

Case No: CH-2017-000070

Neutral Citation Number: [2017] EWHC 2691 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 01/11/2017

Before:

MR JUSTICE MORGAN

Between:

NIKI CHRISTODOULIDES

**Appellant/
Defendant**

- and -

ANDROULLA MARCOU

**Respondent/
Claimant**

Mr John McLinden QC (instructed on direct access terms) for the **Appellant**
Ms Kate Selway (instructed by **DBP Law**) for the **Respondent**

Hearing dates: 26 October 2017

Judgment

MR JUSTICE MORGAN:

1. Mrs Niki Christodoulides (“Niki”) and Mrs Androulla Marcou (“Andre”) are sisters. They have been involved in two sets of proceedings against each other. In one set of proceedings, Andre challenged the validity of a will made by their mother, Mrs Agni Iacovou (“Agni”). I will refer to these proceedings as “the will proceedings”. In the other set of proceedings, Niki applied for an order setting aside a transfer made by Agni of her 50% interest in a property known as Hazelmead. The transfer was in favour of Niki and Andre in equal shares and Niki applied to set aside the transfer on the ground that it had been procured by the undue influence of Andre. I will refer to these proceedings as “the transfer proceedings”.
2. Following a 10 day trial in the County Court at Central London, on 10 February 2017, Mr Recorder Lawrence Cohen QC found in favour of Andre and against Niki in both the will proceedings and the transfer proceedings. He held that the will was invalid. If the will had been valid, Niki would have been the sole residuary beneficiary in relation to Agni’s estate. As the will was invalid, Agni died intestate and the beneficiaries in relation to her estate are Niki and Andre equally. As to the transfer proceedings, the Recorder held that the transfer was valid and had not been vitiated by undue influence.
3. Niki wished to appeal both findings of the Recorder and served Appellant’s Notices in both the will proceedings and the transfer proceedings. Niki needed permission to appeal in relation to both appeals. I have already heard oral submissions on Niki’s application for permission to appeal in relation to the will proceedings and on 26 October 2017, I handed down judgment in that application: see [2017] EWHC 2632 (Ch). I refused permission to appeal in relation to the will proceedings. That means that the will proceedings are now at an end and the Recorder’s finding that the will was invalid cannot now be challenged.
4. Following the hand down of my judgment in the will proceedings, I heard oral submissions on Niki’s application for permission to appeal in the transfer proceedings. I had been provided with a full appeal bundle and with detailed written submissions in relation to the proposed appeal. I was also provided with a bundle of authorities. The oral submissions, following the hand down of the judgment to which I referred, focussed on the question whether the appeal in the transfer proceedings raised only an academic question and whether on that account permission to appeal should be refused.
5. It is accepted that the ultimate position as to the beneficial interests in Hazelmead will not be affected by the court’s decision as to whether the transfer was valid or invalid. Before the transfer, each of Niki and Andre had a 25% share in the property. The transfer related to a 50% share held by Agni. If the transfer were valid, then that 50% share was transferred to Niki and Andre in equal shares. If the transfer were not valid, then that 50% share was a part of Agni’s estate which will (on due administration of the estate) pass to Niki and Andre in equal shares. I was told that the validity, or otherwise, of the transfer did not have any relevant tax consequences.
6. Ms Selway, who appeared for Andre, submitted that the appeal in the transfer proceedings was academic and permission to appeal should be refused. Mr McLinden QC, who appeared for Niki, submitted that the appeal was not academic. He pointed

to the fact that the Recorder made an order that Niki do pay Andre's costs of the transfer proceedings on the indemnity basis. He submitted that if the appeal in the transfer proceedings were allowed and the transfer was set aside then the order for costs could not stand. Andre would be the losing party and should not be paid her costs. Niki would be the winning party and should be paid her costs by Andre. It seemed to be accepted by Ms Selway that if Niki ultimately won the transfer proceedings, there was no reason to think that the costs order made by the Recorder would not be set aside and be replaced by an order more favourable to Niki.

