CONTINUING PROBLEMS IN THE LAW OF UNDUE INFLUENCE

Wright v Hodgkinson

[2004] EWHC 3091 (Chancery Division) (Hegarty QC)

Wright v Hodgkinson was a recent High Court decision involving the law of undue influence.[1] It is submitted that the judge made a fundamental error in deciding the case. Given the obvious care displayed in the judgment, and the conscientious attention given to both the law and the facts, this is a matter of some concern. It would seem that despite the elaborate consideration given to the law of undue influence by the House of Lords in *Royal Bank of Scotland v Etridge*,[2] and a very considerable academic commentary in the area,[3] the law of undue influence remains so ill articulated and understood that the dispositions of property owners are vulnerable to unpredictable challenges. This uncertainty interferes with, and undermines, the policy concerns advanced by the doctrine of freedom of disposition (certainty, autonomy, and low transaction costs) and threatens to lead to an escalation of transaction costs of gratuitous dispositions, and the proliferation of speculative litigation (or the threat thereof).

FACTS

The transaction at the heart of *Wright v Hodgkinson* was a transfer in 1997 by Mr Wright of his house and adjoining land to himself and Mr Hodgkinson as joint tenants in equity.[4] In 1997 Mr Wright was an elderly man (75 years old), and Mr Hodgkinson was considerably younger (38 years old).[5] The transfer was not intended to be an outright gift. Mr Hodgkinson agreed to spend a considerable amount of money on building works on the land.[6] There was also another kind of consideration present. The older man hoped that the transfer would result in him having company and support in his old age.[7] However, the transfer was a clear case of a transaction at an undervalue, the value of the interest acquired by the younger man would greatly exceed the amount of money he would expend.[8] The relationship between the two men was a friendship grown out of an acquaintance. In the past Mr Wright had employed as seasonal labourers on his farm; first the father of Mr Hodgkinson, and then Mr Hodgkinson himself. From 1983 Mr Wright had allowed Mr Hodgkinson to run a business from the land that he eventually transferred into their joint names. Mr Wright was the social superior of Mr Hodgkinson, and had used his greater wealth to bestow favours on the younger man in the past.[9] In the words of Mr Wright he had: "taken

[1] [2004] WL 3130738 at paras 73–74.

[2] [2001] UKHL 44.

[3] Illustrative of this material would be: Rick Bigwood, "Undue Influence: 'Impaired Consent' or 'Wicked Exploitation'?" (1996) 16 OJLS 503, to similar effect (2002) 65 MLR 435; Peter Birks and Chin Nyuk Yin, "On the Nature of Undue Influence", in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law*, (1995); to the same effect Birks (2004) 120 LQR 34; David Capper, "Undue Influence and Unconscionability: A Rationalisation" (1998) 114 LQR 479; Martin Dixon, "The Special Tenderness of Equity: Undue Influence and the Family Home" [1994] CLJ 21; Belinda Fehlberg, "The Husband, the Bank, the Wife and Her Signature" (1994) 57 MLR 467; to similar effect (1996) 59 MLR 675; Mark Thompson, "The Enforceability of Mortgages" [1994] Conv 140.

[4] [2004] WL 3130738 at paras 73–74.

[5] *Ibid*, calculated from the ages at date of trial given at paras. 2–3.

[6] *Ibid*, paras 20, 33, 97–99.

[7] *Ibid*, para 16.

[8] *Ibid*, paras 138 and 164.

[9] *Ibid*, paras 2–6.

him [Mr Hodgkinson] under his wing".[10] The transfer of the house and land was the last, and most valuable, of these favours. Mr Wright had suffered mental deterioration by the time the action came to trial, although the evidence was that this deterioration had not undermined his capacity at the time of the transfer.[11]

The history of the transfer started with an idea of Mr Wright. He thought that Mr Hodgkinson should spend his money (received in compensation for an industrial injury), on developing Mr Wright's land.[12] It was Mr Wright's intention to leave Mr Hodgkinson the land when he died, and he felt the money provided an opportunity for the friends to arrange matters so that they could be neighbours. He proposed that Mr Hodgkinson build an extension to the house, so that they could both live there, together with Mr Hodgkinson's family. When Mr Wright died the property would pass under his will to Mr Hodgkinson. Upon taking advice, Mr Hodgkinson felt that he could not commit his capital to the project without some form of security. Wills, he learnt, are revocable, and the original suggestion would have left Mr Hodgkinson and his family entirely at the mercy of Mr Wright. Hence, the proposal to transfer the land into the joint names of the two friends was first raised.[13] In the event the extension was never built, as relations between the friends deteriorated after the transfer. This deterioration was largely the result of a change of heart on the part of Mr Wright.[14] However, Mr Hodgkinson did expend something of the order of £14,000, and considerable time and labour, on developments that had been agreed by the two men.[15]

