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IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CHANCERY DIVISION
His Hon. Judge Weeks Q.C.

Royal Courts of Justice
Strand, London, WC2A 2LL
6th May 2005

B e f o r e :

LORD JUSTICE WARD
LORD JUSTICE BUXTON
and
MR JUSTICE WILSON

Between:

NICHOLAS GEOFFREY DANIEL	**Appellant**
- and -	
MRS IRENE MARGARET DREW	**Respondent**

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
London EC4A 2AG
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Official Shorthand Writers to the Court)

Mr William Batstone (instructed by Messrs Wilsons) for the Appellant
Ms Penelope Reed (instructed by Messrs Burges Salmon) for the Respondent

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HTML VERSION OF JUDGMENT

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Lord Justice Ward :

Introduction.

1. This is an unusual family dispute. Aged aunt alleges that her nephew procured her resignation from a family trust by undue influence. On 2nd September 2004 His Hon. Judge Weeks Q.C. sitting as a deputy judge of the Chancery Division found for her and ordered that a memorandum signed by her dated 20th February 2002 and the deed of retirement made between her and her nephews dated 25th February 2002 be set aside. He gave the nephew permission to appeal.

The background facts in more detail.

2. The case concerns Hyde Farm, a farm of some 116 acres near Fordingbridge in Hampshire. Mr and Mrs Spicer lived and farmed there for some 50 years until Mr Spicer died in 1969. He left the farm to his wife for life and then to his two daughters in equal shares. The daughters are the claimant, Mrs Irene Margaret Drew, whom, for convenience and I hope not discourteously I shall sometimes call Aunt Margaret, and her elder sister, Mrs Muriel Daniel. At some later time Muriel gave her interest in the farm to her sons, the defendants, Nicholas and Jeremy Daniel. Since Mrs Spicer was elderly and incapable of looking after herself Mr and Mrs Drew went to live at Hyde Farm and maintained the farm for her until her death in 1982. Mr and Mrs Drew continued to farm the property rent free until 1987. Then Nicholas, as I shall refer to the appellant, took over.

3. On 23rd February 1988 Mr and Mrs Drew, as surviving executors of the late Tom Spicer assented to the vesting of Hyde Farm in Aunt Margaret, Nicholas and Jeremy on trust for sale to hold the net proceeds of sale as to half for Aunt Margaret and as to one quarter each for Nicholas and Jeremy. On 21st March 1988 the trustees of this Assent granted a yearly agricultural tenancy of Hyde Farm to Nicholas at a rent of £1 per annum fixed for five years to reflect the fact that Mr and Mrs Drew had been in rent-free occupation for the previous five years.

4. On 12th March 1990, Mrs Drew, now a widow, assigned her beneficial interest to her son Stephen. Thereafter she took no part in the business of Hyde Farm and her son, Stephen, acted as de facto trustee in her place. No-one at first questioned his doing so: after all the sons had stepped into their mothers' places and may well have been content to deal with each other for the sensible reason that they were co-owners of the property.

5. Trouble arose when Nicholas's rent free period expired and Stephen began to ask for rent. There were arguments about the farm falling into disrepair. Matters came to a head in May 1999 when Stephen served a notice on his cousin Nicholas asking for an arbitration as to rent. Nicholas disputed Stephen's authority to serve the notice and served his own notice requiring arbitration as to repairs.

6. Nicholas had begun to demand of Aunt Margaret that she attend meetings of the trustees but she was unwilling to attend to business matters which she told the judge made her legs ache.

7. Solicitors were instructed and a compromise was negotiated subject to contract under which Nicholas and Jeremy would buy out Stephen's interest and Aunt Margaret would retire as trustee. A deed of resignation and a deed of assignment were drafted by Messrs. Wilsons acting for Nicholas and Jeremy and sent on 7th December 2001 to Messrs. Burges Salmon acting for Stephen. On 5th February 2002 Burges Salmon told Wilsons that Stephen had decided, as he was entitled, not to sell his interest in Hyde Farm. As the judge remarked, "Understandably Mr Nicholas Daniel felt frustrated by this turn of events".

The events leading to Aunt Margaret's "resignation".