7. Both counsel referred me to a number of authorities in relation to the proper response of an appeal court to an appeal which is said to be academic. Mr McLinden cited R (Bushell) v Newcastle Licensing Justices [2006] 1 WLR 497, Hutcheson v Popdog Ltd [2012] 1 WLR 782 and Hamnett v Essex County Council [2017] 1 WLR 1155. Ms Selway cited Elders Pastoral Ltd v Bank of New Zealand [1990] 1 WLR 1090 and Rolls-Royce plc v Unite the Union [2010] 1 WLR 318.
8. Not all of the points made in those cases are relevant in the present case. This case does not involve public law nor is the issue in the case one of general public importance. It is a private law claim which only affects these parties and involves the application of established legal principles.
9. From the above authorities, I derive the following propositions which are relevant to a case like the present:
 - (1) The fact that an appellant's success in relation to the issue raised by the appeal (which, considered by itself, has become an academic point) might mean that the court would reverse a previous order for costs adverse to the appellant and/or award the appellant her costs of earlier proceedings is capable in some cases of persuading a court that the appeal as a whole is not academic;
 - (2) In the type of case referred to in (1) above, the court will wish to consider how certain it is that the appellant's success on the issue raised by the appeal will improve the appellant's position in relation to the previous position in relation to costs;
 - (3) The more uncertain is the position in relation to the matter referred to in (2) above, the less likely it is that the court will entertain the appeal;
 - (4) Where the only possible effect of the outcome of the appeal is in relation to previous orders for costs, the court will wish to be very cautious before allowing the appeal to proceed.
10. In order to consider what should be done in this case, I now need to refer to the issue which Niki wishes to raise on this appeal and the various possible outcomes of the appeal.
11. In this case, Niki did not, and does not, contend that Andre was guilty of actual undue influence. Niki's case was, and is, that this is a case of presumed undue influence. Niki says that: (1) there was a relationship of trust and confidence between Andre and her mother; (2) the transfer called for an explanation; and (3) Andre could not rebut the resulting presumption of undue influence. The Recorder held that: (1) there was a

relationship of trust and confidence between Andre and her mother; but (2) the transfer did not call for an explanation. The Recorder did not specifically go on to consider the third question because, on his findings, the third question did not arise.

12. In her proposed appeal, Niki challenges the Recorder's finding that the transfer did not call for an explanation. It is then submitted on her behalf that the appeal court should find that Andre had not rebutted the resulting presumption of undue influence.
13. As to Niki's contention that the transfer called for an explanation and that the Recorder was wrong to hold otherwise, Mr McLinden stresses that Agni was worse off after the transfer as compared with her position before the transfer. He says that that shows that the transfer calls for an explanation. He relies on the objective features of the transaction. However, as explained in Snell's Equity 33rd ed., at para. 8-032, the question whether a transaction calls for an explanation normally requires the court to do more than assess the objective features of the transaction. The court should normally go further and consider the specific facts of the case and all the circumstances in which the transaction was effected. The ultimate question is whether no explanation can be found except for the explanation that there was undue influence. The Recorder did not confine himself to the objective features of the transaction but considered all the circumstances and held that the transfer was explained in a way which did not involve undue influence. If this had been the only point in the case and the answer on this point would have been conclusive of the appeal, I might have considered that this was a case for the grant of permission to appeal but it would be a very borderline case for the grant of permission.
14. If Niki did succeed in arguing that the Recorder had gone wrong in holding that the transfer did not call for an explanation, that would have led to the next question which was whether Andre had rebutted the presumption of undue influence. It can be said on Andre's behalf that the findings of the Recorder which led him to hold that the transfer did not call for an explanation would have been highly relevant when considering whether Andre had rebutted the presumption of undue influence. I consider that Andre would have a strong argument based on those findings.
15. If that is wrong, then I think that it would be likely that the court would need to remit the matter to the Recorder in order for him to deal expressly with the issue of possible rebuttal of the presumption of undue influence. The possibility of such a remission would immediately raise the question whether it was appropriate to have further stages at first instance in this case when the only possible effect on the parties was one of costs. It is not normal to conduct a trial on an issue which is academic save as to the previous costs of the proceedings. Accordingly, the likelihood in this case is that either the appeal court would hold that the findings of fact already made served to rebut the presumption of undue influence or that further findings of fact needed to be made. In the latter case, it is likely that the court would not remit the matter when the only effect of the issue related to costs and, instead, the court would dismiss the appeal.
16. Whilst Niki would no doubt wish to argue that success on the issue whether the transfer called for an explanation should lead the appeal court to conclude that Andre had not rebutted the presumption of undue influence, I think that outcome is unlikely. Mr McLinden argued that Andre could not rebut the presumption because Agni did not have independent legal advice but it is clear that the existence of such advice is

not always necessary as the question of a possible rebuttal is to be answered by reference to all of the circumstances of the case: see Snell at para. 8-033.

17. When I take into account the possible outcomes of the appeal and the different ways in which the appeal might be dismissed, my overall assessment is that the appeal does not have a real prospect of success. In addition to that assessment, in view of the fact that the only possible effect of a successful appeal is in relation to the previous order for costs and the prospect of a successful appeal is low, I consider that I should exercise appropriate caution before granting permission to appeal in this case. The exercise of such caution reinforces my conclusion that it is not appropriate in this case to give permission to appeal.
18. Accordingly, I refuse permission to appeal in relation to the transfer proceedings.