

Neutral Citation Number: [2019] EWHC 830 (Ch)



Case No: PT-2017-000047

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 2nd April 2019

Before :

Master Price

Between :

Ms DAWN YVONNE MOURSI
(as Personal Representative of ANN
SYBIL GURNEY deceased)

Claimant

- and -

Mr WILLIAM PAUL DOHERTY

Defendant

Mr Alexander Learmonth (instructed by **Seddons Solicitors**) for the
Claimant

The Defendant appeared in person

Hearing dates: 7th November 2018

JUDGMENT

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Master Price :

1. This is an application for summary judgment by the claimant in this case, by which she seeks judgment on only one aspect of its claim, namely an order to set aside the transfer to the defendant of the property at 2 Orchard Close, Sheering, Bishop's Stortford, Essex on the grounds of undue influence.
2. I start with some preliminary observations. It is not possible for the court to make findings of fact on contested evidence on an application for summary judgment, unless the facts are common ground or incontrovertible, by evidence which establishes them, or by reason of inherent incredibility. In this context an onus is placed on the defendant insofar as he must, in the language of the old procedure, condescend upon particulars in his evidence in order to show a case which has a real prospect of success at trial. The test is more easily applied in a case in which it is apparent that disclosure and cross-examination will clearly be irrelevant, and the court must not in a case in which those elements have a role to play, anticipate what might happen as a matter of probabilities. The question is not whether the defence is improbable, but whether it lacks any sense of reality or plausibility.
3. It is also important in this case that the claimant relies upon undue influence, where evidential presumptions are in play. The leading case is the decision of the House of Lords in *Royal*

Bank of Scotland v Etridge [2002] 2 AC 773. Presumed undue influence arises where there is a relationship such that one person has acquired over another a measure of influence or ascendancy of which the ascendant person then takes unfair advantage: see the speech of Lord Nicholls at para 8 in *Etridge*. It follows that a person may be of full age and capacity but becomes nonetheless vulnerable and liable to have his or her will unduly influenced. Where such a relationship arises then there is an evidential shift in the burden of proof to the party who seeks to rely upon the impugned transaction. There are two elements to be established: firstly that the disponent reposed trust and confidence in the other party who was in an ascendant position, and secondly that the transaction is not readily explicable by the relationship of the parties: see para 21 in *Etridge*. Then the evidential burden shifts. Of course, in cases of long-standing relationships or family ties a transaction or gift may be readily explicable, so that there needs to be a transaction which calls for an explanation in all the circumstances. The greater the disadvantage caused by the transaction, the more cogent must be the explanation before the presumption is rebutted. The two aspects of this enquiry reflect upon each other, since the greater the bounty which is conferred upon the disponent, the more likely it is that there was a relationship of trust and confidence: see *Sheikh v Malik* [2018] EWHC 972 (Ch).

4. Once the presumption of undue influence is engaged then the defendant must show that the transaction was entered into with full free and informed consent. An aspect of this is also that, as the consent must be informed, a duty of candour arises on the part of the donee in order that the donor can make an informed decision: see *Hewett v First Plus* [2010] EWCA Civ 312.
5. The usual way in which a transaction may be explained is by showing that there was proper, adequate, and independent advice, but this will not be conclusive, since a person may fully understand the implications of the transaction but yet be acting under the undue influence of another. The question is whether the outside advice had an emancipating effect so as to remove any undue influence, and this is a question of fact which must be determined on all the evidence in the case. It is quite possible this was the scenario here, but it seems to me that for the purposes of the present application the court is confined to a decision as to whether the defence as put has any realistic prospect of establishing full and informed consent by virtue of the very nature of the test on an application for summary judgment.
6. I turn then to the relevant facts of the case which fall to be examined in the light of the preceding discussion. The claimant is the daughter of the late Mrs Ann Gurney who died on 27th

March 2017. She sues as her personal representative, having taken out letters of administration on 7th August 2017. Mrs Gurney had bought 2 Orchard Close, which is the property in issue in this case, in March 2006 for £238,500. Her husband, Mr Ron Gurney, died in February 2007. On 20th February 2012 the sale of the property to the defendant was completed for a consideration of £70,000, and a declaration of trust of the beneficial interest in the property for Mrs Gurney's life was executed by the defendant. A joint expert report from a Mr Martin of Martin and Martin Chartered Surveyors in Bishop's Stortford has been obtained from which it appears that the value of the house in February 2012 was £275,000, and that subject to the life interest granted by the deed of trust a valuation of £191,500 is given. This is based on the assumption that Mrs Gurney had a life expectancy of some five years at the time of the transaction when she was 78, and this would appear to have been entirely appropriate given that we know she in fact lived for about another five years and was suffering from various other ailments which impaired her life expectancy in 2012. The sale to the defendant for a consideration of £70,000 was therefore a considerable undervalue.

