OUTER HOUSE, COURT OF SESSION

[2018] CSOH 53

A507/15

OPINION OF LADY WOLFFE

in the cause

ELIZABETH BROOKE (AP)

Pursuer

against

MARY KELLY (AP) AND ANOTHER

Defenders

Pursuer: Sutherland; Drummond Miller LLP
Defenders: Logan; TC Young LLP

31 May 2018

Introduction

Undisputed circumstance giving rise to the impugned transaction

[1] It is agreed that the pursuer disponed her house, a former council house which the pursuer's parents had lived in before it devolved to her ("the property"), to the defender. She did so by disposition granted on 29 February 2012 ("the Disposition"). While on the face of the Disposition this was for no consideration, parties are agreed that the pursuer subsequently received the sum of about £18,000 in cash in about March 2012 from the defender.

The disputed issues

[2] The issues that divide the parties are:

1) whether the defender paid further sums (substantially in cash, apart from the purchase of flights for the pursuer and paid for on the defender's credit card), resulting in a total payment of £45,000;
2) whether the pursuer signed a Short Assured Tenancy ("the Lease") on 1 May 2012, and thereby became the defender's tenant of the property; and
3) whether the right of occupation under the Lease was part of the arrangement by which the pursuer disponed the property to the defender (as the defender asserts) or whether the Lease was not, in fact, entered into by the pursuer. On that matter the pursuer's position varied between an assertion that her signature was forged (*per* the defences to the defender's sheriff court action for eviction in c. 2014/2015), or that it was her signature, but affixed to (or photocopied on) the Lease without her consent (as the pursuer maintained in her evidence in these proceedings).

[3] Accordingly, the pursuer's position was that she was paid no more than £18,000 and did not acquire any right of occupation of the property by virtue of a lease, and that this constituted facility and circumvention. The defender's position was that the Disposition and Lease were, in effect, linked transactions, the parties' common intention being that the pursuer would have a right of occupation and their common assumption being that the payment of rent would be met by housing benefit payable by the local authority.

The legal test for facility and circumvention

[4] There is no dispute as to the legal test to be applied in this action for reduction on the grounds of facility and circumvention of the Disposition. (The pursuer does not seek to prove a want of capacity or of undue influence, the separate ground of reduction often combined with an action based on facility and circumvention.) The three elements -- of facility, circumvention and lesion -- are inter-related. So, for example, the greater the degree of facility shown may permit proof of a lesser degree of circumvention. However, all three elements must be proved. Each case, of course, turns on its own facts and circumstances.

The factors the pursuer relies on

[5] In this case, the pursuer relies on a combination of circumstances including:

1) the effect of her husband's sudden death (of a heart attack at work) and her reaction to it ("abnormal bereavement reaction");
2) the pursuer's emotional frailty; and
3) ongoing medical issues at the material time, which included the need for a total hip replacement (which took place in about February or March 2012), and the effects of certain prescribed medication.

This is set out in a little more detail, but the critical averment (at page 7D of the Closed Record) is that the pursuer's "reaction to her husband's death, together with her pain, lack of sleep and the effects of the medication she was taking, significantly diminished her ability to properly consider her own interests."

[6] In relation to (1), the pursuer led no evidence to prove that she had suffered from an extreme or abnormal bereavement reaction, and I accept Mr Logan's submission to that effect. That leaves factors (2) and (3).

Credibility and reliability

[7] Counsel were agreed that the issues of credibility and reliability were central to this case. Each party fundamentally challenged the credibility of the other. To that end, many other chapters of evidence were adduced of no direct relevance to the merits of the principal issues I have identified. These chapters of evidence were intended to illustrate the lack of credibility, indeed to disclose the dishonesty (amounting in some cases to serious criminality), of the other. These chapters of evidence included:

1) the pursuer's allegation that her signature on the Lease was forged (or otherwise fraudulently affixed);
2) the evidence led on behalf of the defender (spoken to by Doris Lorimer) that the pursuer regularly forged her husband's signature on his cheques, with the consequence that she denuded the bank account in his sole name of the sum of £60,000 before his untimely death. She achieved this, it was said, by prevailing upon the postman to have his bank statements delivered to a neighbour's address;
3) the evidence led on behalf of the defender (spoken to by Colin McInnis) that the pursuer shoplifted an electrical item from Costco;
4) the evidence led on behalf of the defender about the pursuer's importuning of witnesses, namely, her attempt to bribe Doris Lorimer to support her position in this case in return for all the pursuer's jewellery, and also of the pursuer accosting the defender's son outside the court room shortly before he gave his evidence in this proof; and
5) the allegations of housing benefit fraud.

