied them in every particular. She denied that she was present at the Property on 22nd August 2005, said that she was working that day and that the Transfer was signed some time earlier. Essentially, she said that the Applicant had already agreed to transfer the property and was well aware of what she was signing. She also said that both Nicholas Smith (her husband) and Shelley Friend (her daughter) were present when the document was signed, and Mr Smith witnessed the Applicant's signature. In her various Statements of Case, however, R1 had given no details of the date, time

or place at which she says the Transfer was signed, nor of any of the surrounding circumstances. She did not vouchsafe any such details when cross-examined by Ms Daniels. Both Nicholas Smith and Shelley Friend had made witness statements, but again no details beyond the fact of execution by the Applicant were given.

18. However, when Mr Gatty for R2 came to cross-examine her, she was rather more forthcoming. He put his questions to her on the basis that he was not clear in his mind as to what her case was on the execution of the Transfer, other than the fact that she denied the Applicant's version of events. This no doubt followed from the fact that she had neglected to provide any of these details in her own evidence. Thus it was that it was not until her cross-examination by R2 that she provided the information that the Transfer was executed at the Applicant's home, that it "*would have been*" on a Saturday, and in the kitchen, where all of them – that is, the Applicant, R1, her husband Nicholas Smith and her daughter Shelley – sat down to have a cup of tea. By this stage, the Applicant had already given her evidence, and therefore had no opportunity to comment on these details.

THE LEGAL ISSUES AND THE RELEVANT LAW

19. As I have already stated, the original application to the Land Registry arose out of R1's application to remove the Restrictions. The disputed application gave rise to the reference to the Tribunal with which I am concerned. The basis for the Restrictions was two-fold – (a) an alleged beneficial interest in the Property and (b) an alleged right to set aside the Transfer based on R1's undue influence and/or fraudulent misrepresentation. In this sense, therefore, the issues on the reference have always included both her alleged beneficial interest, and the circumstances surrounding the execution of the Transfer. As a result of the Tribunal's order of December 2014, the Applicant added a claim (under section 108(2) of the 2002 Act) to set aside the Transfer. However, there was at that stage no separate application to alter the register to give effect to any order under section 108(2). If the Tribunal were to decide to set aside the Transfer on the grounds of fraud or undue influence, it would still be necessary to remove R1's name from the proprietorship register. The Transfer itself does not of course create R1's legal estate – this is conferred by the fact of R1's registration in the register and the effect of section 58 of the 2002 Act. The Restrictions protect the Applicant but do not in any way restore her name to the

register. Equally, there was no application to alter the Charges Register to remove the Nat West Charge. Although R2 was joined to the reference, as Mr Gatty pointed out this was in a sense a pointless exercise, given that no substantive relief was sought against his client. However, R2 sensibly decided to accept the joinder, to enable it to test the Applicant's case and to put forward arguments regarding the relief sought by the Applicant against R1 and potential relief against R2. The Applicant failed to make any such further application to the Land Registry prior to the hearing before me.

20. Further, quite apart from the Applicant's attack on the validity of the Transfer by virtue of equitable fraud, the Applicant has also alleged that her signature on the Transfer was not validly attested. She has pleaded the absence of attestation, and provided witness statements which confirm her pleaded case. The Applicant has always been consistent in saying that R1 alone was present when the Transfer was executed in the short meeting between them on 22nd August 2005. It was of course for the Applicant and her advisers to make something of that fact, and they did not do so until the opening of the case, in response to certain observations by the Tribunal. Perhaps in consequence, the parties have focused their primary attention on the allegation of undue influence and fraudulent misrepresentation. However, in view of the formal requirements for the execution of the Transfer – under section 3 the Law of Property (Miscellaneous Provisions) Act 1989 ("the 1989 Act") – the allegation of non-attestation, if proved, fundamentally undermines the validity of the Transfer. Although the Applicant may be criticised for not placing more emphasis on this issue, nevertheless it cannot, or should not, have come as any surprise to the other parties that this point would eventually take centre stage. I shall consider the requirements of the 1989 Act and the applicable law in due course. Again, if the Transfer is found to be a nullity, that does not in itself affect R1's registration as proprietor – an application to the Land Registry is required to remove her from the register.

21. On 12th September 2016 – after the conclusion of the hearing – the Applicant made a further application to the Land Registry in form AP1 to remove the name of R1 as proprietor of the Property, and to remove the Nat West Charge from the Charges Register, on the grounds of mistake. At the date of this Decision, there has been no formal reference of those applications, presumably because the objection timetable has not yet been fulfilled and therefore no "dispute" has arisen within the terms of

section 73 of the 2002 Act. It follows that the Tribunal does not currently have jurisdiction to make any substantive order altering the register, although as soon as the Land Registry has referred the dispute – assuming that R1 and R2 object to the applications – that jurisdiction will arise. Given the statutory notice period for objections, that reference is likely to take place soon.

22. The current position is therefore as follows. I have heard all the evidence that is likely to be available and admissible in relation to the following issues: (a) the circumstances of the execution of the Transfer and subsequent registration of R1 as proprietor of the Property; (b) the relationship between the Applicant and R1; (c) the date of the Applicant's discovery of the Transfer; (d) the date of the Applicant's discovery of the Nat West Charge; (e) the dealings between the Applicant and R2 and the steps taken by the Applicant to set aside the Transfer. It appears to me, therefore, that I am in a position to make findings of fact on all the material factual issues that exist as between the Applicant and R1, and the Applicant and R2, even if I am not in a position at this stage to make all the substantive orders that may be required. Given the fact that all necessary parties have been joined to the existing reference, it would clearly be in the interests of all those parties, consistent with the overriding objective and, indeed, common sense, to resolve all those issues of fact within these proceedings, leaving the precise legal outcomes unresolved where appropriate. Once the new applications have been referred to the Tribunal, the appropriate substantive orders can be made and, if necessary, further evidence can be heard in relation to any material factual issues. The fact that all these issues are not currently before the Tribunal is ultimately the responsibility of the Applicant and that may have a bearing on the eventual costs order. However, the Tribunal's priority must be to resolve the dispute between the parties, in all its forms, to the greatest extent. Whilst R2 is of a course a public company with substantial resources, both the Applicant and R1 are private individuals without the same financial ability to conduct protracted rounds of litigation.

23. Before I consider the evidence in more detail, I shall summarise the legal issues that were raised by the parties, and will provide a brief summary of the relevant law to be applied. The legal issues are as follows:

a. Was the Transfer validly executed in accordance with the Law of Property (Miscellaneous Provisions) Act 1989?
b. If the Transfer was not validly executed, is the Applicant estopped from claiming that it is void?
c. Was the Transfer procured by fraudulent misrepresentation?
d. Was the Transfer procured by undue influence?
e. If the Transfer was voidable rather than void, has the Applicant lost the right to set it aside?
f. Did the Applicant have a beneficial interest in the Property at the date of (a) the Transfer and/or (b) the Nat West Charge?
g. If so, does her actual occupation of the Property at both dates give her an overriding interest binding on R2?

THE RELEVANT LAW

24. Section 3 of the 1989 Act provides that: *"(3) An instrument is validly executed as a deed by an individual if, and only if — (a) it is signed — (i) by him in the presence of a witness who attests the signature; or (ii) at his direction and in his presence and the presence of two witnesses who each attest the signature; and (b) it is delivered as a deed.* " If a document purporting to be a deed is executed other than in accordance with these requirements, it is of no effect. It has been held that a party may be estopped from raising the invalidity of a deed in certain circumstances, and the Respondents rely on Shah v Shah [2002] QB 35 and Fung Kai Sun v Chan Fui Hing [1951] AC 489 in this regard.

25. What constitutes a fraudulent misrepresentation is relatively straightforward. If the Applicant's evidence is accepted, clearly R1 misrepresented the nature of the Transfer in order to procure her signature. There is no real controversy as to the ingredients of fraudulent misrepresentation. I have been referred to Chitty on Contracts (32nd ed.) at 7-048 to 7-050.

