CHANCERY BAR ASSOCIATION ISLE OF MAN CONFERENCE

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UNDUE INFLUENCE AND THIRD PARTY ADVICE

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UNDUE INFLUENCE AND THIRD PARTY ADVICE

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1. It is a truth universally acknowledged that a beneficiary disgruntled with the size of his inheritance will at some point contend that the testator has been unduly influenced. We will all have heard, at one time or another, words to the effect of *"Mum would never have done this"* alongside an accusation that a dastardly sibling / friend / relative (delete as applicable) must have succeeded in pressuring the disposing mind to their net benefit. We will all be familiar with the difficulties of such claims and the lottery that taking them to trial can entail.

2. This seminar aims to analyse such a case – *Brindley v Brindley*,[1] in which I represented the Claimant – and to consider the law of undue influence as it currently stands in light of the result. More than that, however, it is in my view a good example of where a case which we had thought strong on the facts can go wrong, and the potential pitfalls in the law of undue influence as it currently stands.

BACKGROUND:

3. The relevant background, in summary, is as follows. The Claimant (Alan Brindley) and the Defendant (Gordon Brindley) are brothers and are the children of Shirley Brindley (hereafter 'Shirley') by her (also deceased) husband, James Leslie Brindley (hereafter 'Mr Brindley'). Gordon is the elder of the two sons by seven years.

4. Shirley resided with Alan and his wife Jackie between 2011 and January 2014; in January 2014, Jackie became ill and Gordon suggested that Shirley should stay with him for a few days. This period of a few days, which commenced on 21 January, 2014, eventually became much longer and Shirley never in fact moved back in with Alan after initially moving to stay with Gordon.

5. As a matter of fact, the position when Shirley went to stay with Gordon was that Shirley owned her property (being a bungalow called Chy-Kerenza on the Lizard peninsula in

[1] *Brindley v Brindley* [2018] EWHC 157 (Ch).

Cornwall) outright and that the position under her last will was that Alan and Gordon were joint executors of the estate and joint residuary beneficiaries.

6. In late March 2014 (i.e. a very short time after Shirley had moved in with Gordon), Chy-Kerenza was conveyed into the joint names of Shirley and Gordon and Shirley executed a home-made will, drafted by Gordon, which appointed him the sole executor of Shirley's estate.

7. Gordon contended that there was nothing unusual about this and that Shirley's presence in his home reflected her own wishes. Alan contended that the above matters should arouse the court's suspicion, particularly in light of a large number of other matters which gave rise to serious concerns that Gordon was exercising dominion over Shirley or unduly influencing her. A few examples of these issues included:

    i. On 23 January, 2014 (i.e. two days after Gordon collected Shirley), Gordon telephoned Alan to inform him that Shirley was going to gift him a half-share in Chy-Kerenza; this had never been discussed before and was later stated to be a 'misunderstanding' by Shirley;

    ii. On 26 January, 2014, Jackie was telephoned by Gordon, who demanded Shirley's chequebook and the keys to Chy-Kerenza on the stated basis that he intended to sell his home in order to go and live at Chy-Kerenza with Shirley.

    iii. A meeting between Alan, Gordon and Shirley was arranged with Arthur Jackson & Co (Shirley's solicitors) but was cancelled at the last moment due to Gordon's refusal to allow Shirley's solicitor to talk to Shirley by herself. Gordon later called the solicitor and informed her that the proposed Lasting Power of Attorney would be cancelled.

    iv. On 5 February, 2014, Alan received an email from Gordon, attaching a letter purportedly from Shirley, explaining that she had decided to stay at Gordon's house permanently and setting out the reasons why. It was Alan's position that this letter was clearly written by Gordon and was transparently indicative of his wishes rather than Shirley's wishes.

v. Gordon's demands for delivery up of Shirley's possessions culminated in a Part 7 claim for delivery up being issued in Shirley's name by Gordon.

8. Shirley died on 8 August, 2015. It later transpired that the new will and the transfer of Chy-Kerenza had been executed around the time that the aforesaid matters had occurred. Alan obtained a caveat on the estate to prevent a grant from issuing but Gordon managed to secure a grant of probate regardless (by applying immediately upon the lapsing of the caveat) and saw fit, notwithstanding Alan's protestations, to carry out the administration of the estate regardless of that issue.