Other matters going to credibility

[8] Counsel agreed the terms of the documentation lodged. The productions included the Disposition, the Lease, the unsigned lease, the defender's agents' files relative to the grant of the Disposition in favour of the defender (spoken to by Mr Fielding) and to the defender's actions for eviction (spoken to by Mr Smith), and (incomplete) bank statements and other financial materials.

[9] This documentation gives rise to further concerns about credibility, namely:

1) The pursuer and defender each had lied to their respective solicitors to the effect that the Disposition was for no consideration, notwithstanding that they both knew that it was their common intention to transfer a large sum in cash in respect of the transaction. (The parties each conceded in their evidence that they had lied at the material time.);
2) In the light of the pursuer's debt problems, it is likely that the solvency affidavit she swore in connection with the Disposition was untrue;
3) In the light of the substantial sum of money the pursuer accepted she had received (probably in March 2012), even if it is not accepted that she received a further substantial amount in April (as the defender contends), it is likely that the pursuer failed to disclose this to her creditors, when entering into a Debt Arrangement Scheme ("the DAS") in about June 2012;
4) On the four or so occasions when the pursuer attended her solicitor, Mr Haig, to confirm repeated changes to her instructions relative to the transfer of the property, she was untruthful *inter alia* about (i) there being no consideration; (ii) the motivation for the disposal, (iii) that no lease would be entered into

between the parties in respect of the property, and (iv) her intention to move on a long-term basis to South Carolina to live with her sister;

5) The defender misrepresented a number of matters to her own solicitor, Mr Fielding, namely, (i) that no lease would be entered into between the parties in respect of the property, it being the defender's intention to let the property to a third party; (ii) that it was the pursuer's intention to move to South Carolina to live with her sister, and (iii) about the motivation for the transaction, and about which the defender misrepresented to Mr Fielding the degree of support she had purportedly offered to the pursuer. His oral evidence confirmed his file note and that he understood that the pursuer had effectively been residing with the defender. The defender's attempts to downplay this in her oral evidence or to suggest that Mr Fielding had recorded this in error, are not credible;

6) The defender's evidence regarding the payments, even at the agreed level, was highly problematic. There was no coherent explanation of the figures relied on from the few, but incomplete, bank statements produced that corresponded in time or amount with the payments claimed to have been made. The defender ultimately accepted that the account to which the produced bank statement related was not her only bank account, contrary to her initial protestations. Her evidence on this chapter was contradictory and confusing. The figures identified with asterisks and said to vouch the payment of the first tranche, of £18,000, did not come near to totalling that figure. The later lump sum withdrawals (of £10,000, £10,000 and £5,000) were also difficult to relate in time to payment of the first tranche. (The source of these funds is not known, as no bank statements were provided for the account from which they were transferred into her

account.) In total, withdrawals amounted to about £36,000. She did not rely on these as the source of the second cash payment. However, she maintained that her ex-husband contributed about £20,000, which she claims was the principal source of the second tranche (said to be c. £24,000). She had no bank statements to vouch the source of his contribution, the explanation being that her ex-husband distrusted banks. (He didn't distrust them sufficiently to ask for the proceeds from the sale of his own flat earlier in 2012 to be paid in cash. The solicitor's settlement of account shows that that payment was by cheque and, issuing as it was from a solicitor, was bound to be crossed- thereby payable only into a bank account.)

7) Other documentation, namely from the solicitor's file pertaining to the defender's abortive eviction proceedings in 2014 and 2015 against the pursuer, disclosed some sharp dealings by the defender. Not long before the eviction proceedings, she had transferred title in the property to her son and she and her son had sought to prevail upon the pursuer to sign a new lease with him, in the increased monthly amount of £550 per month ("the unsigned lease"). Notwithstanding that the pursuer refused to sign that lease, the pursuer provided the solicitor with the higher monthly figure (from the unsigned lease) for the purpose of calculating arrears, rather than that of £520 per month from the Lease. Her solicitor, Billy Smith, was demonstrably punctilious in his record-keeping. His files did not contain the unsigned lease. The defender's glib assertion that she had supplied him with "all of the paperwork", in an attempt to shift the blame to him, again rings untrue.