8. Mrs Muriel Daniel regularly visited her sister on Wednesdays. She did so on Wednesday 20th February 2002 but unusually took her son Nicholas with her despite her knowing that Margaret would not have admitted Nicholas on his own because she refused to discuss business matters with him. Margaret did not deny Nicholas entry when he attended with his mother. They stayed for about twenty minutes.

9. The judge found that both Mrs Drew and Mrs Daniel were totally honest witnesses trying to tell the truth as they remembered it but he concluded:-

> "… Given their age" [Aunt Margaret was 85 years old at the time of the trial] "and the fact that the events occurred over two years ago, I do not think that their recollection is wholly reliable. Mrs Drew in particular, towards the end of her evidence, was showing signs of confusion."

As for Nicholas he said:-

> "I did not find him a completely credible witness."

10. The judge made these important findings:-

> "Mr Nicholas Daniel wanted to speak to his aunt about repairs to the farmhouse, and, knowing that his aunt did not wish to see him, he arranged for his mother to visit her first. He did talk to her about the repairs needed to the farmhouse, and he did remind her of her duties as trustee. I do not think that he shouted or threatened her, but he did say that if she did not accept her responsibility the matter would have to be resolved in court.
>
> Mrs Drew intensely disliked any form of confrontation. She was afraid of her nephew, and frightened by the prospect of court. As a way out, she told him, untruthfully, that she thought she had already resigned. Mr Nicholas Daniel seized on this, knowing that it was not true, and asked her to put it in writing. She was cornered and felt unable to refuse. He drafted a short statement of resignation and came back in the afternoon with Mr Panton [a neighbour of Nicholas] and she signed."

11. That document recorded:-

> "I Mrs I.M. Drew of The Firs Frogham hereby give notice that from this day the 20th February 2002 I resign as Trustee/Landlord of Hyde Farm Hyde Lane Stuckton Fordingbridge Hampshire.
>
> Signed I.M. Drew.
>
> Witnessed Steve Panton."

12. On the following Sunday Margaret told her good friend, Mrs Wort, that as Mrs Wort recalled it:-

> "Margaret told me that Nick said she would have to resign as a trustee of the farm if she refused to discuss farm matters with him, or he would take her to court. She also told me it had been a very unpleasant experience for her and that Nick threatened her with court action if she did not sign this document."

13. There was "a striking disparity", for which there was "little scope for genuine error", between Nicholas's first witness statement and the version he gave in his defence verified as true in his oral evidence about what happened next. The judge found that on the following Monday, 25th February, Nicholas told his solicitor at Wilsons that Aunt Margaret had signed this document. He was advised, however, that the resignation was invalid because it had to be done by deed and he was reminded that a draft deed of resignation had been prepared a few months previously. Nicholas asked the solicitors to email him a copy which they did. He printed it out and went back to his aunt the same day 25th February before lunch. The judge found this:-

"Aware that if his cousin, Stephen, or Messrs Burges Salmon had an opportunity to advise Mrs Drew, the resignation would not proceed, Mr Daniel chose not to instruct Wilsons to send another draft to Burges Salmon but asked them to send a copy to himself instead. On the same day, he went to his aunt's cottage twice with the deed. On the first occasion, he was not admitted. On the second occasion he went with Mr Joint and was admitted on his own. He spoke to his aunt for a long time before Mr Gregory intervened.

On his own account, Mrs Drew raised the question of Stephen being appointed trustee in her place. According to Nicholas:

> "I then reminded her of what her solicitor, Mr Ricketts of Trethowans, had said to me on the telephone to the effect that the trust deed had apparently provided that in the event of Mrs Drew ceasing to be a trustee she would not be replaced as trustee, and that this provision had been put in the trust deed at Mrs Drew's own request."

Whatever Nicholas may have been told, that advice was incorrect. There was no provision in the assent preventing Stephen's appointment but, as continuing trustees, the other two would, of course, have been in a position to block it. Mrs Drew would therefore have been ill advised to resign without securing agreement as to her successor."