9. Proceedings were issued against Gordon seeking his removal as the executor and for the setting aside of the transfer of Chy-Kerenza into Shirley and Gordon's joint names ('the Property Claim'). These proceedings were later amended following disclosure of Shirley's bank statements – a step which Gordon proved singularly unwilling to undertake – when it was discovered that significant transfers of monies (totalling some £273,904.50) had been made by Shirley to Gordon during the last 18 months of her life (in a context where her annual spending during her time with Alan had been in the order of £10,000 per annum). This later claim was referred to at trial as the 'Expenditure Claim'.

10. It was agreed at the outset of the trial that the Expenditure Claim should be adjourned pending the taking of an inquiry in respect of the purpose of the payments made to Gordon which were challenged. The trial therefore proceeded with the Property Claim as its main focus.

11. Gordon brought a counterclaim as executor of Shirley's estate in respect of alleged irregularities in the administration of James Brindley's estate by Alan (the apparent rationale being that such irregularities caused loss to Shirley and therefore fell to Gordon, as the executor of Shirley's estate, to pursue). Most of these issues were resolved by consent or not pursued but the one claim that was litigated at trial was Gordon's claim that Alan account for *"an unknown number of gold sovereigns owned by Shirley or James Brindley and entrusted into the custody of Alan in early 2009"*. Alan denied that any such sovereigns existed.

12. The Judge (HHJ Klein, sitting as a Judge of the High Court) heard evidence relevant to the Property Claim from Alan, Gordon and Roland Freeman, the solicitor who advised Shirley on the Transfer on 19 March, 2014. His key findings are set out below.

THE RELEVANT FACTUAL FINDINGS:

13. HHJ Klein made the following key findings of fact:

i. He found that *"…in relation to the Transfer, there was a sufficient relationship of trust and confidence in which Gordon was the ascendant party and in which Mrs Brindley was in a position of dependence…whilst the relationship between Gordon and Mrs Brindley was not so unbalanced, as a coercive relationship might have been, that any independent advice given to Mrs Brindley in relation to a particular transaction could not have an emancipated effect, it was a relationship, in my view, in which Mrs Brindley was, without more, prepared to agree a course of action proposed by Gordon."*

ii. He found that *"…before Mrs Brindley met with Mr Freeman, she did not appreciate the effect of a gift of the Cornish property to Gordon as a beneficial joint tenant…I am satisfied that she was prepared to so instruct Mr Freeman simply because Gordon had proposed such a course of action."*

iii. He found that *"…the tenor of Gordon's evidence was that, before Mrs Brindley's meeting with Mr Freeman, all that Gordon had done was to show Mrs Brindley on a computer screen the definition of a beneficial joint tenancy. I am satisfied, having pressed him on the point, that Gordon did not show Mrs Brindley a definition of beneficial tenancies in common."*

iv. He found that *"Mrs Brindley's 17 March 2014 letter to Mr Freeman seems to me, on a fair reading, to indicate that Mrs Brindley did not appreciate the effect of a gift of the Cornish property to Gordon as a beneficial joint tenant."*

v. He found that *"Gordon said that he told Mrs Brindley that he was "not on" the LPA. In the light of what I have concluded was Gordon's knowledge at the time, not only was that statement inaccurate but Gordon, in my view, appreciated that it*

was inaccurate. Bearing this in mind and bearing in mind too that Mrs Brindley was prepared to instruct Mr Freeman in writing to make a gift of the Cornish property to Gordon as a beneficial joint tenant, even though, as I have found, at the time she gave her written instructions, she did not appreciate the effect of such a gift, I have come to the conclusion that it is most probable that Mrs Brindley gave those written instructions because Gordon had not accurately or fully explained to her what is the effect of a beneficial joint tenancy, and so had failed to discharge the obligation of candour and fairness which he owed to Mrs Brindley because of the relationship of trust and confidence between them."