8) The defender's explanation for the transfer of title to her son was also not credible. Furthermore, if her earlier passage of evidence was accepted, that her ex-husband had agreed to transfer £20,000 to her in cash on the understanding that the property would pass to their two sons, then this second disposition breached that agreement.

[10] In general, I found the pursuer's evidence to be unreliable, contradictory and prone to extravagant exaggeration. Some of her denials verged on the theatrical. The pursuer frequently dissembled, claimed not to remember something (if adverse to her case, as she understood it) but, when it suited her case, she claimed to have a very clear recollection and was adamant in the position she asserted. She gave the impression of making up evidence to try to work herself out of a corner. For her part, the defender gave the impression of being more calculating in her answers, defensive in respect of certain matters and often inconsistent and self-serving.

[11] For these reasons, I place no reliance on the evidence of either the purser or the defender, unless this is otherwise supported by documentary evidence or by the evidence of a witness whom I accept as credible and reliable.

[12] This finding is not necessarily fatal to the pursuer's case. Her subjective evidence of how she was affected is of doubtful relevance, even if it were credible, to the extent that facility is judged objectively.

The unconnected witnesses

[13] I heard evidence from a number of professional witnesses, namely, Mr Fielding (the defender's conveyancing solicitor in the purchase transaction), Mr Smith (the defender's court agent in the eviction proceedings) and Dr Costello (the pursuer's GP), or who were

otherwise not a family member or close friend of one or other of the parties, namely, Mr Butler (a local authority counsellor and sometime MSP and friend of the pursuer by reason of their involvement in the Labour Party). These witnesses were each careful in their evidence, quick to acknowledge if a matter was not within their recollection and measured. There is no question that they were credible and reliable, and neither Counsel suggested otherwise. Their evidence may be summarised as follows:-

1) Dr Costello. I accept Mr Logan's submission that his evidence was of very little relevance to the case. Dr Costello could only speak to one entry in the pursuer's medical records during the period from 4 August 2011 (the date of the pursuer's husband's death) and late February (when the Disposition was signed) or 1 May 2012 (the date of the Lease). This was on 6 October 2011 and related to the pursuer's reporting of a painful hip. (Her right total hip replacement took place in February or March 2012.) She did not report any mental health issue or emotional vulnerability to him at that time. I also accept Mr Logan's submission that the medications prescribed to the pursuer to help her cope in the immediate aftermath of her husband's death in early August (eg amitriptyline and diazepam) had largely ceased by the end of September, and a month or two before the material time (ie when discussions between the parties commenced). By late September 2011, too, the pain relief medicine (eg co-codamol) was at a much lower dosage than previously. While Dr Costello gave very general evidence as to the kind of side-effects that could occur with these medications, there was in fact no credible and specific evidence from other witnesses that the pursuer actually suffered from these, much less at the material time. More to the point, by October 2011, the pursuer had largely reverted to the medications she

had been on prior to her husband's death. She did not suggest that she suffered from any side effects of this medication, in the period prior to her husband's death. The tenor of Dr Costello's evidence was that, in any event, one might build up tolerances to these medications with the result that side effects might well lessen over time. In short, his evidence provided no support for one of the key components of the pursuer's case. Given that it was known that he had seen so little of the pursuer during this period (as was clear from the GP records), and given his only general evidence about the medications, it is difficult to see what utility his evidence was intended to have. I accept Mr Logan's submissions that the medical evidence was extremely thin.

2) Counsellor Butler. He was careful in his evidence and readily accepted that, after the elections, when he lost his seat, he had not seen the pursuer from about May 2011 onwards. He did not see the pursuer in the immediate aftermath of her husband's death, sending a condolence card instead. And on the one or two times he saw her over the next six months, he could say no more than that she was less bubbly or outgoing than before her husband's death. By reason of a change in his responsibilities, his political activities took him to a different part of Glasgow and he saw less of the pursuer than hitherto on Labour Party business. Mr Sutherland accepted that his evidence had little direct relevance, but was offered as "character evidence". Mr Butler had no first-hand evidence of the events with which this action is concerned. He was unaware of the pursuer's money troubles and he was not in fact able to do more than give his impression in only the most general terms of how the pursuer seemed to him. In the end,

very little of this related to the material time and none of his evidence was, in any event, supportive of a case of facility. It was of no relevance.