26. The ingredients of undue influence are set out at Chitty on Contracts (32nd ed.) at 8-057 to 8-100, to which I have been referred. In this case the Applicant relies on presumed undue influence – that is, a presumption that R1 exercised undue influence over the Applicant in relation to the Transfer. She must establish that the Applicant

reposed trust and confidence in R1, and that the Transfer is a transaction that cannot "*reasonably be accounted for on the grounds of friendship, relationship, charity or other ordinary motives on which ordinary men act*" per Lindley LJ in Allcard v Skinner (1887) L.R 36 Ch. D. 145 at 185. There is no dispute between the parties as to the relevant law to be applied.

27. The Respondents argue that the Applicant has lost the right to set aside the Transfer, whether for misrepresentation or undue influence, on a number of grounds.

    a. First, because a party loses the right to rescind where a third party (R2 in this case) has acquired an interest in the subject matter of the contract. Chitty on Contracts (32nd ed.) at 7-138, Emmett & Farrand on Title at 4.011, Re LG Clarke 1 Ch 1121 at 1136A-B, White v Garden 91851) 10 CB 919 and Babcock v Lawson (1880) 5 QBD 284 at 286 are cited.
    b. Secondly, because the Applicant has affirmed the transaction and is estopped from challenging it – see Chitty at 7-132 to 7-133, and 8-101.
    c. Thirdly, because the Applicant has delayed too long in seeking her remedy. Although the Limitation Act 1980 ("the 1980 Act") does not apply in terms to an action for rescission in equity, it applies by analogy – Oelkers v Ellis [1914] 2 KB 139 at 149-50 and Armstrong v Jackson [1917] 2 KB 823 at 830-831. The Respondents accept that the limitation period (by analogy) may be postponed under section 32 of the 1980 Act until the claimant has discovered the fraud or with reasonable diligence could have discovered it. In this case, they say, the Applicant discovered the fraud (if it occurred) soon after the execution of the Transfer.

28. Considerable argument was addressed by Counsel relating to the position of R2 in the event that the Transfer was found to be voidable. The Applicant relied on the fact that the Applicant was in actual occupation of the Property – within the meaning of paragraph 2 of Schedule 3 to the 2002 Act – at the time of the Nat West Charge (and the Southern Pacific charge that pre-dated it). She argued that her right to set aside the Transfer was a "mere equity", which was nevertheless capable of binding successors in title by virtue of section 116 of the 2002 Act. Ms Daniels referred me in particular to Williams & Glyn's Bank v Boland [1981] AC 487 at 504 in this regard.

.She also invited me to distinguish Mortgage Express v Lambert [2016] EWCA Civ 555 – a case relied on by Mr Gatty for R2 – which suggests that a person in the position of the Applicant (who had lost the right to set aside a transaction for delay or estoppel) would not have an "interest" capable of being protected by actual occupation.

29. Although, as I have said, the Restrictions were based at least in part on a claim that the Applicant had a beneficial interest in the Property, it is fair to say that the parties did not focus on this aspect until the closing arguments. This may be explained by the somewhat evolving nature of the Applicant's case, and, in particular, the possibility that the Transfer might be regarded as void, rather than voidable. The preceding brief summary of the legal principles largely reflects the way that the case was put in the skeleton arguments, but, as will become clear, the critical legal issues that I must resolve developed during the course of the hearing.

THE EVIDENCE

30. The Applicant and R1 put forward two diametrically opposed versions of the same central event, the occasion on which the Applicant signed the Transfer. Unfortunately, they cannot both be telling the truth. Necessarily, therefore, my findings will be influenced by my assessment of the witnesses, and also by the extent to which one version or the other accords with the inherent probabilities of the situation and, if available, the contemporaneous documents. The allegation made by the Applicant against R1 is a serious one. She accuses her own daughter of deceit and abuse of trust. I bear in mind the guidance given in the case of In re H and R (Minors) [1995] UKHL 16 with regard to the standard of proof. A serious allegation such as this must be supported by cogent evidence. In the words of Lord Nicholls in the cited case at paragraph 74: *"Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established"*

THE APPLICANT'S EVIDENCE

31. The Applicant's evidence was not entirely satisfactory in all respects. In particular, there is an inconsistency between her pleaded case and witness statements on the one hand, and her oral evidence on the other. I am referring to the timing of her discovery that R1 had obtained a transfer of the Property – obviously an important issue. This is how it is pleaded at paragraph 21 of her Amended Statement of Case: *"In or about June 2009 [R1] told the Applicant that the Applicant would have to pay the entire monthly mortgage installment* [sic] *of £894.78 or would have to vacate the Property. The Applicant understood as a result of this information, and for the first time, that the Respondent had procured the transfer of the title to her without her knowledge and that the Property had been mortgaged to [R2] to secure the sum of £160,000..."* At paragraphs 29 to 34 of in her first witness statement she describes the events of 22nd August 2005 and the execution of certain documents which, she now realises, included the Transfer. At paragraph 35 she says this: *"I discovered some time later that those "documents" were the TR1 transfer of the Property to [R1}. I don't know what the other documents she got me to sign were."* She does not indicate when she discovered the fact that she had executed the Transfer save to say that it was "*some time later*". However, she returns to the issue at paragraph 42 of the same statement, after explaining that she has seen a letter from iGroup dated 23rd August 2005 stating that her mortgage account had been redeemed. She says this: *"I am not certain whether or not I received this letter at the time, but looking at it now it just says that my account has been redeemed, but no mention is made about any transfer of the Property."* She continues in paragraph 43 as follows: "*At some point later, I met with [R1] because I had heard rumours that she had taken out a mortgage over the Property, had paid off my mortgages and the house was now in her name. I confronted her about this and she confirmed it was true and that the Property was now in her name. I was completely shocked. I said OK then, so now I can cancel the direct debits. I don't need to pay the mortgage or the loan. She said oh yes you do mother, I've had to pay them, you agreed to pay half the mortgage and so you have to finish paying your half and clearing the London Mortgage Company loan. I don't know how much was owing to London Mortgage Company at that point, nor did she tell me how much she had taken out on a new mortgage, but she told me I now had to pay her £300 per month.*"

32. Although the Amended Statement of Case asserts that she did not discover the Transfer until 2009, the witness statement is less definite, suggesting that the Applicant did not find out about the Transfer until an unspecified) period of time had elapsed. However, it was put to her in cross-examination that she must have been aware of the Transfer when she cancelled the direct debits to iGroup and LMC, and began to pay R1 £300 per month. This occurred no later than the beginning of September 2005 – no more than a week or so after the Transfer had been executed. She initially said *"that can't be right. I didn't know the document was a transfer to her. She told me I had to change the direct debit. I didn't pay rent. I paid half to the mortgage and half to the loan."* Her plea at paragraph 21 of the Amended Statement of Case was put to her and it was suggested that she must have discovered the existence of the Transfer in August 2005. Her response was: "*I suppose so*".

33. If the Applicant knew of the Transfer in August 2005, this might be important for a number of reasons. First, it has a bearing on the position of R2, in that the Nat West Charge was created after the Applicant first became aware of the Transfer. This might have an effect on the rights and priorities as between the Applicant and R2. Secondly, it may reflect on the Applicant's case generally, in this sense. If she discovered the Transfer within a matter of days, and did nothing about it, this might support R1's evidence that the original agreement, at the time of the initial purchase of the Property in 2000, required her to transfer the Property after three years. This would be one possible explanation for her inaction.