vi. The finding above was made in the context that one of the learned Judge's findings on the relevant law was that *"a transaction may be set aside for (actual) undue influence if (i) there is a sufficient relationship of trust and confidence in which (ii) the ascendant party has misrepresented to the victim the effect of the proposed transaction and (iii) that misrepresentation was sufficiently causative of the transaction."* [per Lord Nicholls in *Royal Bank of Scotland Plc v Etridge (No.2)*].[2]

vii. The learned Judge went on to say that *"*[a transaction] *will not be set aside, for example, if the victim receives a sufficiently full and independent explanation of the proposed transaction before the transaction is effected from someone with full knowledge of the **relevant** circumstances so that, taking into account the other circumstances which exist at the time, the victim makes an **independent** and **fully informed** judgment about the proposed transaction."*

viii. He found that *"The important question I have to resolve is whether the advice which Mr Freeman gave to Mrs Brindley at the 19 March 2014 meeting had an emancipating effect, so that the proper conclusion is that the Transfer was not caused by any undue influence…I have come to the conclusion that the advice which Mr Freeman gave to Mrs Brindley at the 19 March 2014 meeting was sufficient to have such an emancipating effect, so that the Transfer was not procured or otherwise caused by Gordon's undue influence but was a transaction carried out by Mrs Brindley of her own free will."*

[2] *Royal Bank of Scotland Plc v Etridge (No.2)* [2002] 2 AC 773 at paragraphs 32-33.

ix. He found that *"the making of a new will, even very shortly before the 19 March 2014 meeting, was not a relevant circumstance which Mr Freeman needed to know in order to give Mrs Brindley an emancipating explanation of the proposed transaction."*

x. He found that the fact that *"Mrs Brindley did not make the further will is not sufficiently probative so as to undermine the conclusion that I have reached and would, but for this fact, have reached. Put simply, it is equally probable, in my view, that Mrs Brindley did not make the further will before she died because of the apparently complete breakdown in relations, after 19 March 2014, between her and Alan."*

xi. He found that *"at the time of the Transfer, it was Mrs Brindley's intention that the Transfer would be part and parcel of a larger transaction by which Alan's and Gordon's benefits would be equalised"* but that the Transfer itself was not vitiated by the fact that the remainder of the 'wider transaction' was not concluded.

14. The Judge therefore dismissed the Property Claim.

THE RELEVANT PRINCIPLES:

15. The principles of undue influence as they currently stand are as follows:

i. Undue influence must be proved by evidence; either direct evidence of the wrongdoing itself or by presumption. The legal burden is on the claimant.

ii. *"Undue influence has a connotation of impropriety. In the eye of the law, undue influence means that influence has been misused. Statements or conduct by [an alleged wrongdoer] which do not pass beyond the bounds of what may be expected of a reasonable [person] in the circumstances should not, without more, be castigated as undue influence."*[3]

[3] Ibid, para. 32.

iii. In Drew v Daniel,[4] it was explained that *"in all cases of undue influence the critical question is whether the persuasion or the advice, in other words the influence, has invaded the free volition of the donor to accept or reject the persuasion or advice or withstand the influence. The donor may be led but she must not be driven and her will must be the product of her own volition, not a record of someone else's. There is no undue influence unless the donor if she were free and informed could say "this is not my wish but I must do it"."*

iv. What has come to be known as 'presumed' undue influence is a shorthand expression for a prima facie case of undue influence being established on proof (i) that a complainant places both *"trust and confidence in another party in relation to the management of the complainant's financial affairs"*, and (ii) that there is a *"transaction that calls for an explanation"*.[5] The first element (trust and confidence) goes to the alleged wrongdoer having influence or ascendancy over the complainant; the second (nature of the transaction) goes to the issue of whether the alleged wrongdoer abused that influence.

v. On proof of those two elements, the court may be able to infer undue influence unless the alleged wrongdoer (or another party) is able to counter the inference that he abused his influence or ascendancy. Nevertheless, the court should ultimately consider the entirety of the evidence in order to determine whether undue influence has been established.[6]

vi. Roberts v Pascal is a useful illustration of the nature and degree of *"trust and confidence in relation to the management of financial affairs"* which might demonstrate the necessary level of ascendancy; parents, living in Antigua, authorised their daughter to be signatory to their UK accounts and to deal with the income from and affairs relating to their UK property; they would sign whatever documentation she would place in front of them without demurral.[7]

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[4] *Drew v Daniel* [2005] 2 F.C.R. 365, per Ward LJ at para. 36.

[5] Supra fn. 2, para. 14.

[6] Ibid, para. 219, per Lord Hobhouse.