7. It is therefore a transaction which on the face of it calls for an explanation given that the defendant was not related to Mrs Gurney in any way. It is therefore necessary to look at the history and nature of the relationship between Mrs Gurney and

the defendant. I should mention that no evidence has been filed on behalf of the defendant, although directions were given for any evidence from the defendant for the purposes of this application should be filed by 17th September 2018. At that time the defendant had the benefit of counsel's advice and representation by way of direct access, but it appears that he has not been able to continue to afford that. As a result, he is forced to rely only upon the defence filed, which was verified by a statement of truth, as well as the further information supplied in relation to it. In this it is asserted that the defendant had known Mrs Gurney for many years and they had met when she was living near Harlow when they met in Burnett Park when they were walking their respective dogs. This was in late 1997 or early 1998 when they had friendly chats. The defence also says that they renewed their acquaintance in 2010 when Mrs Gurney telephoned the defendant following receipt of a leaflet in which he was advertising his services in respect of gardening and landscaping. The defendant pleads that she asked him whether in fact he was the same William Doherty whom she used to meet, but it is difficult to see how she can have understood that from the leaflets put in evidence by the defendant which do not in fact bear his name. In any event it seems that the defendant was engaged by Mrs Gurney to do some works at the property in relation to laying a patio and repairing a fence, and he says that he did not charge for his

labour but only the materials required. The claimant disputes the defendant's veracity as to the length of the defendant's relationship with her mother but accepting Mr Doherty's version of events there was at most an acquaintanceship, which ended when Mrs Gurney left her house near Burnett Park in Harlow in 2006, when of course she moved to the property in issue, and which was subsequently revived when the defendant undertook works at the property. It was only then that any close relationship can be said to have arisen. At that point Mrs Gurney had been widowed since February 2007 and was aged 78. The defendant was then 33, having been born on the 20th June 1977. At this time, according to the evidence from the claimant's expert witness in old-age psychiatry, Professor Robin Jacoby, Mrs Gurney was probably already developing dementia which was ultimately a cause of her death, the primary cause being pneumonia. However, Professor Jacoby takes the view that at the time of the sale to the defendant Mrs Gurney's dementia was not yet fully established and he could not say that she did not have capacity to enter into the transaction, although by reason of ingravescent dementia her judgment may have been impaired. More importantly, Professor Jacoby opines that Mrs Gurney was vulnerable to undue influence based on a number of risk factors.

8. Before considering this further it is necessary to consider further what the relationship between the defendant and Mrs

Gurney was. According to the defendant, they were in a loving relationship which continued until Mrs Gurney's death. It is the case that after the sale to the defendant he continued to help her with shopping and also visited her when in hospital. It is common ground that Mrs Gurney lent the defendant at least £15,300 and that she gave him a valuable watch and bracelet which had belonged to her husband and had a combined value of £63,800. Although the defendant denies there was any sexual or romantic aspect to the relationship, Mrs Gurney appears to have been labouring under a different impression, despite the generational gap between them, such that Mrs Gurney was of an age to be the defendant's grandmother. There is in evidence a telephone bill for September 2011 showing that in the period 28th June 2011 to 28th September 2011 Mrs Gurney called the defendant's mobile phone a total of 282 times, a pattern which was repeated in March to April 2012. There are also in evidence in Mrs Gurney's own hand documents which tend to show that she at least envisaged a sexual relationship and indeed marriage. The first of these is a note to the police, and the second is what appears to be a letter or draft of a letter to go to the defendant accepting his offer of marriage. The note to the police arose in circumstances where the defendant had been arrested on suspicion of involvement in a burglary at Mrs Gurney's home in May 2012 and Mrs Gurney was concerned that this was unjustified. All these matters,

combined with the sale of the house itself to the defendant on such preferential terms, go to show in my view that the relationship between the defendant and Mrs Gurney was one in which she reposed trust and confidence in him, such that he necessarily had influence over her which was capable of abuse.