14. Mr Gregory was Margaret's next door neighbour living in the other half of a semi-detached pair of cottages. He is a retired civil servant and he and his wife, conscious of Margaret's frailty, "keep an eye open for any unusual events such as unfamiliar vehicles parked outside her house." He did not recognise the four-wheel drive vehicle outside the cottage nor the gentleman, Mr Joint, who was sitting in it. Mr Joint was there at Nicholas' request to witness Margaret signing the deed. He decided to investigate. The judge was most impressed by him. He gave evidence that:-

> "I was immediately aware of the tension in the room. Margaret was clearly very distressed, looking worried and uncomfortable and, from the redness around her eyes, I thought perhaps close to tears. Although Margaret was obviously upset, I felt I should not intrude in what seemed to be a family affair. I assessed the situation for a few moments and again asked Margaret if there was anything I could do for her. She declined and so I left the house rather worried on her behalf."

15. The judge continued:-

> "During the meeting Mr Gregory came in and found her distressed but because he thought he ought not to intervene in a family dispute he left. Mr Joint then came in, angry at being kept waiting, and Mrs Drew signed the deed against her better judgment. She undoubtedly knew what she was signing, and intended to sign. However, the question for me is, as Lord Nicholls said: how was that intention procured and was it procured by unacceptable means?"

16. The deed was a formal deed of retirement between Margaret "the retiring trustee" and Nicholas and Jeremy "the continuing trustees". The retiring trustee declared that she wished to retire and be discharged from the trust of the Assent dated 23rd February 1988 and the continuing trustees consented to such retirement and discharge and to the vesting in themselves alone of the property now comprised in the assent.

17. Mrs Drew was apparently very disturbed by these events and wrote a rather confused note on the back of an envelope a day or two later. She noted, among other things:-

> "If I didn't sign he said we should have to go to court about it. … Two very unsettled nights, I might say. … I told him on the Monday, you like taking people to court don't you, getting up in the witness box ---"

18. Stephen came to visit his mother shortly thereafter. As the judge found:-

"Mrs Drew told him what she had done and the balloon went up."

They tried to see Nicholas to obtain a copy of the document. Mrs Drew saw the doctor on emergency duty and he found her to be "confused" though she was ordinarily in excellent health and an infrequent attendee at the doctor's surgery. At Stephen's instigation she issued the present proceedings seeking to set aside the deed of retirement dated 25th February 2002 although, as she accepted, she wants to retire from the trusts of the Assent.

19. At first the judge thought that this was "a sterile dispute". He changed his mind because:-

> "First, Mrs Drew does not want to retire without being replaced by her son or a representative of her son, and her nephews are opposed to that course. Second her retirement may affect the validity of steps taken in the arbitration, and may have costs consequences. Third, Nicholas and Jeremy, without her concurrence, have purported to agree the rent payable by Nicholas, and the validity of that agreement is in issue."

20. The first ground of appeal is that none of these reasons justified the judge's change of view and the appellant submits that the judge should have acceded to his submission that the court should not act in vain by granting the respondent relief that she does not wish for and that restores her to an office from which her interests dictate that she should be removed without delay. She has since appointed Stephen to be her attorney on her behalf to execute and exercise the trust powers and discretions vested in her. The appellant points out that pursuant to section 25(7) of the Trustee Act 1925 she remains liable for the acts and defaults of Stephen, the donee of the power of attorney, as if they were her acts and defaults. The magnanimous submission is that if her resignation stands, she is free of that responsibility.

21. I find this sterility argument baseless. As the judge pointed out (see the last sentence in paragraph 12 above) Mrs Drew would have been ill advised to resign without securing agreement as to her successor because if Nicholas and Jeremy could deal with the rent and the arbitration without reference to Stephen or to Aunt Margaret, then Stephen's only recourse would be the difficult and expensive action for breach of trust if his interests were not properly respected. On the other hand, being able to dictate that upon her resignation someone be appointed who would act fairly where the interests of Nicholas came into conflict with the interests of Stephen was and is a powerful reason of practical weight and value in this inter-family battle. In my judgment it fully justified the claim being brought. If the litigation truly was sterile, then I would have thought Nicholas would have had no objection to tearing up the disputed resignations as documents of no consequence whatsoever. The bringing of this appeal by itself indicates the importance of the declaration which has been made and which is now being ferociously fought before us.

22. The second ground of appeal is that there were no grounds upon which the judge could properly conclude that the appellant had perpetrated any "overt acts of improper pressure or coercion such as unlawful threats" such as were required to be proved by the respondent to discharge the burden of proof upon her to satisfy the court that her execution of the deed had been procured by the actual undue influence of the appellant. It is further alleged that the judge confused the circumstances of the case before him with those of a case of presumed undue influence in which the court may intervene to protect the dependant and vulnerable in dealings with their property.