DECISION

On the facts the judge held that there was:[16] "no satisfactory evidence whatever of overt acts of improper pressure or coercion on the part of Mr Hodgkinson." Therefore, the decision turned on whether there was a presumption of undue influence on the facts, and if so whether sufficient evidence had been called to rebut it.[17] The judge based his analysis on the determination of three issues: the existence of a relationship of trust and confidence, reliance, dependence, or vulnerability; the existence of a transaction that called out for an explanation; and whether Mr Hodgkinson had established that Mr Wright had effected the transfer after giving the matter full, free and informed thought.[18] It is submitted that the handling of the first issue considered by the judge can be criticised as a matter of law.[19]

The first issue was concerned with the nature of the relationship between the parties to the transfer. A formal objection to the judge's reasoning is that the obvious case to consider on the facts found by the judge was *Re Brocklehurst*.[20] It would appear that counsel never cited the case. *Re Brocklehurst* concerned a gift of shooting rights over an estate, granted by the estate owner for 99 years to his much younger friend. There

[10] *Ibid*, para 62.
[11] *Ibid*, para 52.
[12] *Ibid*, paras 14–15.
[13] *Ibid*, paras 13–25 and 30–33.
[14] *Ibid*, para 102–105.
[15] *Ibid*, paras 97–98.
[16] *Ibid*, para 131.
[17] *Ibid*, para 132.
[18] *Ibid*, paras 133, 138, and 141.
[19] The handling of the second and third issues can also be criticised. However, it is the first issue that is central to the argument advanced here.
[20] [1978] Ch 14.

was no improper conduct on the part of the donee, and the case turned on whether the relationship gave rise to a presumption of undue influence, and if so whether the evidence at trial rebutted the presumption. The majority in the Court of Appeal held that no such presumption arose.[21] In *Re Brocklehurst* the older donor was the social superior of the younger donee, and there was no evidence of dominance by the donee over the donor. On the contrary, the evidence suggested that the donor was the dominant party to the relationship. The importance of the direction of any asymmetry of power in a relationship of trust and confidence was effectively the key issue raised by the facts of *Re Brocklehurst*. The analysis in *Wright v Hodgkinson* seemed to demand no more than that "trust" should exist in a relationship in order to support a presumption of undue influence.[22] The only other factors given any attention were the age disparity and the fact that the older man felt generous impulses towards the younger man. All three of these factors identified in *Wright v Hodgkinson* were also present in *Re Brocklehurst*, and, whilst the cases can clearly be distinguished, it is not readily apparent that they should be.[23]

ANALYSIS

It seems wrong that a relationship can support the presumption of undue influence where there is no identified vulnerability of the claimant except age,[24] nor any dominance of the claimant by the defendant. In this failure to identify any basis for identifying any "paramount influence"[25] in Mr Hodgkinson, the judge in *Wright v Hodgkinson* failed to understand and apply the relevant law, in the same manner as the judge at first instance in *Re Brocklehurst* had fallen into error.

This error is fundamental, and of more than merely anecdotal importance. As Mummery LJ has commented:[26]

> With the increase in home ownership and the rising value of residential property more people have more property to dispose of in their lifetime and on death and more people expect to benefit substantially from inheritance . . . The elderly and infirm in need of full time residential care are vulnerable to suggestions that they should dispose of the home to which they are unlikely to return. In my view, these social trends are already leading to renewed interest in the law governing the validity of life time dispositions of houses, both in and outside the family circle, by the elderly and infirm.

If, as Mummery LJ suggested, this area of law is in the process of expansive development it is essential that the courts develop it in a manner that respects the autonomy of capable elderly property owners. It would be extremely damaging to this category of property owners if the law degenerated into unstructured judicial discretion in this area. In *Wright v Hodgkinson* it seems the judge lost sight of the crucial

[21] [1978] Ch 14 at 36 and 48 *per* Lawton and Bridge LJJ respectively. The dissentient was Lord Denning MR in one of his most imaginative, and least successful, forays into equity jurisprudence.

[22] [2004] EWHC 3091 paras 133–137. The features of a relationship identified by the quote from Lord Nicholls were: "trust and confidence", "reliance", "dependency"', and "vulnerability". The analysis ignored all except "trust and confidence", and seemed to drop any requirement for "confidence"' in application. What was left was "trust"'. A very large number of relationships can be identified which involve "trust"' and all (given the nature of trust) are "potentially susceptible to abuse", but most of such relationships are clearly not relationships that give rise to any presumption of undue influence.

[23] If generalised, the approach in *Wright v Hodgkinson* would raise a presumption of undue influence upon a gift by parent or guardian to child, or a gift by solicitor to client.

[24] Mr Wright was old, but not infirm in mind or body. Infirmity raises different considerations, initially of dependence, and eventually of capacity.

[25] The expression is taken from the judgment of Kekewich J in *Allcard v Skinner* (1887) LR 36 Ch D 145 at 158.

[26] *Niersmans v Pesticcio* [2004] EWCA Civ 372 at para 4.

importance of the direction of "dependence" within a relationship of trust and confidence that Mummery LJ referred to in his summary of the type of situation that called forth the protective operation of the law of undue influence (author's emphasis):[27]

> A house is the most valuable asset that most people own. If a transfer is made by one person on the *dependent* side of a relationship of trust and confidence to a person in whom trust and confidence has been placed, it must be shown by the trusted party that the disposition was made in the independent exercise of free will after full and informed consideration.

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[27] *Ibid.*

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