34. Mr Morrell, for R1, cross-examined the Applicant extensively on a letter dated 29th April 2010 (at page 206 of the Supplementary Bundle) which purported to be written by R1 to Halifax Mortgages. This letter (and the letter at page 210 of the same bundle) were sent at the time that the Applicant was trying to remortgage the Property in order to safeguard her continued occupation, after R1 had defaulted on the Nat West Charge. In her evidence she stated that, due to her age and lack of earning capacity, she needed some commitment from R1 to transfer the Property to her in order to satisfy the proposed lenders. It was put to the Applicant that she had simply forged the letter of 29th April 2005, using the letter at page 210 as a template. It was put to her that the signature had been photocopied from the other letter. During this line of questioning R1 (through her Counsel) accepted that she had written the letter at

page 210 (dated 5th May 2010), not having previously referred to it or to the earlier letter in her various statements. The Applicant denied the allegation. It seems to me that Mr Morrell's suggestion is unsustainable for a very simple reason. The letter at page 210 (alleged to be the template) is dated 5th May 2010 – some six or seven days after the date of the letter at page 206. I cannot see how the Applicant could have copied portions of a letter that had not yet been written. In any event, if R1 was prepared to write the letter of 5th May 2010 (which she agreed was intended to mislead the lender) there is no reason why she would not have agreed to write another letter for the same purpose and to similar effect.

35. Overall, and despite the matters I have referred to, I found the Applicant to be a credible witness. Furthermore, she has always been entirely consistent in her recollection of the circumstances surrounding the execution of the Transfer in 2005, and the original purchase of the Property in 2000. Her case was set out fully in the letter to R2 dated 11th April 2011, and again in the subsequent letter of 22nd May 2011. This makes it clear that she had been persuaded by R1 in 1999 to buy the Property; that she and R1 would share the mortgage payments; that R1 would inherit the Property on her death. She was clear that R1 had tricked her into signing the Transfer, and even used the term "fraud" in relation to her conduct. She was clear that there was no tenancy, merely a verbal agreement that they would share the mortgage payments. Her version of events as stated in these letters is no different from the evidence she has given to the Tribunal. Furthermore, it is apparent that this is exactly the same version of events that she gave to her solicitors, Webstert Dixon, in 2010, when she made the first attempt to enter restrictions against the title. Unusually, the Tribunal has been able to read the documents in Webster Dixon's file, a file which under normal circumstances would be protected by a claim to legal professional privilege. This came about because the Respondents took the view that the Applicant had waived privilege in the file. They argued that the Applicant's Counsel, in opening the case, had referred to advice received from Webster Dixon in 2010 that she should make payments to R2 to avoid possession proceedings under the Nat West Charge. These payments are relied on by R2 in support of a claimed estoppel. The Respondents submitted that the file should be disclosed in its entirety. I gave Ms Daniels, appearing for the Applicant, the opportunity to consider overnight whether or not the Applicant wished to assert privilege in the file, in which case I

would have to rule on the matter. However, at the beginning of the following day the Applicant voluntarily disclosed the entire file. The file contains a number of notes recording the Applicant's instructions. These demonstrate that the instructions given to her solicitors in 2010 are entirely consistent with her evidence in this Tribunal, and the facts as she stated them in her letters to R2 in 2011. The details she gives of the events of the 22nd August 2005 and the terms of the original agreement with R1 in 2000 are virtually identical. Of course, in one sense this is self-serving, in that these are instructions from the Applicant, untested in any way. However, she was also quite unshaken during the course of her cross-examination by Mr Morrell and Mr Gatty in relation to the central factual issues and remained consistent throughout. However, she was prepared to accept that she was wrong on occasions – such as on the timing of her discovery of the Transfer. She readily admitted that she had been mistaken when stating earlier in the proceedings that she had not met Mr Smith (R1's husband) prior to August 2005. Her willingness to concede points added to her credibility.

R1'S EVIDENCE

36. By contrast, I consider that there are a number of unsatisfactory features as regards both the way in which R1 has presented her case and her evidence generally.

    a. R1's original statement of case dated 25th April 2014 is at best disingenuous and at worst deliberately misleading. For example, this passage which deals with the central issue in the case: *"..... in 2005 I asked Barbara whether we could now transfer the property into my name and she agreed. I arranged a mortgage to cover the outstanding mortgage plus Barbara's outstanding £15,000 loan which had been secured on the property. Barbara agreed to pay an additional £150 per month to me to cover the extra payment for the loan making a total of £300 per month."* There is no mention of the fact that the transfer of the Property and the remortgage was part and parcel of a general re-financing of her property portfolio, and that the remortgage advance secured on the Property by remortgage was well over double the amount originally borrowed by the Applicant. Nor is there any mention of the fact that the additional amounts borrowed against the Property were used to discharge a loan taken out by R1 from her employer, Aston Rothbury, which was pressing for payment. The deliberate impression given by the Statement of Case was of

a simple like for like remortgage of the Property, not a Buy to Let mortgage based on her total rental income of more than £1000 per month..

b. Of course, once the Applicant had seen the MTC file, the true picture became apparent to her. However, it is clear from examining the history of the proceedings that R1 deliberately failed to disclose relevant documents and only produced the MTC file as a result of a series of orders by the Tribunal for specific disclosure sought by the Applicant. The whole sorry saga can be tracked through the Orders at pages 329-355, and the correspondence at pages 359-396 of the Core Bundle. Indeed, the matter initially came on for a full hearing on 4th December 2014, but was adjourned at R1's request because she said that she had been "ambushed" by the Applicant's argument that she had a subsisting beneficial interest in the Property. She appeared by Counsel at that time, and his Skeleton Argument is with the papers. She sought to strike out the Applicant's claim to the extent that it depended on a plea of non est factum. By the time of that hearing, only four documents from the MTC file had been disclosed. Had it not been for that adjournment, no doubt the case would have been decided on the basis of the existing disclosure given by R1, which did not include any documents relating to the other properties, or the true purpose of the remortgage. These facts were in the exclusive knowledge of R1. By this stage, she had obtained the full file from MTC (the receipt is dated 1st December 2014), yet she would have been prepared to fight the case based on the existing Statement of Case and incomplete disclosure.

c. Even after she had received the MTC file, she filed further Statements of Case in February, March and November 2015, yet did nothing to correct or amplify her original pleaded case. Instead, she continued to withhold relevant disclosure until eventually ordered to produce the file. Her stance can be judged from her Amended Statement of Case served in March 2015 in which she responds as follows to the Applicant's claim that she has been unable to obtain a copy of the MTC file because R1 was the client: *"Regarding the original conveyancing file, neither the Applicant nor her solicitors have ever asked me for my authority to retrieve this"*. By this time, she was herself in possession of the file and was under a duty to disclose it.

d. R1 denies that the Applicant has ever reposed "trust and confidence" in her, as her defence to the claim of presumed undue influence. In support of this, she

denied that she had anything to do with the Applicant's purchase of the Property save for accompanying her mother to a meeting with solicitors, and introducing her to the solicitors and mortgage brokers. She insisted that "*I was not involved*". However, a document was produced (see page 166 of the Supplementary Bundle) which suggests something very different. This is a note from R1 to the Applicant at the time of the completion of the original purchase. Clearly R1 was acting as the intermediary between the Applicant and the conveyancer, perhaps not surprising since R1 worked as a legal secretary for that firm (Dhama and Douglas). The letter also makes clear that R1 had made a number of payments relating to the purchase – including, it would seem, the mortgage brokers' commission – for which she was reimbursed. Far from not being involved in the transaction, she was clearly heavily involved in a number of respects.

e. Throughout her evidence R1 sought to convey the impression that she was unschooled in commercial and property matters. She professed not to have any knowledge of conveyancing procedures, despite the fact that she had worked for several solicitors' firms. However, the documents on the MTC file (see for example the correspondence with Claire Shearmur around the time of completion) – and indeed the document referred to d. above – demonstrate a familiarity with the financial and legal aspects of buying and mortgaging property that is quite at odds with this impression. R1 is someone who buys, sells and mortgages investment property and is not the novice she claims to be.

