OUTER HOUSE, COURT OF SESSION

[2019] CSOH 44

A373/17

OPINION OF LORD BRODIE

In the cause

ADELINE MARGARET WILSON

Pursuer

against

PETER WATKINS AND ANOTHER

Defenders

Pursuer: Edward; Drummond Miller LLP
Defenders: MacColl QC, Michelle Adam (Solicitor Advocate); Thorntons Law LLP

12 June 2019

Introduction

[1] The pursuer and the second defender are mother and daughter. The first defender is the second defender's husband. In 2012 the first defender lost his job. The pursuer invited the defenders to reside with her in her house in Kirriemuir ("the property"). The defenders accepted the pursuer's invitation. They sold their house and moved into the property.

[2] In 2012 the pursuer was the owner of the property. It was unencumbered by any security. The pursuer had acquired title to it in 2005 after the death of her husband. At least for present purposes, it may be taken that in 2013 the pursuer executed a disposition of the property, dated 18 September 2013, in favour of the defenders, reserving to herself a liferent

("the Disposition"). The Disposition was registered in the Land Register of Scotland on 30 September 2013. It may also be taken that she also executed a Minute of Agreement between her and the defenders, again dated 18 September 2013 ("the Minute of Agreement"). The Minute of Agreement is not held incorporated into the Closed Record. The terms of the Minute of Agreement are not the subject of averment.

[3] As at 2012 and thereafter, the pursuer had a good relationship with the defenders. That would no longer appear to be the case. After an incident in 2015 the pursuer left the property and went to reside with her other daughter. The defenders continue to reside in the property.

[4] In this action the pursuer concludes for production and reduction of (first) the Disposition and (second) the Minute of Agreement. In a third conclusion she seeks an order ordaining the defenders summarily to flit and remove themselves from the property to the end that the pursuer may enter thereon and peaceably possess and enjoy the same. The first conclusion is supported by the pursuer's third plea-in-law: "The Disposition ... having been impetrated by the defenders exercising undue influence upon the pursuer to their own benefit, should be reduced." The second conclusion is supported by the pursuer's second plea-in-law which, *mutatis mutandis* is in the same terms as her third plea: "The Minute of Agreement ... having been impetrated by the defenders exercising undue influence upon the pursuer to their own benefit, should be reduced." The first plea-in-law for the defenders is a general plea to the relevancy and specification of the pursuer's averments.

[5] The action incorporates a counterclaim for the defenders seeking payment by the pursuer of the sum of £45,000 by way of restitution in respect of undue enrichment in the event that the pursuer is found to have been unduly influenced by the defenders. This proceeds on averments (in Answer 3) that the defenders had used the proceeds of sale of

their former home to extend the property by adding further rooms and had also expended a sum in replacing a kitchen.

[6] The action came before me for discussion on the Procedure Roll on 11 April 2019. Mr Edward, Advocate, appeared for the pursuer. Mr MacColl QC, together with Ms Adam, Solicitor Advocate, appeared for the defenders. Mr MacColl explained that certain matters had been agreed between the parties. First, the pursuer's preliminary pleas to the relevancy of the defences and the counterclaim were to be reserved (a note of argument for the pursuer had been intimated which outlined a submission that no relevant defence had been pled to the third conclusion but that was not being insisted on). Second, no point would be taken by the defenders as to the sufficiency of the first conclusion in circumstances where what was sought to be reduced was a registered title, notwithstanding that were the pursuer to succeed in this action, further proceedings would be required to rectify the Register. Third, no point was taken as to the competency of decree being pronounced by the Court of Session in terms of the third conclusion. Fourth, no point was taken as to the absence of any substantive plea by the defenders indicating the basis of their defence to the third conclusion (something Mr MacColl indicated that he would remedy in due course by amendment). Thus, the sole issue for debate was whether the pursuer's averments were sufficient to entitle her to proof of her case of reduction on the ground of undue influence.

The pursuer's averments

[7] The pursuer makes the following averments.

In condescendence III:

> "For a number of years, after the death of the pursuer's husband in 2003, the second defender assisted the pursuer in managing her finances. On 29th August, 2011, the pursuer granted a Power of Attorney in favour of the second defender. In 2012, the

> first defender lost his job. The pursuer invited the defenders to reside with her. She had a good relationship with them. She trusted them. In particular, she trusted them in relation to financial matters."

In condescendence IV:

> "In about 2013, the defenders engaged Blackadders, Solicitors to prepare a Minute of Agreement and Disposition. They advised the pursuer that she required to sign documents in respect of her future care. The second defender took the pursuer to the Solicitor's office. The pursuer trusted her daughter. She did not understand what she was signing. The pursuer has subsequently discovered that Blackadders were acting for all three parties in the transaction."