The friends and family evidence

[14] The pursuer led the evidence of a number of friends, neighbours and two family members (her niece, Pauline Maxwell, and her great niece, Caroline McNulty). The questions posed to these witnesses fell into two categories: asking (in some detail) about the impact on the pursuer of her husband's death in the immediate aftermath, and general questions of their impressions thereafter. The evidence about the pursuer's reaction to her husband's sudden death in the immediate aftermath is consistent with that of an older woman of normal resilience dealing with the vicissitude of life. There was, however, no evidence that she suffered an abnormal or excessive grief reaction and I accept Mr Logan's submission that the pursuer has failed to prove this averment. The only identifiable timeframe that the other evidence relative to the pursuer's mental or emotional state (speaking non-technically) could be related to was the later period, from 2014 or 2015, when the pursuer was anxious about the sheriff court proceedings for eviction and, latterly, about these proceedings. Otherwise, the assertions that the pursuer "wasn't herself' or that she was "on another planet" were simply too inspecific as to time frame and were somewhat formulaic. There were very few concrete examples given to illustrate any genuine vulnerability and, in the main, the examples were trivial ("forgetting where she put things"). There was some evidence from some of these witnesses about the pursuer seeming to be unfocused, through medication, but in the main, this was in the immediate aftermath of the death of the pursuer's husband and corresponded in time with the additional medication she was prescribed as a consequence (eg for anxiety and sleeping tablets). It may

reasonably be inferred that this ceased by about late September. The overall impression was that these witnesses and the pursuer had discussed this evidence, reinforcing each other's views. This was consistent with the evidence about the pursuer's gregarious nature and her inability to keep things to herself. These witnesses would naturally be sympathetic to the pursuer and influenced by the bonds of loyalty and friendship, but their evidence was not persuasive of the pursuer genuinely being vulnerable or unable to look after her interests, much less that this was so at the material time.

[15] The same observations apply to the evidence of the two family members who gave evidence. The pursuer's niece and great niece were very supportive of the pursuer when her husband died, and one of them moved in with the pursuer for a few months. However, this degree of support ceased in about late November or early December, when she moved to Brighton. From about this point, these witnesses had significantly less contact with the pursuer and could not credibly speak in any way to the pursuer's mental or emotional state thereafter, given their very limited face-to-face contact. Their evidence fell into the same pattern I have described in relation to the evidence of the pursuer's friends.

[16] I am unable to place any reliance on this evidence. This is for three reasons. It was in such bland and formulaic terms that it did not support a case that the pursuer was not coping at the material time. To the extent that it was relatable to a time-frame, again, it did not relate to the material time, but focused on the high points of stress to the pursuer when her husband died and then not until two or three years later, when she became embroiled in legal proceedings. Finally, even if I had found this to be evidence relatable to the relevant time frame, it simply did not come close to demonstrating the requisite facility.

[17] It is with some concern that I note two matters emerging from the evidence, which reinforce the impression that the evidence of friends and family had been marshalled or

manipulated by the pursuer. The first was Doris Lorimer's evidence, not challenged in cross, that the pursuer visited her in great distress on Friday 13 June 2014 and spent 12 hours trying to prevail upon Doris Lorimer to support the pursuer's version of events - to the point where the pursuer sought to bribe her with the offer of all her jewellery. Doris Lorimer refused. The pursuer was distraught, but this was a reaction of frustration at not getting her way. The second episode emerged on the last day of evidence, from the defender's son, to the effect that even as he was waiting outside the court to give evidence the pursuer accosted him in relation to his appearing as a witness for the defender in these proceedings, and that the pursuer had to be pulled away from this confrontation.