f. This deception fed into other aspects of her case. For example, in her Statement of Case, she had referred to an alleged occasion in 2008 when the Applicant had asked R1 to buy her an apartment in Spain and became agitated when she had refused. She went on: "*I am only a secretary with average earnings and I explained that I was not able to afford to purchase the additional property.*" In fact, R1 owned at least three properties at this time, all charged with Buy to Let mortgages, generating (in 2005) an income of approximately £1100 per month (see the Mortgage Illustration at page 21 of the Core Bundle).

g. R1 has throughout these proceedings maintained that she paid half the iGroup mortgage instalments relating to the Property – see for example her response

(dated 15th March 2015). She initially accused the Applicant of misleading the Tribunal by failing to disclose her bank statements for Nat West account number 14048647, stating that "*If she is willing to produce these, or the Tribunal can order the Applicant to do so, this will clearly show the payments made by me to the Applicant in respect of my half of the mortgage payments.*" The Applicant did produce these statements, from 2002 onwards, and contended that they proved that she had borne the entire costs of the repayments. On 20th March 2015 the Tribunal ordered R1 to disclose *"such of her bank statements as evidence payment by her of ½ the mortgage each month from 21st July 2000 to date..."* No such statements were produced, and R1 informed the Tribunal at a further hearing on 2nd October 2015 that *"there are no bank statements that evidence those payments."* In cross-examination she said that she *"did not feel the need to produce the bank statements"*. In fact, she sought to demonstrate by reference to the Applicant's statements that she had regularly made cash payments into the account from a particular branch of the Nat West close to her work. She was in fact only able to identify a handful of such credits, in different amounts. All in all, therefore, she was simply unable to make good her claim that she had contributed to the mortgage repayments between 2000 and 2005, and chose not to disclose her bank statements. It seems to me plain that she was unable to prove such payments because they had not been made.

h. On a number of occasions she has told lies to third parties. Perhaps the most blatant lie was in the letter (page 210 of the Supplementary Bundle) which she wrote to Halifax Mortgages in 2010. At this time the Applicant was paying the monthly instalments on the Nat West mortgage secured on the Property so as to ensure (according to her evidence) that possession proceedings were not commenced. She was trying to arrange a mortgage for herself, so as to repay R1's liability to R2. In that context, she asked R1 to transfer the Property back to her. She refused, but agreed to sign a letter in these terms: *"I confirm that it is my intention to transfer to my mother, Mrs Barbara Ann Phillips, [the Property] for a nil value. I have yet to obtain advice on the CGT position but believe that this will not affect the proposed nil consideration amount*". She was asked about this letter and whether she did indeed intend to transfer to her mother at that time. She readily accepted that she had no such intention.

Other examples exist. For instance, on 6th September 2005 (see page 275 of the MTC Bundle) her solicitors wrote to the intended mortgagee (Southern Pacific) as follows: "*In accordance with Special Condition 50 of the offer we confirm that the tenancy is covered by a satisfactory Assured Shorthold Tenancy Agreement pursuant to the Housing Act 1988.*" This information can only have derived from R1, MTC's client, yet it was completely untrue. It was, however, a necessary lie, because such a tenancy was a pre-requisite of the Buy to Let mortgage.

i. The application form submitted to R2 on 5th August 2008, prepared by a mortgage broker called Elizabeth Atkins, is another example of R1's willingness to tell lies. This was the application which led to the advance of £159,000 secured by the Nat West Charge. This was another Buy to Let mortgage. The mortgage conditions were not in evidence but I think it is common ground that these would include a requirement that the Property was or would be let on an Assured Shorthold Tenancy – a term of the Southern Pacific lending in 2005. In the mortgage application form the answer "*yes*" has been given to the question "*Is any part of the property to be let?*" Under "*State the term in years*" the answer is "*1*". Under "*State rental income*" the answer given is "*13,200*". None of these answers is true. Although R1 maintains that she was charging her mother "rent", there was never any formal tenancy agreement, and she agrees that her mother would be entitled to remain in the property for life, subject, on her case, to paying the required amount. That amount, on her case, was £150 per month, not £1100 per month or £13,200 per year. R1 claims that the mortgage broker must have misunderstood her instructions, but that is a convenient but improbable explanation.

j. The same point can be made with regard to the statement in MTC's letter dated 15th June 2005 (which the Applicant denies having received) that the Applicant had executed a trust deed declaring that she held the Property on trust for R1, but the deed had been lost. These instructions can only have come from R1, MTC's client. There was never any trust deed, even on R1's case. She sought to explain the solicitor's statement by saying that they had "misinterpreted" her instructions. It is difficult to see how such a clear

statement could have been made unless those were the instructions given by her. The more likely explanation is that R1 was not telling the truth.

k. As I have already pointed out, I find it very surprising that R1, in the course of the four separate documents submitted by her as Statements of Case, had never prior to the hearing given any details of the signing of the Transfer, given that this was the central factual issue in the case. In the event the only positive evidence from her as to the execution of the Transfer emerged in the course of Mr Gatty's cross-examination on behalf of R2. Equally, neither the attesting witness, Mr Smith, nor R1's daughter Shelley, gave any details in their short witness statements. When they came to give their evidence, however, they all said that the document was executed on a Saturday.

l. Throughout her evidence she demonstrated a considerable animus towards her mother. At one point she described her as greedy, and tried to characterise her as a successful businesswoman who could easily afford the repayments on the Nat West remortgage. This is what she said in her original Statement of Case: "*After being unemployed for a year and having spent all my savings and borrowed extra money to meet my obligations in about July 2009 I visited Barbara and explained that, although I was about to start a new job, I had no savings left and I was unable to make the payments and she reluctantly agreed. Barbara runs 3 successful businesses (2 children's nurseries and also rent rooms to foreign students) and I believed she would be very capable of making the payments. Barbara refused to speak to me after that but then sent a letter to my home. I did not read the letter but I am told that she had said that she no longer considered me to be her daughter and other spiteful things*". In the event, of course, the Applicant made these monthly payments of £894 for some 18 months which, according to her, used up all he available savings. In cross-examination, however, R1 admitted that she was herself able to make these payments from her other resources but "*I didn't feel the need to tell her.*" Given that the Property was the Applicant's home, and the whole purpose of the original purchase was (as R1 accepts) to guarantee her ability to remain there for life, this demonstrates R1's disregard for her mother's needs and the arrangement that they had made.

INHERENT PROBABILITY – THE RESPONDENTS' ARGUMENTS

37. In addition to a sustained attack the Applicant's credibility, both Mr Morrell for R1, and Mr Gatty for R2, submit that it is inherently improbable that the Applicant's signature on the Transfer could have been procured by R1 in the manner alleged. They say that R1 could not possibly have been confident that she would ever be able to deceive the Applicant as to the true purpose of the document she signed. In particular they rely on the following points:
    a. MTC wrote a letter to the Applicant on 15th June 2005, informing her about the proposed transfer, and R1 could not be confident that the letter would not be received by the Applicant;
    b. She could not be confident that MTC would not subsequently contact the Applicant regarding the proposed transfer – indeed Claire Shearmur actually spoke to her by telephone on 4th July 2005 according to the telephone attendance note.
    c. She would have been reckless to wait until 22nd August to obtain the Transfer. By this date she had already instructed MTC to discharge the two charges on the Property, which she would not have done if the Applicant had not already executed the Transfer.
    d. The Applicant's case necessarily means that MTC was a knowing party to the deception on her.