In condescendence V:

> "In May 2015, there was an incident at 1 Woodend Drive in the course of which the second defender damaged the pursuer's wrist. The pursuer called the Police. She no longer felt safe residing in the property with the defenders. In the course of the incident, the second defender asserted that she owned 1 Woodend Drive. The pursuer believed this assertion to be untrue. For her own safety, she went to reside with her other daughter. The pursuer tried to withdraw money from her accounts and was unable to do so. As a result of the issues which had arisen, she consulted Blackadders, Solicitors. The solicitor instructed by her, Petra Grunenberg, drafted a letter which she could send to the defenders. The solicitor she consulted with told the pursuer that she had signed the property over to the defenders. The pursuer was shocked. The solicitor nonetheless drafted the letter on the basis that the house had been transferred to the defenders in liferent. Following receipt of the letter from the pursuer, the defenders refused to vacate the property. The pursuer sought legal advice from another firm. Thereafter, she had the opportunity to read the Minute of Agreement entered into between her and the defenders on 18th September 2013. The Minute of Agreement incorrectly stated that the pursuer was unable to live independently in the property. It further incorrectly stated that the defenders had moved into the property in order to enable her to continue to live there. As hereinbefore condescended upon, the pursuer had offered a home to the defenders when they encountered financial difficulties as a result of the first defender losing his job. It further stated that the defenders had been liable for outlays for the property. Between 2004 and 2015, a sum of £52,152.95 was transferred from the pursuer's bank account into the first defender's bank account. In 2012, a sum of £9,107.81 was transferred from the pursuer's bank account into the first defender's bank account. The pursuer is unaware of the reasons for those transactions or the use to which the funds were put. Payments for gas, electricity, the television licence, council tax and insurance were being made from the pursuer's bank account. That account was primarily funded by her state pension and a pension with Reassure Limited. For a period until November 2013, £170 per month was paid into her account from an account in the joint names of the defenders. The payments were designated as being for housekeeping. The Minute of Agreement further incorrectly stated that the pursuer's intention to bequeath the property to the defenders. It had never been her

> intention to do so. It further incorrectly stated that the pursuer had determined to transfer the property to the defenders inter vivos. The pursuer signed the Minute of Agreement not knowing its import. She signed the Disposition consequent on the agreement without knowing its import. She understood that the documents were designed to protect her."

In condescendence VI:

> "The defenders abused their close personal relationship with the pursuer to bring undue influence to bear upon the pursuer to effect a transfer of her home to them and to enter into an agreement prejudicial to her and favourable to them. As a result of the agreement and Disposition, the pursuer is prevented from disposing of the property as she wishes on her death. She has in any event not been afforded peaceable occupation of the property as the defenders remain there. She is not able to reside in the property with the defenders. The pursuer has called upon the defenders to vacate the property so that she can enjoy peaceable occupation of the property at least during her lifetime. They have refused to do so. This action is in any event necessary to reduce the Disposition and the agreement entered into."

Submissions

The defenders

[8] Mr MacColl adopted his note of argument and moved for dismissal of the action in so far as relating to the conclusions for reduction. It was his submission that the pursuer's averments did not go far enough to instruct a relevant and sufficiently specific case of impetration of the pursuer's consent by the undue influence of the defenders. He accepted that the case relating to removal from the property, as third concluded for, should proceed to proof before answer.

[9] Mr MacColl explained that the law as to reduction of a deed by reason of undue influence had recently been discussed in the opinion of Lord Uist in *Matossian Executor* v *Matossian* [2016] CSOH 21 at paragraphs 9 to 11. Mr MacColl commended the passages from *McKechnie* v *McKechnie's Trs* 1908 SC 93 at 98 and *Weir* v *Grace* (1899) 2 F (HL) 30 at 32, which are quoted by Lord Uist in his opinion. However the leading authority remained *Gray* v *Binny* (1879) 7 R 332 where Lord Shand had set out what Mr MacColl described as the

four-part test for the relevancy of a case of undue influence. That test required that in order to establish a case of undue influence it must be averred and proved: (1) that there was a relationship which created a dominant and ascendant influence, (2) that the relationship was one of confidence and trust, (3) that a material and gratuitous benefit had been given to the prejudice of the granter, and (4) that the granter had been without the benefit of any independent advice at the material time.

[10] In Mr MacColl's submission the averments in the present case did not meet his four-part test. Necessary averments were absent. Such averments as there were were confused and lacking in specification. They did not give the defenders fair notice of the case they had to answer.