[18] The most persuasive evidence led on the question of facility is the short notation found in the agreed GP's records, for the entry dated 26 October 2011 that the pursuer was of "mood still low but coping". The totality of the pursuer's evidence was that she was shocked by her husband's death, though there was surprisingly little evidence that there was a close relationship (Doris Lorimer's evidence being suggestive of tensions, eg that the deceased required to stay out at the pub until 10 pm), but was well supported by friends and family in the three or four months that followed until she adjusted. The medication prescribed to her followed this same arc: some additional prescriptions were prescribed, but these ceased by late September, the inference being that they were no longer needed. At no point did she seek or receive mental health counselling or support or was she offered any referral to these type of services.

[19] In the light of this evidence, I find that the pursuer has failed to prove the requisite element of facility.

[20] I am fortified in this view by the evidence of Mr Fielding, the solicitor who acted for the defender in the purchase transaction. He gave general evidence about the duties

incumbent upon a solicitor in the position of Mr Haig, the pursuer's solicitor, in a situation where an older client gave instructions to give away her principal asset. He also had had many dealings with Mr Haig over the years; he respected him and could speak to what he would have expected Mr Haig to do. This evidence was elicited from Mr Fielding because, surprisingly, Mr Haig was not called.

[21] Mr Sutherland accepted Mr Fielding's description of Mr Haig as a responsible and competent solicitor with whom Mr Fielding had had professional dealings over many years. He also accepted Mr Fielding's evidence as to what a reasonably competent solicitor would do in the circumstances of an older client wishing to denude herself of her sole asset for no consideration and with no legally enforceable means to protect her occupation (if that was intended), and he also accepted that there was nothing to show that the pursuer's solicitor did anything other than act consistently with the duties incumbent upon him. (I reject the pursuer's own criticism that Mr Haig should have stopped her doing what she was doing.) In her evidence the pursuer accepted that he did, on several interactions with her, repeatedly ask her if she understood. Her response, that she (in effect) fobbed him of with "yes, she did" but that her true position was that "she really didn't", does not ring true. Rather it reinforces the impression that she was highly calculating, and prepared to deflect his correct professional instincts to achieve her own purposes. I have no doubt that she knew full well what she was doing in pursuit of her objective. From the evidence I accept, the pursuer persistently lied to him to deflect his professional concern. The sad fact is that the one independent professional person who could truly have advised the pursuer and to act in her best interests, was precluded from doing so by the pursuer's own calculating conduct.

[22] The reality was that the pursuer found herself in straightened circumstances after her husband's death. She was, for reasons that are not entirely clear from the evidence, reluctant to pursue legitimate channels to raise funds (eg by equity release). She was seemingly intent on entering into a DAS as a means not to pay all of her debts as they fell due, and to that end required to divest herself of the property. In my view, that was her motivation in setting in train the steps that led to the Disposition and the Lease. On the evidence, she was the initiating force in these matters, not the prevailed upon facile widow (as she sought to portray). Under the heading of circumvention, below, I comment on two further passages of evidence that further reinforce this conclusion.

[23] Further, I accept Mr Logan's submission that highly relevant evidence of the pursuer's emotional and mental state and ability would have been that of Mr Haig. (I do not, however, accept his submission that I approach this as a question of considering the disparity of the parties' disclosure *per se*; or that some doctrine of "cards face up on the table" (short of the doctrine of *ex turpi causa*, which Mr Logan did not invoke and is not pled) applied.)

[24] I stress that I do not regard it as a discrete *legal* requirement that the evidence of the professional (or other) persons interacting with the pursuer in respect of the impugned transaction must be led. But, it must be said, the failure to do so here, when Mr Haig is alive (but retired) and could have spoken to his own file (which was extant but not lodged), is notable. It is surprising, because in the usual case of facility and circumvention the granter of the impugned deed is typically deceased and evidence is led to reconstruct the deceased granter's state of mind from objective evidence of other witnesses or the evidence of a professional adviser who acted on the instructions of the granter in respect of the impugned deed or transaction. This is undoubtedly highly relevant evidence concerning the state of

mind or presentation of the granter at the material time. I have not had the benefit of this kind of evidence. Instead, the pursuer's case rested on the unfocused and generic evidence I have already described from sympathetic friends and not disinterested family. I am not persuaded that Mr Haig would have been concerned only with the pursuer's capacity in a formal way, as Mr Sutherland suggested. In the light of Mr Fielding's evidence, about Mr Haig's experience and competence (as to which there was no doubt), and what he would have done in the circumstance to satisfy himself as to his client's instructions, when presented with an older, recently widowed woman who wished to divest herself of her principal asset ostensibly for no consideration, his evidence was bound to be highly material. Furthermore, given the relatively high number of meetings the pursuer had with Mr Haig, he would have had ample opportunity to form a view on matters directly relevant to the issue of facility.