38. These submissions depend to some extent on the contents of the MTC file, which provides a picture of the transaction as it developed. However, the MTC file itself is of questionable integrity. I have already mentioned some of my reservations about this file, and the manner in which it was disclosed. It was obtained from MTC by R1 in December 2014, shortly before the first (abortive) hearing before Judge Michell. When she instructed McMillan Williams to act for her she gave them what she said was "the file". She removed instructions from that firm, but apparently it retained the MTC file as part of its lien for unpaid fees. The Tribunal made an order on 1st October 2015 requiring McMillan Williams to release the file to the Applicant's solicitors ("TWM"), and this was done on 21st October 2015. However, concerns were expressed by TWM as to the contents of the file. In particular: "*1. We note that the green pocket file containing the papers is not labelled and the papers are loose therein. Is this how you received the file.....4. Has anything been removed from*

the file? Some paperwork that we would expect to see in a conveyancing file for the transfer of a property is not in the file." McMillan Williams responded on 30th October with the following answers; *"1. Yes this is how we received the file. 2. Mrs Smith provided the file directly to us. 3. We would have been provided with this file sometime in November/December 2014. 4. Nothing has been removed from this file."* To my mind, the green pocket file – which I have inspected – cannot possibly be the original MTC conveyancing file. Quite apart from anything else, it has no name or file reference on it, the documents are out of order and some are obvious copies, there are no central staples for the hole-punched items, and it contains documents which are unrelated to the original transaction such as R1's RX3 application in 2013. It is instructive to compare this file with that of Wilmotr Dixon LLP, the Applicant's former solicitors. This file was produced at the hearing before me, as a result of representations made by R1 and R2, and I shall refer to its contents in another context. However, it demonstrates what a solicitor's file should contain. The MTC file includes a "receipt" dated 1st December 2014, signed by R1, which states that she has received "*the enclosed conveyancing documents. These documents are the original documents.*" This "receipt" does not identify the firm or person from whom the documents are received, nor the nature of the documents themselves. It is a very curious piece of paper altogether.

39. For whatever reason, no solicitor from MTC was called to give evidence, either as to the transaction itself, or as to the contents of the file. I was told that MTC has ceased to exist as a firm, but there is no reason to think that the individual solicitors could not be contacted. Claire Shearmur, in particular, could have been called to explain some of the items in the file. Although it would no doubt have been open to either side to contact her, it would be more usual for her to be called to give evidence by her client, R1, which would avoid any privilege issues, if they existed. In a case of this nature, where R1 relies heavily on two particular documents in the MTC file – the letter of 15th June and the telephone attendance note of 4th July – it is difficult to understand why R1 did not call her to explain them. If attempts were made to call her I was not told about them. A simple Google search reveals that she was working for a firm in Guildford until recently.

40. In all the circumstances, I am bound to treat the documents in the MTC file with a considerable degree of caution. R1 relies heavily on the attendance note dated 4th July 2005 which purports to record a conversation with the Applicant in which she agrees that she holds the Property on trust for R1. The Applicant denies that this conversation took place, and of course Claire Shearmur has not given evidence to explain her note. I cannot place much reliance on it, for two reasons. First, it is highly improbable that the Applicant would acknowledge that she held the Property on trust for R1. It is common ground that it was always intended that she would have the right to reside in the Property for life – she says rent-free, R1 says on the basis of a rent payment. However, the central purpose of the purchase of the Property was to provide her with security in her home. It is highly unlikely that she would not have mentioned this fact, even if she understood the concept of a trust. Secondly, the provenance of the attendance note has not been demonstrated. Since the MTC file in its original form is not available, it cannot be known whether this is indeed a genuine document. It may be noted that in the two other telephone attendance notes that have been produced, Claire Shearmur identifies herself by her initials, not by her full name. In my judgment, there are too many uncertainties regarding this document to enable me to prefer it to the oral testimony of the Applicant, who denied that the conversation ever took place.

41. The only other documents that could amount to notice to the Applicant of the proposed transfer is the letter of 15th June 2005. Since the file in its original form has not been produced, it is difficult to draw any conclusions as to whether it was actually sent. In the form contained in the green pocket file, it is a photocopy of a printed letter with signature. There are two copies in the file. The Applicant says that she did not receive the letter, and I accept that evidence. Accordingly, the letter was either never sent, or went missing. There are other aspects of MTC's conduct which raise questions. For example, Claire Shearmur wrote to both mortgagees, iGroup and LMC, representing that she acted for the Applicant, and requesting a redemption statement on behalf of her "client". Manifestly, she had never been instructed to act for the Applicant, and the statement to the mortgagees was untrue.

42. Both Mr Gatty and Mr Morrell submit that the Applicant's case necessarily means that MTC were complicit in the fraud. They say that it is inherently improbable that a

firm of solicitors would be involved in fraud, and therefore the Applicant's case is unlikely. It seems to me that there are other explanations. For example, it is apparent that MTC were never instructed to act for the Applicant in redeeming the existing charges on the Property, yet Clare Shearmur held herself out as having that authority. She may simply have been persuaded by R1 that the Applicant had agreed to the transaction, and was less than scrupulous in satisfying herself that this was true. The telephone call recorded in the attendance note – if it took place – might have been with someone impersonating the Applicant. R1 might have offered to hand deliver the letter of 15th June. There are a number of possible scenarios which do not involve a finding of fraud – as opposed to incompetence and breach of professional duty – on the part of MTC.

INHERENT PROBABILITY – THE APPLICANT'S CASE GENERALLY

43. In assessing the different factual versions put forward by the Applicant and R1, I must have regard to the inherent probabilities generally. According to R1's statement of case the purpose behind the original purchase was as follows: *"Many years ago Barbara asked me to purchase her council house at 22 Salters Hill as an investment so that she could live there rent free,..... In 2000 Barbara again asked me and she also asked two of my sisters, Kelly Burgess ..... and Wendy Phillips, whether we wanted to buy the house either individually or together but both Kelly and Wendy declined. Again I explained to Barbara that I could not afford to pay the whole of the mortgage without some contribution from her. We agreed I would buy the property and she should pay me a rent of £150.00 per month and that I would be responsible for the upkeep ..... and she would be responsible for the internal decoration. We also agreed that the property should initially be purchased in Barbara's name in order to obtain the council's discount and it would then be transferred to me after the discount period of 3 years had elapsed".* The Applicant comments on this allegation at paragraphs 11 and 12 of her first witness statement as follows: *"I did not ask Jackie to purchase the Property as an investment so I could live in it rent free as she claims in her response to my statement of case. It was she who approached me to say the Council were reducing the discount and suggested that I buy it ... In January 2000 Jackie asked me again. I said if she would guarantee to pay half the mortgage I would make a Will and leave her the Property on my death. She agreed. We agreed it would be my home until I died and that I would buy it in my sole name as the tenancy was in*

may name. As far as I can recall after this length of time, the rent was approximately £100 per month. Jackie said the rent would go up and I would always have to pay it, whereas with a mortgage it would be paid off at some point and then the house would be mine and I wouldn't be a tenant. I also wanted to make home improvements which wasn't really possible as a tenant." It is not disputed by R1 that the Property was purchased for £33,200, which represented a discount of £48,000 (or 60%) of the then market value. The discount was, of course, attributable solely to the Applicant's tenancy.

44. The Applicant and R1 do not agree on the details of the agreement that preceded the purchase of the Property. However, whichever version is accepted, it was clearly not agreed or intended that Applicant's security of tenure would be compromised in any way. She had an existing tenancy which would entitle her to remain at the Property for life is she so wished. Whether the impetus for the purchase came from the Applicant or from R1, manifestly the Applicant's right to remain in the Property for life was fundamental. Accordingly, R1's explanation of the agreement makes no sense. The Applicant already had the right to remain in the Property and the ability to meet the rental payments. She would have absolutely nothing to gain from an agreement to pay R1 £150 per month "rent" (£50 more than she was currently paying) and then to pass the Property to R1 after three years, obtaining no benefit whatsoever from the effective contribution of £48,000 to the purchase price. Furthermore, she would substitute one landlord (Lambeth) for another (R1). Why would she suggest such a one-sided arrangement? It is far more likely that the Applicant's version is correct. It at least makes some sense. She would become the owner of the Property, which would give her complete security. Because the costs of the mortgage exceeded the rent she was paying, she needed some help to manage that, which R1 agreed to pay in the form of one-half of the mortgage repayments. From R1's point of view, by contributing to the mortgage, she would eventually obtain the Property outright. This still worked very much in her favour, and is consistent with her having persuaded her mother to exercise the right to buy. There was much more in the deal for her than for the Applicant. This is not to say that it was not open to the Applicant to make any agreement with R1 that she chose, however disadvantageous. However, the more disadvantageous that it would be, the less probable it is that such an agreement came about.