[11] Here, the parties were in a family relationship of mother, adult daughter and son-in-law. The pursuer avers that she invited the defenders to reside with her, that she had a good relationship with them and that she trusted them, particularly in financial matters. The pursuer granted a power of attorney in favour of the second defender. That, Mr MacColl accepted, sufficiently avers what he described as a relation of confidence and trust (the second part of the test) but the existence of such a relationship is only part of the four-part test; it does not deprive the pursuer of all responsibility to protect her position. It was not enough to entitle a pursuer to reduction on the ground of undue influence that someone with whom she had a close relationship got her to do something that she later became unhappy with. To make out a case of undue influence there had to be specific averments to instruct the other three parts of the test. Here there were no such averments. Accordingly, as a matter of pure relevancy the pursuer's case was deficient and should not be allowed to proceed to proof.

[12] The pursuer's averments as to the events of 2013 and the circumstances in which she may have come to sign the Disposition and the Minute of Agreement are limited to what appears in condescendence IV. It was not clear from these averments what the pursuer was seeking to prove. Did she accept that she was legally represented at the relevant time? There is an averment that the second defender took the pursuer to Blackadders' office. She does not explain what actually happened there; not even who was present, or what was said or what, if anything, was done. She does not say in terms that she signed anything on the occasion of that visit. This is in the context of detailed averments in answer where reference is made to taking the advice of a named solicitor in April 2013, a meeting at the property on 19 April, a letter of engagement issued by the solicitor and signed by the three parties on 26 April and a further meeting at the property on 18 September 2013 which was attended by the solicitor and on which occasion the documents were signed. These averments in answer are met with a simple denial by the pursuer. The defenders had not been given fair notice of what was the case they had to face. The pursuer would seem to be in a position to say certain things but then she "slams on the brakes" leaving large gaps in her account without any explanation whatsoever. The question of legal representation is left unaddressed, as is what it is said the defenders did to exert undue influence. It was not enough for the pursuer to assert that she did not understand what she was signing. A person of full capacity will be taken to be bound by what she signs, absent particular circumstances, for example where a father says to a son: "You do not need to read it, just sign". Here, there is no suggestion of such particular circumstances. In condescendence V the pursuer makes averments to the effect that the narrative of fact in the Minute of Agreement is inaccurate and in condescendence VI she avers that the defenders abused their

close personal relationship with the pursuer. That is it. What then is the case which the defenders have to meet?

[13] As to the requirement that the relationship had created a dominant and ascendant influence to which the granter was subject, there had to be averments that such influence existed and that it had been exercised. Here there were no such averments. On gratuitous benefit, Mr MacColl did not take the extreme position that the benefit enjoyed by the party exercising influence had to be entirely gratuitous. Rather, it was enough if the benefit could be said to be wholly disproportionate. However, the pursuer makes no averments to that effect beyond averring that she conveyed the property (under reservation of a liferent). That was in the context where the defenders make averments of expenditure by them on extending the property and paying for a new kitchen, which are met by the admission that "work to the property was carried out in 2012 and 2014." As to absence of independent advice, looking to what was averred in condescendence IV and V, it was impossible to discern what the pursuer's position was. There were no averments that the solicitors had been acting so as to advance the interests of one party over the other. In condescendence V the pursuer avers that she sought the assistance of Blackadders after she left the property in 2015. This suggests that they were her agents and acting as such. The availability of advice is important; it is the means of addressing any lack of understanding on the part of the granter. If you choose to act when there is someone available to give you advice, then that is your lookout. Here the pursuer does not offer to prove any want of independent advice.

[14] Mr MacColl submitted that our system of pleadings was such that a case could be tested by reference to whether the averments of primary fact were such as to allow the legal

question to be taken to enquiry. Here such case as is made does not survive that test. It should be dismissed.

The pursuer

[15] Mr Edward began by reminding me that an action can only be dismissed as irrelevant if it will necessarily fail even if all the pursuer's averments are established: *Jamieson* v *Jamieson* 1952 SC (HL) 44 at 50 and 63.

[16] Mr Edward accepted that a case of undue influence had to have the elements identified by Lord Shand in *Gray* v *Binny*, albeit that it was not appropriate to describe this as a four-part test. The criteria were looser than that. There was no dispute that the parties had been in a relationship of trust and confidence. As was averred in condescendence IV it was the defenders who engaged Blackadders, and it was they who advised the pursuer that she required to sign documents. The dominant or ascendant position of the defenders was therefore to be inferred. Mr Edward accepted that Blackadders were the pursuer's solicitors (indeed they had acted for her previously) but they were not "independent" in that they were also acting for the other side in the transaction, albeit no criticism was made about what they did. The transaction was gratuitous in that the transfer of the property was made for no monetary consideration. There were averments of transfers from the pursuer's to the first defender's bank account. It was accepted that, generally speaking, parties must be taken as bound by the documents which they sign but that was to suppose that their consent had not been obtained by undue influence.