9. The next stage of the inquiry as it seems to me is to look at how Mrs Gurney reached the decision to sell the house to the defendant, given the vulnerability to which Professor Jacoby alludes, and whether in that context there is an arguable case that she acted of her own free will on the basis of independent advice, and in the knowledge of all the circumstances and implications of the decisions she was making.
10. Of course the paradigm way in which an inference of undue influence may be overcome is by evidence of independent advice. As to that it is necessary to examine the involvement of Mrs Gurney's solicitors in relation to the sale and the advice that was given before turning to consider the defendant's own character and history and what relevance this might have in the context of undue influence. The solicitors acting for both parties were Maddersons whose file in connection with the transaction is in evidence and it is clear from the cover of the file that it was appreciated that this was a sale at an undervalue. Marianna Fratello, a conveyancing executive employed by Maddersons, acted for Mrs Gurney and wrote a letter confirming instructions

to her on 20th December 2011. In that letter she said that Maxine Madderson, the senior partner of the firm, would have overall supervision of the matter, although she was also acting for the defendant on the other side of the transaction. Mrs Gurney wrote in reply to that on 28th December confirming that the sale to the defendant was agreed for the sum of £70,000 and stated that she and the defendant had known each other for 10 years and loved each other. She envisaged in that she would have a lease for 10 years, renewable for another 10 years and she described her decision as being the result of financial problems and hard times. The file contains the usual correspondence one might expect in relation to a domestic conveyancing transaction and it proceeded to completion on 20th February 2012. There are in evidence signed copies of the transfer and the declaration of trust whereby the defendant held the property on trust for Mrs Gurney during her lifetime. It is not apparent when the change from the proposed lease was decided on or what advice was given in that connection. It is moreover the case that Mrs Gurney seems to have parted with substantial sums of money in the period from October 2010 through to February 2012, amounting in total to in excess of £85,000 and nearly a further £80,000 in the period up to the 31st of December 2013 when Mrs Gurney had no more than about £550 in cash. It is not clear where all this money went or what need Mrs Gurney can have had to pay these sums away.

These are matters which are not in issue upon this application and the defendant's case is that he was aware that Mrs Gurney had been the victim of various scams which he had reported to the police. However, on the face of it Mrs Gurney was under a misapprehension as to her financial position when she wrote to Maddersons in December 2011, since at that time she had substantial sums available in cash, and had previously been living within her means.

11. There is in evidence a letter from Maxine Madderson dated 7th May 2014, apparently written on the instructions of Mrs Gurney.

It is worth quoting what she said in this letter in full:

"I understand from my client that you are unhappy that your mother sold the property to Mr Doherty and you fear there may have been some undue influence. I can assure you that I personally attended on your Mrs Gurney and satisfied myself that she had full capacity to make the decision to transfer the property for just £70,000 to Mr Doherty and that she did so entirely of her own free will. My understanding at the time was that your mother had some financial difficulties and had agreed with Mr Doherty that he would buy the property from her in an amount which he could afford but which would give her sufficient funds to deal with her own financial difficulties, and as a quid pro quo for selling the property cheaply, he would allow her to stay at the property for the entirety of her life rent-free."

This letter was of course written over two years after the sale was completed and cannot be regarded as anything other than self-serving. It does not reflect any attendance note or correspondence on the file itself, and it is impossible to regard

Ms Madderson as independent since she was in fact not acting for Mrs Gurney, but for Mr Doherty in connection with the transaction in question. Moreover, by its own terms, the advice given was on the basis of the misapprehension of financial difficulties, so cannot have been informed advice.

12. In this context I must consider also the letter of 23rd September 2011 from Mrs Gurney's GP, written "To Whom it May Concern", and the doctor's notes which preceded it. The letter reads as follows:

"I am writing at the request of Mrs Gurney. She attended the surgery today to inform me that she plans to sell her house and to move in with her partner. She has requested a letter from myself to confirm that she is in a fit state of mind and is aware of what she is doing. There is no indication looking through her clinical record of any mental impairment, memory impairment, confusion or any other such problem. She is an active lady, still does clay pigeon shooting and drives her own car. I can confirm that this lady appears to be in a sound state of mind."

13. On the same day it seems that Mrs Gurney had written to Dr Aziz saying that she was selling her house and moving in with her partner and that she wanted a letter from him to say that she was "in fine state of mind" and knew what she was doing. Dr Aziz interviewed Mrs Gurney and wrote the following note:

"Attended to request a letter as plans to sell her house and buy another place with her partner whom she has known for a long time. He is 20 years her junior and working as a builder and doesn't own a house but will be getting a large inheritance soon and they want to set up a home.

She does clay pigeon shooting and still drives, fully aware of her choices and not coerced at all. Requesting a letter to certify she is of sound mind.”