45. Furthermore, the agreement alleged by R1 is simply not borne out by proven facts. First, there is no evidence that any payments of £150 per month were ever paid by the Applicant to R1. The only payments that can be established are those which the Applicant made directly to the mortgagees between 2002 and 2005. If R1's version of the agreement is to be accepted, the payments of rent would be apparent. Secondly, on her case the Property was to be transferred to her after three years – after the statutory period had elapsed – yet no transfer was effect for over 5 years. In the meantime R1 was acquiring other properties and borrowing money against these properties as security. Nothing in the evidence, therefore, supports R1's case on the original agreement.

46. R1's case as to the events of 2005 are equally improbable. By this time, she had long since ceased to make any regular payments towards the Applicant's mortgage, despite having (on her own case) agreed to pay half. She had not sought a transfer of the Property in 2003 (after three years had elapsed) but waited until 2005. By this time she was seriously over-extended financially, having borrowed heavily, including a short-term loan of over £190,000 from her then employers. It appears that unless she was able to use the available equity in the Property, she would have been unable to repay these loans and service the debt. She therefore had every possible incentive to acquire the Property, whereas the Applicant had nothing to gain, and much to lose, by transferring the Property to R1.

OTHER EVIDENCE

47. In addition to her won evidence, the Applicant relied on witness statements of a neighbour, Kim Keeley; her son, Richard Phillips; and one of her daughters, Kelly Burgess. All three witnesses gave oral evidence and were cross-examined. She also served a hearsay notice in respect of the evidence of another neighbour, Patricia Goodman. Both Mrs Keeley and Mrs Goodman stated that they had seen R1 at the Applicant's house on 22nd August 2005. The evidence of Mr Phillips was largely hearsay, as to his understanding of the arrangements made between R1 and the Applicant. Mrs Burgess says that she was party to discussions in 2000 between the Applicant, R1 and another sister, Wendy, with regard to the purchase of the Property from Lambeth. At one point the three sisters discussed sharing the costs of the

mortgage on the Property, but eventually it was R1 who said that she would arrange a loan on mortgage for herself, because the Applicant was too old to obtain one for herself. She was in daily contact with the Applicant at this time, and her mother told he that she had agreed to share the mortgage repayments equally with R1, and that she would pass the Property on to her on her death.

48. In addition to the evidence of R1 herself, her husband Nicholas Smith and her daughter Shelley Friend made witness statements upon which they were cross-examined. These statements were little more than pro forma, stating that they were "*in attendance*" when the document was signed by the Applicant, with Mr Smith saying that he witnessed the signature. No other details are given – where the document was signed, or at what time, or on what day. They both add this: "*In my opinion [the Applicant] would have been in no doubt that this was a transfer form and the property was being transferred from [the Applicant's] name to [R1's] name*". Richard Phillips – the Applicant's ex-husband – made a witness statement dealing with an issue (when the Applicant had first met Nicholas Smith) which was of no real relevance. He did not attend.

FINDINGS OF FACT

49. In the light of the evidence, and the other factors I have mentioned, my findings of fact are as follows:
    a. The agreement made between the Applicant and R1 in 2000 was as stated by the Applicant – namely, that she would retain the Property during her lifetime, and would pass it on to R1 on her death, subject to R1 paying one-half of the original (iGroup) mortgage. It was never agreed that she would be R1's tenant paying rent.
    b. The initial purchase of the Property was suggested and encouraged by R1, who was working as a legal secretary with Dharma and Douglas at the time, dealt with all the conveyancing aspects of the purchase and introduced the Applicant to the mortgage broker.
    c. The Applicant placed trust and confidence in R1 in connection with her dealings with the Property and relied on her experience and understanding of mortgage lending in that respect.

d. R1 failed to make any payments towards the mortgage after 2002 although very occasional credits were made by her to the Applicant's bank account. There is no documentation to support her claim that she paid the required sums prior to 2002 and I do not have sufficient material to make a finding on this point.

e. The Transfer was executed on Monday 22nd August 2005 at the Property. R1 came to the Property at around lunchtime and Kim Keeley saw her leave. The fact that R1 sent an email to MTC at 11.52 does not mean that she could not have travelled to Gipsy Hill during her lunch break.

f. Only R1 and the Applicant were present in the house at the time of execution. The signature of the "attesting" witness was placed on the document at some other time.

g. R1 induced the Applicant to sign the Transfer by telling her that it was something to do with mortgage rates, and she need not worry about it. She deliberately concealed parts of the document to prevent the Applicant from understanding what it was.

h. The Applicant was not aware that the document that she signed was a transfer of the Property to R1.

i. At the time that she signed the Transfer, the Applicant continued to repose trust and confidence in R1 with regard to dealings with the Property. She would not have signed the Transfer without reading it if she had not trusted R1 in relation to the Property and legal matters generally. Indeed, R1 actually accepted this in cross-examination, stating that she did not repose any trust or confidence in the Applicant.

j. The Applicant did not receive the letter from MTC dated 15th June 2005 and did not speak to Clare Shearmur or anyone else at MTC on 4th July or at any other time before , during or after the transaction.

k. The Applicant never gave instructions to MTC to act on her behalf in regard to the redemption of the iGroup and LMC mortgages and Clare Shearmur falsely represented to the lenders that she had done so.

l. The Applicant became aware of the Transfer shortly after it had been executed and took no steps to set is aside until 2010 at the earliest.

m. When she confronted R1 about the Transfer, probably in late August 2005, she was asked by R1 to make payments of £300 per month to her, and she agreed.

This was the equivalent of the mortgage payments that originally applied when the Property was first acquired in 2000. It is not clear the extent to which the Applicant understood that the Property had not only been transferred to R1, but that it was subject to a different charge and for a different amount. Her evidence betrayed considerable confusion about what she had actually understood to have happened in August 2005 and how it affected her. It seems that it was only the discovery that R1 had remortgaged the Property to R2 that brought home to her the effect of the August 2005 transaction.

n. In 2009 R1 told the Applicant that she had remortgaged the Property to R2, that she was about to lose her job, and that she could no longer afford to keep up the mortgage payments. She told the Applicant, in terms, that the Property would be repossessed, and the Applicant evicted, unless she agreed to pay the monthly instalments.

o. The Applicant made payments of £894.78 to R2 for approximately 18 months. She ceased to do so when she had used up her savings, and R1 re-commenced payments in order to prevent R2 from effecting a sale of the Property by auction at a guide price of £160,000.

50. In reaching these conclusions I have largely rejected the evidence of R1 and her husband and daughter, and have preferred the Applicant's evidence wherever there is a conflict. I have already given my reasons for finding R1 to be an unsatisfactory witness. I found her answers in cross-examination to be designed to assist her case rather than genuinely truthful answers. . She was presenting an entirely false image of herself, and indeed a false image of the Applicant, in order to explain the transactions. I regret to say that I cannot accept the evidence of Mr Smith and Ms Friend either. I think it highly significant that their original statements contained not a single detail of the occasion when they say the Applicant signed the Transfer. However, after R1 had stated in cross-examination that it was on a Saturday, at that point both witnesses recalled that the occasion was a Saturday. They showed every sign of having been coached. The Transfer was dated 22nd August (a Monday), and it is extraordinary that they did not mention the date on which they say the document was signed when they made their statements. These statements were clearly written by someone else – quite possibly R1 herself – as the identical phraseology indicates. By contrast I felt able to

accept the evidence of Ms Keeley and Mrs Burgess, neither of whom, of course, have anything to gain from lying to the Tribunal.