[17] Mr Edward submitted that proof of the exercise of a dominant influence was not essential in order to establish undue influence. It was artificial to require that where there was a relationship which was productive of trust and confidence. It was abuse of the trust

and confidence arising from the relationship in question which was at the heart of undue influence. A proper assessment of the case required the leading of evidence. Reference was made to *Honeyman's Trs* v *Sharp* 1978 SC 223 at 229 and 230 and *Clydesdale Bank plc* v *Black* 2002 SC 555 at 559 and 567. Reverting to what had been said in *Jamieson* v *Jamieson*, Mr Edward submitted that it could not be said that the pursuer could not succeed.

The applicable law

[18] One means of conferring private rights is by voluntary grant, often effected through the mechanism of a formal deed. To be voluntary, a grant must be with the full, free and informed consent of the granter. Accordingly, where there is in fact no consent or where consent is in some way vitiated, a grant will be void or voidable and where the grant is constituted in a deed that deed will be open to reduction.

[19] As in noted by McBryde *The Law of Contract in Scotland* (3rd edit, 2007) at paragraph 16-22, in *Tennent* v *Tennent's Trs* (1868) 6 M 840 at 876 Lord President Inglis sets out the grounds of reduction of a deed in Scots law in the form of an apparently comprehensive list: incapacity; force and fear; facility and circumvention; fraud; and essential error. However, within just a decade of the decision in *Tennent* v *Tennent's Trs*, Lord Inglis presided in a case which added a further ground to the list: undue influence, a concept imported from England. The case was *Gray* v *Binny*. It remains the leading authority on the topic: see eg *Mumford* v *Bank of Scotland, Smith* v *Bank of Scotland* 1996 SLT 392 Lord President Hope giving the opinion of the court at 397(and when *Smith* was appealed to the House of Lords, see *Smith* v *Bank of Scotland* 1997 SC (HL) 111 Lord Jauncey at 114 and Lord Clyde at 119); also *Horne* v *Whyte* 2004 SCLR 197, Lord Drummond Young at para [11] and *Matossian Executor* v *Matossian*, Lord Uist at para [9].

[20] In *Gray* the Lord Ordinary (Young) and each of the judges of the First Division were in no doubt that the deed of consent to disentail which was in question and all that followed from it should be reduced. The pursuer, a 24-year-old army officer, "with no training or education to qualify him to understand or transact business" had been "stripped of his inheritance for a grossly inadequate consideration" whereby "the other party to the transaction [had] to a corresponding extent been gratuitously benefited and enriched". The other party was the pursuer's then 45-year-old mother with whom he was on close and affectionate terms. She had, however, misled him as to nature of his rights, dissuaded him from seeking independent advice and obtained his signature consenting to the disentail of a very valuable estate in concert with a family law agent who "had no thought, and did not imagine, that his client [the mother] …had any thought, of dealing fairly with the pursuer."

[21] Lord Deas would have been prepared to regard these facts as coming within "our ordinary and well established issues of facility coupled with fraud or circumvention to the lesion of the granter of the deed" (*supra* at 350). However, the Lord Ordinary, having had the benefit of "copious reference" to English authority, as well as "all the Scotch cases in this department of the law" had based his decision on the principle he derived from the authorities to which he had been referred, which was:

> "where a relation subsists which imports influence, together with confidence reposed, on the one side, and subjection to the influence and the giving of the confidence on the other, the Court will examine into the circumstances of any 'transaction of bounty' …between parties so related, whereby the stronger party (using the term for brevity) greatly benefits at the cost of the weaker, and will give relief if it appears to have been the result of influence abused or confidence betrayed." (p338)

The Lord President was prepared to adopt the reasons stated by the Lord Ordinary, and Lord Deas would have felt constrained to concur generally with the views of the Lord Ordinary had he considered it necessary on the facts. However, it is Lord Shand's

reformulation of the principle identified by the Lord Ordinary which has proved to be most influential.

[22] Lord Shand explained that in coming to the conclusion that the pursuer was entitled to have the deed set aside, he agreed with the view of the Lord Ordinary that the case belonged to a class in which a remedy may be given without concluding that there had been fraud, in the primary sense of that word, or that the party who had been disadvantaged had been facile. Rather than a case of fraud Lord Shand considered that (at 346):

> "The case is one in which confidence was invited and given, and parental influence unduly used by the pursuer's mother, with the assistance of her agent, in procuring a deed to her own great advantage, and to the corresponding disadvantage of her son; and a deed so obtained is, I think, liable to be set aside without affirming that it was procured through fraud."