This was of course materially inaccurate as the defendant was over 40 years her junior and did not in any event reflect the transaction which ultimately took place. Whilst Dr Aziz’s conclusion that Mrs Gurney had capacity is not impugned, his conclusion, if such it was, that she was “fully aware of her choices and not coerced at all”, can only have been a superficial impression at that time, and cannot stand in the light of Professor Jacoby’s report in relation to her vulnerability, and in the context of the transaction which actually took place. It may well be that in her dealings with her doctor and the solicitors at this time Mrs Gurney maintained a good social façade, as it has been termed, which was not perhaps penetrated, as it might have been by more stringent inquiry. On this I was referred to the discussion in Williams, Mortimer and Sunnucks on Executors, Administrators and Probate, 21st. ed. at para10-15.

14. In this context it seems to me that, although Mrs Gurney’s capacity to reach the decisions she did cannot be impugned, the rationality of what she in fact decided to do is relevant to the need for an explanation, and reinforces the need for cogent explanation on the basis of an informed decision on advice, having been apprised of all relevant circumstances. The suggestion by the defendant that Mrs Gurney wanted to downsize is inconsistent with what happened as is his claim that

he was looking at equivalent properties since he says he could only afford the £70,000 he paid Mrs Gurney. It is here also, in my view, that the defendant's previous character and the history of his relationships comes into play. He has convictions, on guilty pleas, of assault occasioning actual bodily harm on his 60-year-old uncle in November 2011, and an earlier conviction for fraud against a 78-year-old lady. The claimant has also ascertained that he was involved with a Miss Wilkinson. At the outset of that relationship, he was aged 28 whereas she was 57. He claimed to have known her all his life. Together with his brother John Doherty he purchased Miss Wilkinson's house for £49,000 when in fact it was worth £375,000, on terms that Miss Wilkinson enjoyed a lease for life. She was suffering from early onset dementia at the time. The exact amount which was actually paid for the property is obscure, but the upshot of the story as related by Miss Wilkinson's solicitor, who acted in proceedings brought by Miss Wilkinson's deputy, appointed by the Court of Protection, in Newcastle-upon-Tyne County Court, and they resulted in a settlement whereby the defendant and his brother paid £250,000 to Miss Wilkinson. The property was eventually sold for £440,000, so that the defendant appears to have benefited substantially from this transaction. The £70,000 which was paid to Mrs Gurney in fact came from the defendant's share of the proceeds of sale of the house acquired from Miss Wilkinson. It is not apparent that this fact was ever

imparted to Mrs Gurney, or any of the defendant's criminal history. In my view it would at the very least be necessary to show that Mrs Gurney was advised independently as to her options, and such advice should have been given independently and in the knowledge of the defendant's character. In my view the duty of candour on the husband in the *Hewett* case, who did not inform his wife that he was having an affair so that she could make an informed decision about their future together in the context of standing security for his borrowings, is entirely analogous. There is, therefore, no evidence to displace the presumption since the transaction was preceded by inadequate and uninformed advice. There is moreover no realistic prospect that the defendant can improve upon this and he has deployed no evidence in this regard.

15. I do not consider it necessary or desirable to go into other factual matters on the question of undue influence, or the defendant's character or credibility, but I should mention the possibility of a defence by way of laches, which was alluded to earlier at the CMC which preceded this application by the defendant's then counsel. In my view, this is clearly bad for two reasons. In the first place the claim form was issued less than six years after the transfer in issue, so that on the basis that the basic statutory limitation period is to be adopted by analogy, there is no bar, but moreover lapse of time affords no defence until the influence or invalidating relationship has

ended: see *Allcard v Skinner* [1887] 36 Ch D 145, at 163, 187. That can only have been on Mrs Gurney's death on 27th March 2013.

16. For these reasons, it is my view that the defendant has no realistic prospect of a successful defence to this claim, were it to proceed to trial. It may be, as was submitted by counsel for the claimant, that it is unlikely that the defendant's credibility in relation to contested matters of fact could stand up in the light of his character and of various discrepancies and inconsistencies in his evidence which have been pointed out. However, it seems to me dangerous in the context of an application of this sort to rely upon matters of credibility in the absence of oral evidence and cross-examination, with the result that I have not entered into those matters and proceeded upon the defendant's version of matters, and even on that basis it is my view that this transaction cannot stand. There is no realistic prospect that the defendant can come up with further evidence that would establish his defence. The facts that, as Mr Doherty asserted before me, Mrs Gurney's family knew about the sale to him at the time and that the house was on the market before it was sold to him, are, in my view, neither here nor there.
17. In the usual way, this judgment is being circulated in draft to the parties. The solicitors for the claimant should liaise with Mr Doherty, and with counsel for the claimant, and arrange an

application without notice at 2 pm when I am available (which needs to be pre-booked), so that I can fix an appointment for the handing down of the judgment and also to deal with settling the order and any other consequential matters which arise.