CONCLUSIONS ON THE LEGAL ISSUES

The validity of the Transfer

51. Having regard to the circumstances in which the Transfer was executed, and the lack of attestation, I conclude that the formal requirements of the 1989 Act were not complied with. That renders the Transfer a nullity, subject to any estoppel or other doctrine which would prevent the Applicant from relying on the lack of attestation. In this connection, the Respondents rely on the authority of Shah v Shah [2002] QB 35 as setting up an estoppel in their favour. Mr Gatty, for R2, adds certain refinements of his own based on other decisions such as Wishart v Credit and Mercantile plc [2015] EWCA Civ 655 and Fung Kai Sun v Chan Fui Hing [1951] AC 489. The facts of Shah v Shah were as follows. The Plaintiff invested substantial sums in a Kenyan bank of which the Defendants were executives. The bank got into difficulties, and a repayment agreement was negotiated between the Plaintiff and the Defendants. The Defendants signed a document described as a deed which stated that they jointly and severally agreed to pay the Plaintiff the sum of £1.5m. The signature of a witness attesting to the Defendants' signatures was added shortly after they had signed but not in their presence. On the Plaintiff's claim on the deed, the Defendants took the point that the deed was void due to non-attestation in accordance with the 1989 Act. The judge below held that the Defendants were estopped from relying on the lack of attestation, and the Court of Appeal agreed. Pill LJ, giving the leading judgment of the court, held that the requirement for attestation was a secondary requirement – the need for the disponor's signature being the primary requirement. Accordingly, although it would not be possible to defeat the primary requirement by way of an estoppel, it was possible, in the appropriate circumstances, to be estopped from asserting invalidity due to non-attestation. In the Shah case, the Defendants had delivered the document to the Plaintiff in the knowledge that it had not been validly attested, and in the further knowledge that the Plaintiff would assume that it had been validly executed and rely on it accordingly. Perhaps unsurprsingly, both the trial judge and the Court of Appeal held that the Defendants' conduct amounted to an estoppel. In the instant case, the Respondents argue that the Applicant's failure to take any steps to challenge the Transfer for many years, and her payment of £300 per

months to R1 and certain mortgage instalments to R2 in 2010 and 1011, create an estoppel, against both R1 and R2.

52. I do not agree that this decision assists the Respondents. There are a number of critical differences in the underlying facts. First, at the material time the Applicant was unaware that she was signing an instrument that requires attestation. Secondly, it was R1, the person seeking to take advantage of the Transfer, who was aware that it had not been attested and was therefore a nullity. Thirdly, the Applicant, being ignorant of its true nature, never delivered it, either to R1 or R2. Fourthly, when R2 advanced money to R1, it did not do so in reliance on the Transfer, but on the fact of R1's registration as proprietor. Finally, whereas in Shah v Shah the court was prepared to overlook the lack of attestation because the Defendants required no protection, in this case the Applicant was a wholly innocent party and it is precisely in this situation that a rigorous application of the 1989 Act is required. In all the circumstances, therefore, Shah v Shah cannot assist either Respondent.

53. Mr Gatty, as I have said, has another string to his bow. He has referred me to the so-called Brocklesby principle, as exemplified in the case of Wishart v Credit and Mercantile plc [2015] EWCA Civ 655. In this case, the Claimant, Wishart, had made an agreement with a business partner, Sami, to the effect that a large sum of money derived from an investment would be used to purchase a residential property known as Dalhanna. It was intended that the property would be conveyed to Mr Wishart for use as his residence, albeit that the entire purchase was arranged by Sami. However, Wishart took no steps to ensure that the property was conveyed into his name, and did not even ask to see the contract. He kept out of the transaction entirely. In fact, Sami procured a conveyance of the property into a company controlled by him, and shortly afterwards Sami (via the company) applied to a lender ("C&M") for a loan of £500,000. The loan was made, and this enabled the company to pay the outstanding stamp duty, which in turn enabled registration of the purchaser to take place. Registration of a charge taken by C&M to secure the loan was effected at around the same time. C&M obtained a possession order relating to Dalhanna, and Wishart claimed the proceeds of sale, on the grounds that he had a beneficial interest in the property which was protected as an overriding interest by actual occupation. He failed at first instance, and he appealed. It was held that his beneficial interest was not

an overriding interest by the application of the Brocklesby principle. The principle is derived from the case of Brocklesby v Temperance Permanent BS [1895] AC 173, Broadly speaking, its essence can be distilled to this: "*The Brocklesby principle is not based on actual authority given to the agent, but rather on a combination of factors: actual authority given by the owner of an asset to a person authorised to deal with it in some way on his behalf; where the owner has furnished the agent with the means of holding himself out to a purchaser or lender as the owner of the asset or as having the full authority of the owner to deal with it; together with an omission by the owner to bring to the attention of a person dealing with the agent any limitation that exists as to the extent of the actual authority of the agent. This combination of factors creates a situation in which it is fair, as between the owner of the asset and the innocent purchaser or lender, that the owner should bear the risk of fraud on the part of the agent whom he has set in motion and provided (albeit unwittingly) with the means of perpetrating the fraud. The same principle applies where the dishonest vendor or mortgagor of the asset, who by the sale or mortgage raises money from an innocent third party, has been vested with the legal title as a trustee:*"

54. In the Wishart case: " *Mr Wishart left the acquisition of Dalhanna completely in the hands of Sami. Mr Wishart gave Sami authority to make whatever arrangement he saw fit to acquire Dalhanna, so long as the net result was that Mr Wishart would have the beneficial ownership of it free of any mortgage. As the judge said, Mr Wishart gave Sami "free rein" to make the arrangements for the acquisition ([162]). Clearly, Sami acted outside the limits of his authority by arranging for the grant of the mortgage over Dalhanna to C&M, but C&M was not on notice of any such restriction on his authority. Mr Wishart exercised no supervisory function whatever in relation to what Sami might do to effect the transaction to acquire Dalhanna. He did not ask to inspect or countersign the contract of purchase. He did not contact the vendor to explain his interest in the acquisition; nor did he seek to enter any note of his interest on the register at the time of the acquisition. He did not arrange for Eren to explain to anyone that the money which was being provided for Sami to complete the purchase of Dalhanna was to be regarded as Mr Wishart's money. In this way, in practical terms, Mr Wishart furnished Sami with the means to hold himself out as the true beneficial purchaser of Dalhanna, and hence as the legal and beneficial owner of the*

property for the purposes of borrowing money from C&M against the mortgage in its favour."

55. There are two particular points that can be made. First, the facts of the present case are very different from the facts in Wishart and the other cases referred to by the Court of Appeal. In the instant case, the Applicant had no idea that she was signing a Transfer whereby her name would be removed from the register. She did not authorise or instruct R1 to do anything on her behalf. R1 had no authority whatsoever. Secondly, I cannot see that the Brocklesby principle can possibly rescue a void disposition such as the Transfer in this case. Although a limited estoppel may be set up in the circumstances of a case such as Shah v Shah, the Brocklesby principle only operates to postpone an existing beneficial interest to the charge. It may be a form of estoppel, in that the beneficial owner is estopped from setting up the prior interest. However, it has no application to the formal requirements under the 1989 Act. This may however become a material issue as and when the Applicant's application to set aside the Nat West Charge is determined.

56. Mr Gatty also relies on Fung Kai Sun v Chan Fui Hing [1951] AC 489. The headnote reads as follows. "*The manager of certain real property belonging to the respondents fraudulently mortgaged it by means of forged mortgages to the appellant, whose first intimation that the mortgages were alleged to be forged was the service of the writ by the respondents in their action against him for a declaration that the mortgages were null and void and should be set aside. There had been no contractual or other relationship between the respondents and the appellant, and the former, after they became aware of the forgery, had, for their own purposes, delayed for about three weeks – until the issue of the writ – before informing the appellant of the forgery. By his defence the appellant alleged, inter alia, that the respondents' silence had deprived him of any opportunity of obtaining restitution from the forger, and he claimed they were therefore estopped from saying that the deeds were not executed by them. HELD that the respondents were not entitled to withhold from the appellant information that the mortgages were forgeries, and that when they chose to do so they took the risk that they would later be estopped from asserting that the deeds were forged if by reason of their keeping silent the appellant had suffered detriment. The true test was whether the appellant's chances of recovering from the forger had been*

materially prejudiced by the delay. In the circumstances of the present case, however, the appellant had failed to establish that he had suffered such detriment by reason of the delay as would give rise to an estoppel."