The judge's directions as to the law.

23. He said that the relevant law was not in dispute and was contained in Lord Nicholls of Birkenhead's speech in *Royal Bank of Scotland v Etridge (No. 2)* [2002] 2 AC 773 and he quoted from paragraphs 6 to 12 inclusive. In this part of his speech Lord Nicholls had found it "necessary to go back to first principles". He explained in paragraph 6 that:-

> "Undue influence is one of the grounds of relief developed by the Courts of Equity as a court of conscience. The objective is to ensure that the influence of one party over another is not abused."

24. In paragraph 7 he explained how equity supplemented the common law which dealt narrowly with duress:-

> "Equity extended the reach of the law to other unacceptable forms of persuasion. The law will investigate the manner in which the intention to enter into the transaction was secured; "how the intention was produced"; in the oft repeated words of Lord Eldon as long ago as 1807 (*Huguenin v Baseley* 14 Ves 273, 300). If the intention was produced by an unacceptable means the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or "undue" influence and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will. It is impossible to be more precise or definite. The circumstances in which one person acquires influence over another, and the manner in which influence may be exercised, vary too widely to permit of any more specific criterion."

25. In paragraph 8 he drew the distinction between "overt acts of improper pressure or coercion such as unlawful threats" and the second form now commonly referred to as presumed undue influence which:-

> "arises out of the relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage."

As he explained in paragraph 9:-

> "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."

26. In paragraph 11 he pointed out that:-

> "The principle is not confined to cases of abuse of trust and confidence. It also includes, for instance, cases where a vulnerable person has been exploited. Indeed there is no single touchstone for determining whether the principle is applicable. Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other. None of these descriptions is perfect. None is all-embracing. Each has its proper place."

27. Judge Weeks, a very experienced judge, said this:-

> "The reference to "exploitation of the vulnerable" in paragraph 11 was made in the context of what used to be called "presumed undue influence". Although this is a case, if anything, of express undue influence, I think the reference is relevant because the exploitation of the vulnerable can be regarded as an example of unacceptable conduct where the consent procured ought not fairly to be treated as an expression of a person's free will."

The judge's conclusion.

28. Having asked whether Margaret's intention had been procured by unacceptable means he decided:-

> "Mrs Drew was, in my judgment, a vulnerable person, unversed in business, anxious to avoid confrontation and eager to comply. Nicholas Daniel was younger and according to his aunt did not show her the respect she thought he should. I have heard him give evidence. He has a keen appreciation of his own interests and scant regard for those of others. "Unscrupulous" would be too harsh a description but he is, at the very least, insensitive. Again, in my view, "aggressive" would probably be too harsh and "forceful" might be a better description of his character.
>
> He knew that if his aunt was given the chance to talk to her son or her solicitors the transaction would not proceed as he wished. He deliberately chose not to involve them,

> but to take advantage of his aunt's naiveté in business matters. In my judgment the means by which her signature was procured is unacceptable. Mrs Drew's consent, obtained in the circumstances that I have described ought not fairly to be treated as an expression of her free will."

The appellant's case.

29. In summary, Mr Batstone advances this case on behalf of the appellant, though only the first two submissions were set out in the grounds of appeal in the appellant's notice.

> i) It was necessary for the claimant, Aunt Margaret, to establish that her signatures had been procured by overt acts of improper pressure or coercion and the judge neither found that nor was there evidence to support any such finding.
>
> ii) The judge was wrong to take account of her vulnerability: in doing so he elided actual and presumed undue influence.
>
> iii) Lord Eldon's often quoted words, "The question is, not, whether she knew, what she was doing, had done, or proposed to do, but how the intention was produced", are applicable only in cases of presumed undue influence and so the judge erred in applying them here.
>
> iv) To observe that the court would have to resolve the dispute cannot amount to unlawful or improper pressure.
>
> v) The judge erred in the fact-finding exercise in that (i) he failed to weigh the medical evidence properly (ii) he failed to take into account the contemporaneous note written by the claimant (iii) he was wrong to find that Aunt Margaret was a vulnerable lady (iv) he failed to deal at all with the evidence of Nicholas and Mr Joint that he would leave the deed with her to decide at leisure whether or not to sign it (vi) accordingly, the judge made too great an invasion into the sanctity of understandings reached between individuals simply because one had been persuaded by the other.