[25] Had the pursuer otherwise led evidence sufficient to establish facility, the failure to lead Mr Haig would not have been fatal to her case. But it remains the case that he would undoubtedly have formed a view as to her ability to understand the import of what she was doing, as to her presentation, and whether she appeared firm in her instructions or facile of mind.

[26] I find that the pursuer has failed to prove the first element, of facility.

[27] In the light of that finding I can deal with the other elements more shortly.

Circumvention

[28] The bulk of the evidence led (which was of direct relevance) appeared to relate to the issue of facility. The question of circumvention was touched on lightly.

[29] For the avoidance of doubt, I proceed on the basis that (*pace* Mr Logan's argument), the pursuer does not require to show that there was a degree of dependency in her relationship with the defender.

[30] In the light of the evidence I have heard, while it would appear that the pursuer and the defender were acquainted, they were not close friends prior to the death of the pursuer's husband. They had mutual friends, and on that basis, they were friendly on the relatively infrequent social occasions when they did meet. Certainly, the defender was not as good a friend, with daily contact, as others who appear at this proof (such as the doughty and loyal Valerie Duncan or Doris Lorimer, before she fell out with the pursuer).

[31] I also find on the evidence I have heard that the pursuer was the instigator of the arrangement that led to the Disposition and the Lease. I do so on the basis of the following evidence:

1) The pursuer was driven by financial problems and her concerns about her financial future, in the wake of her husband's death. The good wage he would have brought home ceased on his death, and it would appear it was not replaced by any appreciable widow's pension;
2) The pursuer was generally unable to live within her means. This was a common theme remarked upon by some of the purser's witnesses as well as the defender's. (This was offered as one reason why the pursuer couldn't be paid the whole lump sum at once. Doris Lorimer's observation was that if the pursuer "had it [ie money], she spent it");
3) The evidence disclosed that the pursuer was very keen to avoid paying her known creditors, and in particular, was avid to avoid payment of any monies

into her bank account, given that these would be applied to reduce her bank overdraft;

4) These matters in turn led her to seek payment in cash as a means to avoid payments in her bank account; and

5) The further consequence of this was the common subterfuge that each party maintained to her own solicitor that the Disposition was to be for no consideration.

These were strong motivating factors which impelled the pursuer to seek to raise some funds from the asset that the property represented, but which led her to disregard the usual channels (eg equity release or, had she been able to fund it, a small mortgage) or to do so through traceable channels, which the pursuer was most anxious to avoid.

6) On the evidence, I find that it was likely that it was the pursuer who suggested the specific figure (of £45,000). I do so on the basis of the evidence of Doris Lorimer, whom I accept as entirely credible and reliable, that long before the discussions between the pursuer and the defender began, the pursuer had disclosed her financial worries to Doris Lorimer, who was at that time the pursuer's very close friend. (This is consistent with the other evidence I have heard that the pursuer was naturally gregarious; that she found it difficult to keep matters to herself, and that she regularly worried aloud to her friends about financial and other worries.) This prompted Doris Lorimer's own son to offer to pay the pursuer the sum of £45,000 for the house. I accept Doris Lorimer's evidence on this point, and also her evidence that the pursuer declined this offer, because the payment would be by cheque and not cash. If paid in this manner, it would mean that some of these funds would be used to settle her bank overdraft

and they might otherwise potentially have become available to her other creditors. It would have necessarily precluded her entering into a DAS while she possessed such funds. In my view, it is unlikely to be a coincidence that the figure of £45,000 as the total price (on the defender's version of events) was the very same as that offered by Doris Lorimer's son. Rather, this figure lodged in the pursuer's mind as the sum she should be looking for if she were to dispone the house. This reinforces the picture that it was the pursuer who approached the defender, and it lends credence to the defender's position that £45,000 was the amount paid over.