Lord Shand's reformulation of the Lord Ordinary's principle is found at 347:

> "The circumstances which establish a case of undue influence are, in the first place, the existence of a relation between the granter and grantee of the deed which creates a dominant or ascendant influence, the fact that confidence and trust arose from that relation, the fact that a material and gratuitous benefit was given to the prejudice of the granter, and the circumstance that the granter entered into the transaction without the benefit of independent advice or assistance."

[23] Mr MacColl and Mr Edward were agreed that this was the key formulation of the concept of undue influence as it was received into Scots law and applied in the subsequent authorities. They were in disagreement, however, as to whether Lord Shand's formulation could be accurately re-stated in terms of Mr MacColl's four-part test. I understood Mr Edward to take particular issue with a requirement to establish that the relationship in question was one which conferred a dominant and ascendant influence on the party who had taken the benefit in terms of the deed under challenge.

[24] With all respect to Mr MacColl, I find his re-statement of Lord Shand's formulation to be, if not exactly inaccurate, at least awkward and, in its dissociation of the concept of a

relationship which creates a dominant or ascendant influence and the concept of what he describes as a relationship of confidence and trust, potentially confusing. In my opinion, should it be thought necessary to do so, a closer and more manageable re-statement of the elements identified by Lord Shand and therefore of what have to be averred and proved in the event of challenge to a deed on the ground of undue influence would be: (1) the existence of a relationship of a fiduciary character between granter and grantee; (2) the grant by the granter in favour of the grantee of a material and gratuitous or at least grossly disproportionate benefit at the granter's cost or otherwise to his prejudice; and (3) the granter having acted without independent advice or assistance of an appropriate sort. It is a matter of abuse of trust, as demonstrated by the taking of a gratuitous benefit in the absence of appropriate independent advice.

[25] I take the admittedly somewhat imprecise expression "relationship of a fiduciary character" as encapsulating what Lord Shand describes as a relation of dominant or ascendant influence (on the one hand) and confidence and trust (on the other), from what was said by Lord President Clyde in *Ross* v *Gosselin's Executors* 1926 SC 325 at 334 and Lord Guthrie in *Forbes* v *Forbes's Trs* 1957 SC 325 at 336. According to Lord President Clyde:

> "The essence of undue influence is that a person, who has assumed or undertaken a position of quasi-fiduciary responsibility in relation to the affairs of another, allows his own self-interest to deflect the advice or guidance he gives, in his own favour."

Lord Guthrie was to this effect:

> "In my opinion, an onerous contract entered into by a party of full age cannot be reduced on the ground that his consent was the result of undue influence exercised upon him, unless the influence was exerted to the detriment of that party by or on behalf of the other party to the deed in breach of a duty arising out of a fiduciary or quasi-fiduciary relationship. I adopt as substantially accurate the statement of the law in Gloag on Contract, (2nd ed.) p. 526:—'Where the parties to a contract stand to each other in a relation which might enable the one to exert a dominant influence over the other, the contract will be reducible if it is proved that any material facts

> were concealed, or if the result is that a gratuitous advantage has been obtained by the exercise of that influence.'"

[26] As I understood Mr Edward's position it was that a "relationship of confidence and trust" was a sufficient basis for a case of undue influence where it was combined with gratuitous benefit and the absence of truly independent advice; dominant or ascendant influence was not an essential element. Now of course something might turn on precisely what is meant by a relationship of confidence and trust, but if it is no more than the sort of mutual confidence that one would expect in any close family relationship or friendship then I have to disagree with Mr Edward. More is required. As I would see it, a prerequisite of a relationship which might give rise to undue influence is not simply that it involves a degree of mutual trust but that it involves an imbalance of power, or knowledge, or experience, or moral or physical strength as between the parties to the relationship. It is because of that imbalance that the dominant party effectively owes fiduciary duties towards the dependant party.

[27] The expression "dominant or ascendant influence" is a direct quotation from the passage in Lord Shand's opinion in *Gray* at 347 where he states the principle which he considers should apply. It is true, as Mr Edward pointed out, that Lord President Inglis does not use Lord Shand's expression in the course of his opinion. However, in an opinion which in large part consists of a narrative of the facts, the Lord President describes what amounts to a summary of the defender's position in argument as an admission that the pursuer's late mother "must have exercised over the mind of her son an influence of very unusual character and strength". Moreover, it will be recollected that the Lord President was prepared to adopt the reasons of the Lord Ordinary, Lord Young. In his opinion (*supra* at 338) the Lord Ordinary refers to a "stronger" and a "weaker" party, "subjection to

…influence", and a party having obtained an undue advantage from a "dependant". That, I would suggest is language very close to "dominant or ascendant influence". Had he thought it necessary, Lord Deas would have concurred with the views expressed by the Lord Ordinary.