Actual undue influence.

30. It is true that Lord Nicholls defined actual undue influence in terms of "overt acts of improper pressure or coercion such as unlawful threats". He drew the distinction between cases of presumed undue influence and those where there was evidence of "specific overt acts of persuasion" or "overt acts of persuasive conduct". Judge Weeks directed himself in accordance with that speech and for my part I cannot accept that he did not have those matters in mind. It is, of course, only one way of describing the first class of undue influence because, as Lindley L.J. observed in *Allcard v Skinner* (1887) 36 Ch.D 145, 183:-

> "As no Court has ever attempted to define fraud so no Court has ever attempted to define undue influence, which includes one of its many varieties."

His description at page 181 of the first category was this:-

> "There are the cases in which there has been some unfair and improper conduct, some coercion from outside, some over-reaching, some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor."

31. In the broadest possible way, the difference between the two classes is that in the case of actual undue influence something has to be done to twist the mind of a donor whereas in cases of presumed undue influence it is more a case of what has not been done namely ensuring that independent advice is available to the donor. I will return to the question of whether or not this is established in this case.

32. Mr Batstone is also correct in his submission that when Lord Nicholls included cases "where a vulnerable person has been exploited", he was still dealing with presumed undue influence. Where I disagree with Mr Batstone is in his submission that the judge fell into the error of eliding the two classes of cases. He did not. He was clear that the reference to "exploitation of the vulnerable" was made in the context of presumed undue influence and that this case was "if anything, [one] of express undue influence". He did not elide the two classes. He was, however, justified in treating the exploitation as a relevant factor because it "can be regarded as an example of unacceptable conduct where the consent procured ought not fairly to be treated as the expression of a person's free will". There is in any given case a vast penumbra of facts which bear upon the question whether actual undue influence was exerted. The vulnerability of one party must feature in that analysis. So does the forcefulness of the personality of the other. I can see no error in the judge's approach.

33. I cannot accept Mr Batstone's submission that Lord Eldon's words apply only in the case of presumed undue influence. He draws support for that submission from this passage in Lindley L.J.'s judgment at page 181-182 which I cite at length:-

> "The second group consists of cases in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor, or even to manage his property for him. In such cases the Court throws upon the donee the burden of proving that he has not abused his position, and of proving that the gift made to him has not been brought about by any undue influence on his part. In this class of cases it has been considered necessary to show that the donor had independent advice, and was removed from the influence of the donee when the gift to him was made. *Huguenin v Baseley* was a case of this kind. The defendant had not only acquired considerable spiritual influence over the plaintiff, but was entrusted by her with the management of her property. His duty to her was clear, and it was with reference to persons so situated that Lord Eldon used the language so often quoted and so much relied on in this case. He said: "Take it that she (the plaintiff) intended to give it to him (the defendant): it is by no means out of the reach of the principle. The question is, not, whether she knew, what she was doing, had done, or proposed to do, but how the intention was produced: whether all that care and providence was placed round her, as against those, who advised her, which, from their situation in relation with respect to her, they were bound to exert on her behalf." This principle has been constantly recognised and acted upon in the subsequent cases, but in all of them, as in *Huguenin v Baseley* itself, it was the duty of the donee to advise and take care of the donor. Where there is no such duty the language of Lord Eldon ceases to be applicable."

34. I venture to think Mr Batstone has misunderstood the last sentence. What Lindley L.J. was saying is that if there is no duty of the kind which fixes the case in class two, then there is no need to question why the donor acted as she did. The court does not enter upon that enquiry unless the relationship of ascendancy, which is how Lord Nicholls described it, has first been established. Without that evidence a case of presumed undue influence simply would not get off the ground.