[7] *Roberts v Pascal* [2009] 1 P&CR D60.

vii. As to the sort of transaction that *"calls for an explanation"*, Lord Scott described at paragraph 220 of *Etridge*: *"a transaction which cannot be explained by reference to the ordinary motives by which people are accustomed to act"*. In *Allcard v Skinner*,[8] where the donor parted with almost all her property, Lindley LJ pointed out that where a gift of a small amount is made to a person standing in a confidential relationship to the donor, some proof of the exercise of the influence of the donee must be given. The mere existence of the influence is not enough. However, he said that *"...if the gift is so large as not to be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act, the burden is upon the donee to support the gift."*

viii. Once the evidential burden shifts, there is prima facie evidence that the alleged wrongdoer both had the necessary power to influence and abused that power so as to prevent the free and independent exercise of the donor's will. But the evidence is rebuttable. The question in all cases is that posed in *Drew v Daniel* and quoted above at (iii).

16. The idiom of 'actual' and 'presumed' undue influence is pervasive in undue influence cases and it can be seen that it is important to ensure that an overly mechanistic approach to the question of 'presumed' undue influence is not taken. It is a common but inaccurate interpretation of the law that the assertion of the presence of the two necessary ingredients is sufficient. It is not. It is an oversimplification to allege that it is possible to successfully demonstrate undue influence by alleging that there is a 'relationship of trust and confidence' and a 'transaction calling for an explanation'; as Lewison LJ has stated extrajudicially (citing in particular *Etridge* but also a number of other cases):

> *"The evidential presumption is merely a forensic tool which helps to prove the case. The task of the court is to draw appropriate inferences of fact on a balanced consideration of all the evidence at the end of the trial. The judicial task is not to tick off boxes one by one*. [emphasis added]
>
> *The three areas of evidence: the nature of the relationship, the nature of the transaction and the other evidence of what happened and why are components that interact with each other throughout the trial leading to a balanced conclusion when all has been said and*

[8] *Allcard v Skinner* (1887) 36 Ch D 145, per Lindley LJ.

done. The take home message, then, is that there is only one kind of undue influence: actual undue influence, which must be proved with or without the aid of an evidential presumption. The overall or legal burden of proof lies on the claimant, and provisional shifts in evidential burdens must not be allowed to obscure that. The use of the evidential presumption does not alter the overall burden of proof. Observations to the contrary effect which have been made from time to time in the Court of Appeal are, I suggest, erroneous."

17. A particularly vexed question (determinative in this case and influential in several others) is the question as to whether independent legal advice has been taken by the donor, and if so, whether it is enough to emancipate the decision from the undue influence. As stated by Lord Nicholls in ***Etridge*** at [8]-[9]:

"…the second form [of unacceptable conduct] *arises out of a relationship between two persons where one has acquired over the other a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage…in cases of this latter nature the influence one person has over another provides scope for misuse without any specific overt acts of persuasion. The relationship between two individuals may be such that, without more, one of them is disposed to agree a course of action proposed by the other. Typically this occurs when one person places trust in another to look after his affairs and interests, and the latter betrays this trust by preferring his own interests. He abuses the influence he has acquired."*

18. Pausing there, it is notable that this scenario is precisely the situation which the Judge, by his findings, found to have existed in this case (I am aware of no other case in which there has been a finding that undue influence existed but that the claim is nonetheless not made out). The Judge stated that it is possible for independent advice to have an emancipating effect on the undue influence. Whilst the Judge did not cite any specific authority in support of this proposition, Lord Nicholls dealt with the point in ***Etridge*** at [20]:

"Proof that the complainant received advice from a third party before entering into the impugned transaction is one of the matters that the court takes into account when weighing all the evidence. The weight, or importance, to be attached to such advice depends on all the circumstances. In the normal course, advice from a solicitor or other outside adviser can be expected to bring home to a complainant a proper understanding of what he or she is about to do. But a person may understand fully the implications of a

proposed transaction, for instance, a substantial gift, and yet still be acting under the undue influence of another. Proof of outside advice does not, of itself, necessarily show that the subsequent completion of the transaction was free from the exercise of undue influence. Whether it will be proper to infer that outside advice had an emancipating effect, so that the transaction was not brought about by the exercise of undue influence, is a question of fact to be decided having regard to all the evidence in the case."