7) The defender was described as a "saver" and in her own words she thought that this was a "good deal", and was happy to oblige. This small passage of the defender's evidence rings true. It is also consistent with the picture of events that the pursuer initiated the transaction, for the reasons I have identified from the evidence, and also the evidence that the defender was pretty canny and happy to oblige on these terms.

8) The evidence of the pursuer's repeated interactions with her solicitor are also relevant to the issue of circumvention. As the granter of a gratuitous deed which was not pursuant to missives, she was in control. There was no time pressure or agreed date of entry that required to be met. If there were any circumstance or instruction not to her liking, she was free to halt the transaction at any time. After she gave her initial instructions, which appeared to include the provision for a liferent, she thereafter had further meetings with the solicitor to countermand the suggestion that there was to be a liferent; another meeting to confirm that there would be a lease, not a liferent; and a further meeting to confirm that there would

be neither a liferent nor a lease, and that she was intent on moving abroad on a long-term basis. I do not accept that she was intimidated by the defender during these meetings, which all took place with her solicitor outwith the defender's presence. Nothing in the other evidence lends support to the image the pursuer sought to convey of her as the catspaw of the defender. Rather, these interactions show her well capable of acting in a determined manner to achieve her own ends, and to tell a series of lies to her solicitor to achieve those ends. On the evidence I accept, she was likely to have been the instigator in these arrangements and able to mislead her own solicitor in order to achieve them.

9) There is also the evidence of the pursuer's witness, Christine MacCormack. She spoke to the pursuer confiding in her, in a delighted fashion, that she had just disponed her house for cash.

10) Mention must also be made of a further witness. Colin McInnes, who was friendly with both the pursuer and defender, having known them since he was a boy. The pursuer had attended his wedding a few weeks after her husband's death and was sufficiently close to have been invited to the celebratory meal. The defender had also assisted, at times, in his upbringing. He spoke to the pursuer having shoplifted an item at Costco, when he had driven her there to help (as she would not have been able to lift the large bags of bird seed that she had desired). He also spoke to the pursuer boasting to him that she had sold the property to the defender. He also confirmed that her demeanour was of someone very pleased with what she had done. He had also been present when the pursuer signed the Lease. I found him entirely credible and reliable, and commendably straightforward. I have no hesitation in accepting his evidence.

All of this is inimical to finding that there was some manner of circumvention.

[32] The fact that the pursuer was able to dissemble and manipulate events to suit her self-interest is demonstrated by the evidence that she entered into a DAS just a very few months after having received the sum of about £18,000 (on her account) or the greater sum of £45,000 (on the defender's account). Other evidence disclosed that within a few months of that she was spending large sums (eg on a 50" TV, sundry electronic gadgets and flights) outwith her means. This is another instance of the casual dishonesty in which the pursuer appeared from time to time to indulge.

[33] It is in this context, that the somewhat unsatisfactory evidence about the housing benefit may be relevant. It appeared to have been assumed between the parties that the pursuer would be entitled to, or could access, housing benefit. Given that the other evidence suggested that the defender was quite careful with money and anxious to protect her position, this assumption is consistent with the evidence that the defender appeared to be unconcerned about the pursuer's ability to pay rent. (This is one part of the defender's evidence I am prepared to accept.) However, this appears also to have been the pursuer's working assumption, too. I accept the evidence of Colin McInnes that at about the time she signed the Lease (which he had witnessed) the pursuer was "off to Anniesland", meaning the local offices of the council responsible for housing benefit.

[34] To the extent that the pursuer was prepared to acknowledge the issue of housing benefit, it was to suggest that in 2014 she was being prevailed upon by the defender to make a fraudulent claim for housing benefit. I express no view on that matter, but it is difficult to dispel the impression that the evidence I have heard is not the whole picture and that both the pursuer and the defender entered into this arrangement (and the Lease) in order collusively to claim housing benefit. This would provide a further strong motivation for the

pursuer to dispose of the house, but with the comfort that it would be in both parties' interests for the Lease to be kept in place. It would also readily explain the uncharacteristic lack of concern on the part of the defender, and the complete lack of concern on the part of the pursuer, as to how the pursuer would be in a position to fund the rent due under the Lease. It would also explain the timing of the Lease, in relation to the Disposition, and the parties' otherwise inexplicable desire to keep this feature of their dealings hidden from their respective solicitors and, perhaps, too the defender's comment recorded in her solicitor's file note (which had no support in the evidence) that it was her intention to let the property out to a third party. (For aught yet seen, the desire to distance herself from the pursuer, for this purpose, might also explain the otherwise curious disposal by the defender to her son in 2014.)