35. Nothing in Lindley L.J.'s judgment suggests that Lord Eldon's dictum should be as narrowly confined as Mr Batstone submits. If there is no presumed undue influence then there is no need to inquire what prompted the relevant decision taken by the donor but if actual influence is under consideration the enquiry seems equally apposite. Lindley L.J. went on in his judgment on page 182 to examine the principle which underlies both classes of undue influence and he set it out in these terms:-

> "Is it that it is right and expedient to save persons from the consequence of their own folly? or is it that it is right and expedient to save them from being victimised by other people? In my opinion the doctrine of undue influence is founded upon the second of these two principles. Courts of Equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of donors. The Courts have always repudiated any such jurisdiction. *Huguenin v Baseley* is itself a clear authority to this effect. It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back property which they foolishly made away with, whether by giving it to charitable institutions or by bestowing it on less worthy objects. On the other hand to protect people from being forced, tricked or misled in any way by others into parting with

> their property is one of the most legitimate objects of all laws; and the equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud.
>
> As no Court has ever attempted to define fraud, so no Court has ever attempted to define undue influence, which includes one of its many varieties. The undue influence which Courts of Equity endeavour to defeat is the undue influence of one person over another; not the influence of enthusiasm on the enthusiast who is carried away by it, unless indeed such enthusiasm is itself the result of external undue influence. But the influence of one mind over another is very subtle …"

36. This passage, which I repeat applies to both forms of undue influence, demonstrates to me that in all cases of undue influence the critical question is whether or not 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 offspring 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".

37. Any doubt that Lord Eldon's words apply to both classes of undue influence is removed by paragraph 7 of Lord Nicholls' speech which I have set out in paragraph 24 above where, when dealing with undue influence in general he expresses the view that the law will investigate the manner in which the intention to enter into the transaction was secured. Mr Batstone was forced to concede that Lord Nicholls was dealing with both forms of undue influence and that seems to me to be the end of his argument on this ground. The judge was perfectly entitled to pose the question he had to answer in terms culled from Lord Nicholls' speech: "How was that intention procured and was it procured by unacceptable means?"

38. Mr Batstone's next point arises from the evidence of Nicholas in this passage of his cross-examination:-

> "Q. You told Mrs Drew, did you not, that if she did not retire and did not come to meetings, the matter would have to go to court?
>
> A. No, I was very careful – if you want to put spin on it, yes, but I was very careful to couch it in terms, which was that if we could not get a conclusion to the matter – i.e. if she wouldn't act as a trustee, she wouldn't retire, she wouldn't go and take legal advice – then we are in a position we can't move forward with the trust and the court will have to resolve the issue."

39. If, which Mr Batstone did not accept, that statement could amount to an overt act, it could not, he submitted amount to *improper* pressure. In support of that submission he relies upon a passage in the 29th Edition of *Chitty on Contracts*, Volume 1, paragraph 7-041:-

> "Since recourse to law is the remedy for redress provided by the law itself, it is obvious that *prima facie* a threat to enforce one's legal rights by instituting civil proceedings cannot be an unlawful or wrongful threat." [Emphasis added by me].

40. I add the emphasis because the manner in which the "threat" is uttered is part of the penumbra of facts which need to be taken into account. That paragraph in Chitty itself concludes:-

> "It is not clear whether a threat to institute civil proceedings which is not unlawful in itself could ever constitute duress for present purposes, if it is coupled (for instance) with a wholly unjustified demand, or if it is made in special circumstances (for instance) in which the defendant has a particular fear of the publicity which may follow from a claim. In principle there seems no reason why such a threat should not amount to duress in appropriate circumstances, but for obvious reasons these are likely to be rare."

I agree.

41. So did Mr Batstone in argument during the closing submissions before the judge. This exchange took place:-

> "Mr Batstone: The thrust of her evidence was that Margaret was alarmed by the prospect of the court having to resolve it.
>
> Judge Weeks: Yes, and that is not unlawful pressure.
>
> Mr Batstone: That is not unlawful pressure, no.
>
> Judge Weeks: On the other hand, it is a factor to be taken into account, is it not?
>
> Mr Batstone: My Lord … well …
>
> Judge Weeks: Even though you may ridiculously say it, it is quite one thing to say between two adults of the same age and the same capacity negotiating, "If you don't do this I will take you to court", it is another thing to say it to an old lady, is it not?
>
> Mr Batstone: Well, my Lord, I cannot dissent from those words your Lordship has just uttered, but it does not fit on the facts of this case, with respect," [and he went on to cite Chitty].

I agree with the judge that in the peculiar circumstances of this case which, make the case rare and exceptional, the impact of the reference to court proceedings was a factor to take into account.