[28] The importance of establishing a "dominant" influence can also be seen in Lord President Hope's review of what is required to amount to undue influence in *Mumford* v *Bank of Scotland, Smith* v *Bank of Scotland*. At 397G the Lord President says this:

> "In our opinion the tendency of the English law to deal with cases of undue influence by reference to presumptions arising from the fact that the parties are related to each other differs significantly from the approach to cases of undue influence in Scots law."

Later in the same page Lord Hope quotes Lord Shand's statement of principle in *Gray* and continues:

> "There is no indication in this passage that a presumption of undue influence can arise merely from the nature of the transaction and the fact of the relationship. What is important is the effect of that relationship in the particular case, with the result that each case must be examined upon its own facts. The question, as explained by *Gloag on Contract* (2nd ed, 1929), p 527, is whether the circumstances were such, and the influence exercised by one party so dominant, as to deprive the other of the power of apprehending the considerations applicable to the case."

I see this passage to be very much to the point when considering what sort of a relationship may provide the basis for a case of undue influence. Contrary to what may be the case in England, in Scotland no presumption of undue influence arises simply from the identity of the parties to the relationship, for example parent and child. There must be something more; what I have described as an imbalance as between the dominant party and the dependant party, giving rise to what amounts to a fiduciary relationship. The issue is fact-sensitive. Mr MacColl referred to the observation of the Lord Justice-Clerk (MacDonald) in *McKechnie* v *McKechnie's Trs* at 98:

> "…if there is anything in the nature of weakness or facility in such cases, the weakness or facility will make it easier to hold that that a person acted under undue influence."

That I would see as providing an example of factual circumstances which might allow the court to conclude that one party was subject to the dominant influence of the other. Other sorts of fact may be relevant; whether primary facts or the inferences that may be drawn from primary facts. In *Smith* v *Bank of Scotland* 1997 SC (HL) 111 at 119 Lord Clyde quoted from the opinion of Lord Maxwell in *Honeyman's Executors* v *Sharp* 1978 SC 223 at 230:

> "…there must be cases where the facts as proved raise a *prima facie* inference that the gift has been acquired by abuse of a position of trust and which at least cry out for an explanation even though the precise mode of abuse is not known and might indeed be too subtle to be readily capable of precise expression."

[29] Mr Edward relied on Lord Maxwell's approach in *Honeyman's Executors* and the weight it gave to the need for proof of the facts. I accept, as I have already emphasised, that whether the nature of the relationship between the parties is such as to provide a basis for a case of undue influence (what I have described as a relationship of a fiduciary character) is fact-sensitive, but for facts to be proved they must first be averred. That applies to the issues of gratuitous benefit and absence of advice just as it applies to the issue as to whether it might be said that there was the necessary relationship of a fiduciary character. I must therefore turn to an assessment of the pursuer's pleadings. However, before doing so I should explain why in my attempt to identify the relevant law, I have attached no significance to the passage cited by Mr MacColl from the Lord Chancellor's speech in *Weir* v *Grace* at 32.

[30] The passage from *Weir* v *Grace* is as follows:

> "The conduct of a person in vigorous health towards one feeble in body, even though not unsound in mind, may be such as to excite terror and make him execute as his will an instrument which, if he had been free from such influence, he would not have

> executed. Imaginary terrors may have been created sufficient to deprive him of free agency. A will thus made may possibly be described as obtained by coercion."

On reflection, I am not entirely sure what Mr MacColl's purpose was in drawing this dictum to my attention, other than the fact that it has been referred to in other cases. If it was simply a way of making the same point as had been made in *McKechnie*: that a person of weak disposition may be more easily imposed upon than a stronger person, then I would accept that as self-evident. However, if, as I understood him at the time he was making his submission, Mr MacColl was arguing that in order that a person be held to be exercising undue influence his conduct must be such as to excite "terrors", imaginary or otherwise, then I do not agree. In his speech in *Weir* v *Grace* Lord Chancellor Halsbury was expressing his extreme difficulty in discerning the basis upon which it could be said that a will leaving a bequest of residue to the testatrix's law agent had been impetrated by undue influence (the agent had refused instructions to draft the will with the provision in his favour, advised the testatrix to leave her money to relatives, and only relented to the extent of referring her to an independent law agent to prepare her will, after which the testatrix survived for 16 years). According to the Lord Chancellor, what the case of undue influence required but which counsel for the pursuer had not put his finger on, was "fraud or coercion, under which the thing was done". Lord Halsbury then referred to what Lord Cranworth had said in the (English) case of *Boyse* v *Rossborough* 1856, 6 Clark's H of L Cas 2 at 47 for "a good general exposition of what the law is on the subject". The passage quoted by Mr MacColl is part of a long quotation by Lord Halsbury from Lord Cranworth's speech in *Boyse*. Prior to the passage quoted by Mr MacColl, Lord Cranworth has this (*Weir* v *Grace* at 32):