[35] On this scenario, which on one view best explains the otherwise convoluted explanations and conduct of the parties, the grant of the Disposition and the Lease were the means to perpetrate a fraud. If that were the position, that common plan unravelled when it transpired that the pursuer would not be eligible for housing benefit for the two-year period following the Disposition. This would, however, be consistent with the two-year period following the Disposition where, again perhaps uncharacteristically, the defender did not insist on payment of the rent. If this scenario reflected what had occurred, and I stress that I make no such finding, the presence of fraud might have unravelled all, but the parties might then have been facing serious criminal charges - a matter I raised at the outset of this proof, in my general warning to parties regarding eliciting incriminating evidence. This warning had been prompted by the concerns reported to the court by the Commissioner who had taken Sandra Kenneway's evidence. He advised placing no reliance on her evidence,

adduced as a purported witness to the defender's cash payments to the pursuer, as he found her neither credible nor reliable.

[36] In the light of the foregoing, I am not persuaded that the pursuer has proved circumvention.

Lesion

[37] This factor is academic given my determination that the pursuer's case fails on two of the three elements. I can deal with this shortly. As I explained above, I do not accept the parties' evidence unless this was supported from other sources. As just noted, the Commissioner counselled against the court accepting the defender's witness, Sandra Kenneway, who had been led as a witness to the handing over of cash to the pursuer on two occasions. I would have been disinclined to find that the total amount of cash paid was £45,000, as the defender contends, but for the evidence of Doris Lorimer. She did not strike me as a friend of the defender. She had been a very close friend of the pursuer, though they have now fallen out. She spoke to a series of conversations with the pursuer about the disposal of the property. She described the pursuer initially suggesting to her that she had received no money. Doris Lorimer explained that she told the pursuer she didn't accept this. The pursuer then suggested ever higher figures, as these were met with scepticism by Doris, until the pursuer conceded that she had received £45,000 from the defender. Had it been necessary to decide this point, I would have been inclined to find that the pursuer had received this amount.

[38] I also accept that the pursuer signed the Lease shortly after the Disposition and that these two deeds were intended to be part of an overall arrangement whereby the pursuer could remain in occupation. On that basis, there is some force in Mr Logan's submission that

the defender did not get vacant possession. In other words, it is not quite the stark choice between £45,000 and a property valued at about £125,000.

[39] I set little store by the fact that the Lease was a short assured tenancy rather than a slightly more favourable tenancy in terms of security of tenure or duration. This form of lease appears to have been obtained from a friend, and not on the basis of an informed choice of the least favourable form of tenancy. It was suggested in submissions that after the passage of one year, this kind of lease became more favourable in terms of duration and security, though the regulations said to govern this were not produced.

[40] On the evidence, the defender did not receive payment under the Lease and she did not seek to enforce the Lease until some two years had passed. This reinforces the conclusion that the Lease was linked to the Disposition. This also explains the two-year period of abeyance of rent, coinciding with the time during which the pursuer was precluded from claiming housing benefit. The pursuer lived rent-free in the property with the acquiescence of the defender, during a time when the defender would have expected to receive about £14,200. This is not irrelevant to the question of lesion.

[41] Surprisingly, the sheriff court eviction proceedings were not sisted pending the outcome of these proceedings; they were dismissed on a no expenses due to or by basis. The pursuer has remained in occupation, without payment of rent, for a period of just over six years. For aught yet seen, had housing benefit been payable, the arrangement might have continued indefinitely.

[42] There was no evidence as to the value of the property without vacant possession. Had it been necessary to decide the point, I would have been inclined to find, with some hesitation, that lesion had not been proved. It seems to me that the true character of the arrangement was that provided by the very first witness: in retrospect, it was a bad bargain.

[43] It follows that the pursuer's action fails. As requested by the parties, I will reserve the question of expenses meantime and will put the matter out By Order.