57. I do not see that this case assists R2. The forged document in the Fung Kai Sun case was the very instrument which the lender relied upon. When the lenders made their loans, they relied on the forged mortgages. In the instant case, of course, this analysis cannot apply since the title to the Property is registered. When R2 took its charge over the Property, it was not relying on the original Transfer, but (a) on the fact that R1 was the registered proprietor, and (b) that she had executed the Nat West Charge. Furthermore, it not clear what detriment R2 says that it has suffered. It has known since 2011 that the Applicant impugns the Transfer and accuses R1 of fraud – see her correspondence with R2 in April and May of that year – yet R2 has done nothing to call in the loan or otherwise seek to recover the advance from its customer R1. It seems to have been content to retain the loan on its books, despite the knowledge that the Transfer was alleged to have been procured by fraud.

58. On the evidence, I conclude that the Transfer was not validly executed in accordance with the requirements of the 1989 Act, and is a nullity. Since the Applicant is not estopped, as against either Respondent, from setting up the invalidity, it follows that she is entitled to apply to the Land Registry for alteration of the register on the basis of a mistake – namely, that the Land Registry registered R1 as proprietor on the basis of a defective Transfer. Indeed, such an application has now been made.

59. As I have said, the Tribunal presently lacks jurisdiction to alter the register. However, as and when the matter comes back before the Tribunal as a referral from the Land Registry, the issue will be determined in accordance with the provisions of Schedule 4 of the 2002 Act. It is provided by paragraph 6(3) of the Schedule that: "*If on an application for alteration under paragraph 5 the registrar has power to make the alteration, the application must be approved, unless there are exceptional circumstances which justify not making the alteration.*" Clearly, since the Transfer is a nullity, the register must be altered "*unless there are exceptional circumstances which justify not making the alteration.*" It would be for the Respondents to satisfy

the Tribunal that such exceptional circumstances exist. However, that issue is not presently before me.

Undue influence and fraudulent misrepresentation

60. In view of my conclusion that the Transfer is a nullity, it is not strictly necessary to consider the Applicant's claim that her execution of the Transfer was obtained by either the fraudulent misrepresentation by R1 or her undue influence. Indeed, the relief sought, to set aside the Transfer, is otiose given that it is of no effect. Had it been necessary to determine these issues, I would have found in the Applicant's favour. It is abundantly clear that the Applicant would not have signed the Transfer if she had been aware of its true nature. However, she did so for two reasons. First, because R1 falsely described the document in these terms: "*it's only about the change in the mortgage rates, it's nothing to worry about.*" Secondly, because at this time the Applicant reposed trust and confidence in R1 and therefore believed this explanation, which would otherwise not have satisfied her. She did ask for time to read the document, on her evidence, but allowed R1 to persuade her that it was not necessary. Given that the Transfer effected a transaction that was manifestly disadvantageous to her, and contrary to the agreement reached in 2000, R1 has signally failed to displace the presumption of undue influence. The fraudulent misrepresentation is also apparent. Both Respondents have argued – on different grounds – that even if I were to find in the Applicant's favour on the facts, it would be too late to set aside the Transfer. Fortunately, I do not need to decide these difficult issues of law given my primary findings.

The Applicant's beneficial interest.

61. In addition to the claim to set aside the Transfer – under section 108(2) of the 2002 Act – the Applicant also asks the Tribunal to direct the Chief Land Registrar to maintain the Restrictions on the register. Formally, that requires an order cancelling R1's application in Form RX3. These Restrictions, as recorded in the Case Summary, relate to the Applicant's claim to retain a beneficial interest in the Property. These Restrictions would impede R1's ability to deal with the Property. They do not directly affect R2's interest, although a finding of a beneficial interest would clearly be of some relevance at a future stage, when the application to alter the register under Schedule 4 is considered.

62. In my judgment, the Applicant retains the entire beneficial interest in the Property, notwithstanding her signature on the Transfer. This must follow from the fact that the Transfer was of no effect due to non-attestation. If the Property had been an unregistered title, the Transfer would not have been effective to transfer the legal estate. The fact that R1 is now the legal owner is attributable only to the effect of section 58 of the 2002 Act. Although R1 has the legal estate in the Property, in view of the circumstances in which the Transfer was signed she never obtained the Applicant's beneficial interest in the Property. There was clearly no intention on the Applicant's part to give R1 her beneficial interest. Nor in my judgment can the Respondents rely on section 63 of the Law of Property Act 1925 ("the 1925 Act"). This applies to a conveyance, as defined in section 205 of the 1925 Act, which does not extend to an instrument under hand for no consideration. This is made entirely clear in the decision of Wilberforce J (as he then was) in Re Stirrup's Contract [1961] 1 All ER 805 at 809 where he discusses the effect of section 63 in relation to an assent: *"..... the expression "conveyance" is stated to include an assent, that seems to produce the result that an assent, provided that it is under seal, is effective to pass whatever estate the conveying party has (emphasis added"*. Although the necessity for a seal no longer exists, the clear sense is that a "conveyance" for the purposes of section 63 must be an effective and properly executed instrument. Perhaps an argument could have been advanced to the effect that the void Transfer constituted some sort of gratuitous equitable assignment of the Applicant's beneficial interest, although neither Respondent sought to make this argument and in the circumstances it clearly could not have succeeded. Accordingly, the registration of the Transfer did not in any way affect the underlying beneficial ownership of the Property, which has always been that of the Applicant. R1 therefore holds the Property on a bare trust for the Applicant, pending alteration of the register, and the Restrictions must remain.

63. As I have said, the existence of the beneficial interest may be of relevance when the Applicant's application to alter the register to remove the Nat West Charge falls to be considered. At first blush, it would appear that the Applicant's beneficial interest would constitute an overriding interest protected by her actual occupation of the Property as at the date of the Southern Pacific charge and subsequent re-mortgage to R2. However, this issue and the other associated issue of over-reaching are

complicated, and must be decided at the appropriate time: it would be wrong to pre-judge the issue.

THE SUBSTANTIVE ORDER

64. I shall therefore direct the Chief Land Registrar to cancel R1's application in Form RX3 dated 8th August 2013 to cancel the Restrictions. For the reasons stated, I shall dismiss the application under section 108(2) of the 2002 Act which is otiose, given that the Transfer is of no effect. There remain unresolved the Applicant's recent applications to alter the register. On the assumption that the Respondents will object, the dispute should be referred to the Tribunal by the Land Registry as soon as possible to allow all the outstanding issues to be disposed of. The Applicant should draw the attention of the Land Registry to this Decision and this paragraph in particular. Since I have held that the Transfer is void and of no effect, it seems to follow that the registration of R1 as proprietor was a mistake. The consequences for the Respondents, and the proper application of Schedule 4 of the 2002 Act, must be resolved by the Tribunal once the references have been made.

65. As to costs, I am minded to make an order for costs in the Applicant's favour, but I recognise that the order may not be entirely straightforward. I therefore direct the Respondents, if they so wish, to file and serve their written submissions with regard to costs no later than Wednesday 9th November 2016, and the Applicant may respond no later than Wednesday 16th November 2016. Costs will be subject to a detailed assessment in any event.

Dated this 1st November 2016

Owen Rhys

PROPERTY CHAMBER LAND REGISTRATION

BY ORDER OF THE TRIBUNAL