> "In order, therefore, to have something to guide us in our inquiries on this very difficult subject, I am prepared to say that influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or by fraud."

However, Lord Cranworth immediately qualified that proposition by explaining that in interpreting "coercion" or "fraud" some latitude must be allowed. He then illustrates what he means by giving the example of a person in vigorous health so conducting himself towards someone whose condition is so feeble as to give rise to imaginary terrors that the conduct of the vigorous person falls into the category of coercion. He then makes a similar point in relation to fraud and concludes the passage quoted by Lord Halsbury as follows:

> "It is, however, extremely difficult to state in the abstract what acts will constitute undue influence in questions of this nature. It is sufficient to say that allowing a fair latitude of construction, they must range themselves under one or other of these heads—coercion or fraud."

[31] It is not clear just where these statements by Lord Cranworth, quoted by Lord Halsbury and given some emphasis by Mr MacColl, fit into the principle accepted by Lord Shand in *Gray*. What it might mean is that for the principle to apply it is necessary to establish, by direct evidence or as a matter of inference, that the party who has received the benefit at the expense of the other party has exercised his influence on the other person in a way that has to some extent (and perhaps to a very attenuated extent) the character of either coercion or fraud. However, respectfully agreeing with everything that appears in the paragraph which begins on page 229 of Lord Maxwell's opinion in *Honeyman's Executors* v *Sharp*, I cannot say that I have found that reflected either in *Gray* or the Scottish cases which have followed *Gray*.

[32] Mr MacColl did complain that the pursuer in the present case had failed to aver what it was that the defenders were said to have done in exercise of their influence but he did not focus on an absence of averments of coercion or fraud. I consider that he was right not to do so. However, Mr MacColl's criticism that the pursuer does not aver just how the defenders are said to have abused her trust of course remains.

Assessment of the pleadings

[33] Mr MacColl submitted that the pursuer's case was irrelevant. He came to that conclusion by drawing attention to what, in his submission, was required to be averred but which was not, allied to what Mr MacColl argued was the fatal concession that at the relevant juncture the pursuer had had available legal advice. He complained that the pursuer had not given fair notice of what her case against the defenders was. He said that the pursuer's pleadings lacked specification.

[34] In my opinion there was force in Mr MacColl's submissions.

[35] This is a case where the pursuer says remarkably little about the circumstances in which, so her pleas in law assert, she was subject to the exercise of undue influence. It is to be borne in mind that this is not a case, such as *Honeyman's Executors* for example, where the person who it is averred was unduly influenced is deceased and therefore not available to be precognosced with a view to giving evidence. Nor is it a case where the person who it said was imposed upon, although still living, is in some way facile or less than fully competent. Here the pursuer may be taken to be a generation older than the defenders. She was widowed in 2003. However, beyond that there is nothing to suggest that she was at the relevant date or dates, and indeed now, other than an adult of full capacity and of at least ordinary intelligence and experience of life. That she was quite capable of understanding a legal document (and, incidentally, capable of independent living) is suggested by averments in article V of condescendence. There (page 12D of the Record), referring to a time after she had left the property and gone to live with another daughter she explains that, having consulted Blackadders, the pursuer sought legal advice from another firm. She then avers:

> "Thereafter, she had the opportunity to read the Minute of Agreement entered into between her and the defenders on 18th September 2013. The Minute of Agreement incorrectly stated the pursuer was unable to live independently in the property. It further incorrectly stated that the defenders had moved into the property in order to enable her to continue to live there".