19. This point is placed in a factual context in *Glanville v Glanville* at [62],[9] where Park J stated (in respect of the participation of a solicitor who was also, coincidentally, called Mr Freeman):

"How much significance do I attach to the participation of Mr Freeman? The answer is: some, but not a lot. The fact that a solicitor was instructed to act on a transfer does not automatically mean that it is not at risk of being set aside on grounds of undue influence…in this case Mr Freeman was not instructed for the purpose of looking out for undue influence, and if he detected any signs of it, counteracting it. He was not comparable to solicitors who, after the decision of the House of Lords in Barclays Bank v O'Brien *(and possibly before it also), are commonly instructed to advise wives who are asked to concur in their husbands' business borrowings being charged on the matrimonial home. It was not his role to say to Mr Glanville that the proposed deed of gift would prevent Mr Glanville (if he died before his wife, as seemed a near certainty) from leaving the house to his own family, and to ask Mr Glanville if he was really sure that he wanted to do that. It is true that, from the conversation which Mr Freeman did have with Mr Glanville, he was satisfied that Mr Glanville did want to enter into the deed of gift, but Mr Blayney is right when he says that, in a case where undue influence is alleged, the question is not whether a donor wanted to make a gift, but why he wanted to make it."*

CONCLUSIONS:

20. I think HHJ Klein – with the greatest of respect to him – got it wrong. Reading the decision was an interesting experience inasmuch as it was all going swimmingly until paragraph 113, where the judgment takes an unexpected lurch sideways. I would suggest that the following points are non sequiturs when taken in context, given the express finding that Gordon was unduly influencing Shirley:

[9] *Glanville v Glanville* [2002] EWHC 1271 (Ch)

i. Mr Freeman, who provided the advice to Shirley, does not appear to have been aware that (as the Judge found) Shirley was acting under the undue influence of Gordon. That in itself is a powerful limitation on the evidence he gave. However, and perhaps more importantly, he was told by Shirley that her objective was to ensure that her sons were treated equally. She did not tell him the very relevant fact that she had just made a Will which left her estate between her two sons equally. Further, Mr Freeman does not appear to have impressed upon her that she would need to make a new Will if she wanted to treat her sons equally or transfer Chy-Kerenza into joint names as beneficial tenants in common.

ii. In other words, Shirley might have gone away from the meeting with Mr Freeman understanding the nature of a transfer into joint names as beneficial joint tenants but she does not appear to have understood how she could still ensure equality between her sons because she made no attempt to make a new Will and there was no evidence there was a good reason for this.

iii. Further, Shirley was living with Gordon whom the Court found was exercising undue influence over her. She went back to him after the meeting with Mr Freeman and was there at the time she executed the Transfer, and took no steps to execute a new Will. It is therefore difficult to see how Mr Freeman's advice had a liberating effect on her.

21. In short, the question might be posed in this way: if a gift is made by a donor which is:

i. Inexplicable by reference to the donor's stated reasoning;

ii. Inconsistent in its effect with the explanation of the transaction given by the donee; and

iii. Expressly found to have arisen in a context where the donee was abusing a relationship of trust and confidence with respect to the donor and misleading the donor as to the true effect of the transaction;

to what extent can the taking of advice from a solicitor as to the effects of the transaction emancipate it from being procured by undue influence?

22. *Brindley v Brindley* is a salutary warning that an undue influence claim which appears strong on its facts (and clearly was strong on its facts; the Judge found that undue influence was present) can founder at trial. HHJ Klein's conclusion seemed to be, in effect, that whilst Shirley was unduly influenced by Gordon, Mr Freeman's intervention and his advice meant that she was not unduly influenced in executing the transfer. Reading between the lines, it seems likely that the Judge was highly impressed with Mr Freeman's evidence and was satisfied – notwithstanding the questions that arise as a result – that Mr Freeman's view about Shirley's understanding should be preferred.

23. Whilst undue influence as an allegation is a tale as old as time (as cases such as *Allcard* demonstrate), it is probably safe to say that claims involving such accusations will continue to grow in future in line with the apparent growth of probate and estates litigation more generally. These cases will all turn on their own facts to a certain extent but one thing which I think is clear from *Brindley* is that the interrelationship between the overlapping concepts inherent in an undue influence claim continues to be a particularly slippery issue for judges to decide.

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