42. As for the complaint that the judge wrongly decided a number of material facts and did not decide others, the first answer is that this did not form any part of the grounds of appeal. I would, however, not dispose of the point on that technical basis. The question of Aunt Margaret's vulnerability was raised and the judge rejected the submission that she was a spirited lady of independence whose personality filled the room. He accepted the evidence of Mr Gregory that Margaret was clearly very distressed, worried and uncomfortable. He recited her "rather confused note" made some days after the event. Her distress is evident in her recording "two very unsettled nights". She needed medical attention on the Saturday when she was found to be confused whereas generally she was in excellent health. There is in my judgment simply no prospect whatever of Nicholas overturning the judge's findings - after he had had the opportunity to assess the parties over two days - that:-

> "Mrs Drew was, in my judgment, a vulnerable person, unversed in business, anxious to avoid confrontation and eager to comply."

43. It is true that the judge did not deal with the evidence of Nicholas and Mr Joint that Nicholas made it plain that she did not have to sign the deed unless she was happy to do so. That omission does not, in my judgment, vitiate his judgment because it is plain reading it as a whole that he was satisfied that that distressing and lengthy conversation between them so sapped her resistance that for quietness' sake she would do anything. As the judge held:-

> "Mr Joint then came in, angry at being kept waiting, and Mrs Drew signed the deed against better judgment."

44. On that finding her will was overborne and even if Nicholas did say what he and Mr Joint say was said, it was not sufficient at that late stage in the meeting to retrieve the damage he had already done to destroy the freedom of her volition.

45. It remains for me to consider whether on the facts found by the judge there was evidence of overt acts of improper pressure or coercion or persuasive conduct. I am satisfied there was an abundance of evidence to justify that finding. Not least among the many facts of this case are these:-

> i) Nicholas told Aunt Margaret at their first meeting on 20th that she should either attend the meetings of trustees or retire and that it was not right for her to do neither.

ii) When she said she had already retired he told her to put it in writing.

iii) He returned later that day with the home-made memorandum for her to sign.

iv) He returned on 25th with the deed of retirement saying:-

> "I reminded her she had already signed a document confirming her retirement."

v) He told her if she ceased to be a trustee she could not be replaced by Stephen or by any independent party.

vi) The whole of this lengthy and distressing meeting on 25th February was capable of being viewed as coercive forcing her to do that which she did not truly desire to do.

46. The next question is whether that amounted to improper or undue influence and the unfair procurement of her consent. These factors demonstrate the impropriety of Nicholas's actions:-

i) When Aunt Margaret said she had already resigned, Nicholas seized upon the opportunity to obtain confirmation from her there and then, knowing that what she had said was not true.

ii) He opportunistically exploited the advantage thus presented to him of having her "cornered".

iii) He chose not to involve her solicitors or Stephen in order "to take advantage of his Aunt's naiveté in business matters".

iv) She was "a vulnerable person, unversed in business, anxious to avoid confrontation and eager to comply".

v) He on the other hand had "a keen appreciation of his own interests and scant regard for those of others."

vi) His statement that she could not be replaced as a trustee was an active, and in my view, crucial misrepresentation that it was not open to her to insist on an acceptable successor as a condition of her retirement.

47. In those circumstances it is no surprise the judge should conclude that Mrs Drew's consent "ought not fairly to be treated as an expression of her free will".

48. This disposes of Mr Batstone's last complaint that the judge wrongly trespassed upon the legitimate give and take of discussion between adults and wrongly allowed Stephen's influence upon her to seek her escape from an act which upon proper analysis worked to her advantage because it brought a continuing liability as trustee to an early end. Mr Batstone seeks to bring this case within that category referred to by Lindley L.J. where the Courts of Equity repudiate any jurisdiction to set aside gifts "on the ground of the folly, imprudence or want of foresight on the part of donors". In my judgment this case falls squarely within that other category to which he referred where the court, as a court of conscience, does intervene "to protect people from being forced, tricked or misled in any way by others into parting with their property".

49. In my judgment Nicholas's actions were unconscionable and this appeal is wholly without merit. I would dismiss it.

Lord Justice Buxton :

50. I agree.

Mr Justice Wilson :

51. I also agree.

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