There is the averment (in article IV of condescendence, page 9B of the Record) that: "She did not understand what she was signing". There are a number of things which are unsatisfactory about that averment. There is little by way of context in the pursuer's pleadings to explain just what the pursuer means by it. It stands with the pursuer's bare denial of quite detailed averments by the defenders as to the giving of instructions to solicitors and the preparation and execution of the Minute of Agreement and Disposition. The pursuer does not explain what she thought she was doing when she signed such documents as she accepts that she did sign. However, taking it to be the pursuer's case that although she signed the Minute of Agreement and Disposition in the office of Blackadders on 18 September 2013, she either did not read or did not understand the meaning or import of the documents, it is difficult to see where this takes the pursuer's case in the absence of any averment of lack of mental capacity on her part or misrepresentation or pressure on the part of the defenders or failure to carry out any professional duty on the part of Blackadders, the firm of solicitors the pursuer describes as acting on her behalf. As a matter of generality it may not be very extraordinary for an adult of ordinary intelligence and competence to sign binding legal documents without having read them or, if having read them, not having fully understood them, but as Mr Edward conceded, in such circumstances an adult of ordinary competence will usually be held bound by what she has chosen to add her signature to as an indication of agreement. Mr Edward's concession seemed to me to be inevitable. It is consistent with what was said in *Young* v *Clydesdale Bank Ltd* (1889) 17 R 231,

Lord Adam at 240, Lord Shand at 244, an authority referred to by Lord Hope in *Smith* v *Bank of Scotland*.

[36] Mr MacColl accepted that the pursuer had sufficiently averred a relationship of confidence and trust as between the pursuer on one hand and the defenders on the other. However, that concession must be understood in the light of Mr MacColl's analysis of the criteria for a relevant case of undue influence which he derives from what Lord Shand said in *Gray* v *Binny*. As I have explained, this is not an analysis which I would adopt. Nevertheless, however one chooses to describe the sort of relationship which may result in one party unduly influencing the other, I agree with Mr MacColl that it requires the one party to be dominant or ascendant and the other party to be in some way subordinate or amenable. I simply cannot find the averments to instruct such a relationship.

[37] This failure to explain circumstances which arguably might impose quasi-fiduciary duties on the defenders would matter less if there had been specific averments of the defenders misleading or putting pressure on the pursuer. There are no such averments. The pursuer goes no further than saying that the defenders "advised the pursuer that she required to sign documents in respect of her future care" (Record page 9A) and that the pursuer "understood that the documents were designed to protect her" (Record page 13D).

[38] Equally, there may be cases where the nature of the gratuitous benefit is so substantial and so unexpected as to raise an inference of an abuse of trust (see the passage in *Honeyman's Executors* at 230, quoted at para [28] above). Such a position is not apparent here: the pursuer accepts that the defenders had expended money on the improvement of the property which she conveyed to them, the second defender is one of her daughters and accordingly someone to whom she might be expected to transfer the property on death (albeit that the pursuer disclaims such an intention) and the pursuer reserved a liferent. At

least on one view and without looking at the Minute of Agreement (the terms of which I have not considered as they are not incorporated into nor summarised in the pleadings nor made the subject of a joint minute) the result of the conveyance was to give the pursuer an exclusive right of occupation of the property and to impose on the defenders liability for extraordinary repairs.

[39] Critically, the pursuer had legal advice and assistance from a solicitor with Blackadders. Mr Edward emphasised that the solicitor was not "independent" in that she acted for all the parties to the transaction. That may be and in consequence the solicitor's role may have been particularly delicate and difficult, but no criticism whatsoever is made of her or her performance of her duties.

[40] In considering how I should dispose of the case I have had regard to Mr Edward's reminder that an action can only be dismissed as irrelevant if, having proved everything that he offers to prove, the pursuer must inevitably fail. I have also had regard to Lord Maxwell's emphasis in *Honeyman's Executors* on the need for evidence to elucidate the subtleties which may be associated with a case of undue influence. However, there is nothing in what was said by Lords Normand and Reid in *Jamieson* to subvert the proposition that a pursuer must set out in her pleadings a statement of sufficient material facts which, if established in evidence, would or at least might, entitle her to the remedy that she seeks. Where the pursuer relies on the court drawing inferences favourable to her case the pleadings must contain a statement of sufficient primary facts to allow these inferences to be drawn. The underlying rationale for this proposition is that fairness requires that the defender be given notice of what the pursuer intends to prove, allowing him to admit what he is willing to admit and to prepare to answer what he is not willing to admit. Because the pursuer will not be allowed to prove material facts that she has not pled, the strength or

otherwise of her case can be determined by looking at what she does offer to prove. In my opinion, in the present case the pursuer has failed to make averments which, if proved in their entirety, entitle her to the remedy that she seeks.

Decision

[41] I shall accordingly uphold the defenders' first plea-in-law and dismiss the action but only in so far as it relates to the first and second conclusions of the summons. It would seem to follow that the counter-claim should also be dismissed but I shall have the case brought out by order to allow parties to address me on that should they so wish. I shall reserve all questions of expenses.