FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 4
CA89/17

Lord President
Lord Menzies
Lord Brodie

OPINION OF THE COURT

delivered by LORD MENZIES

in the Reclaiming Motion by

ILENE ANDERSON AND ANOTHER

Pursuers and Reclaimers

against

GEORGE DAVIDSON WILSON

Defender and Respondent

Pursuers and Reclaimers: Martin QC, Beynon; Lefevre Litigation
Defender and Respondent: Sandison QC, Cowan; Burness Paull LLP

30 January 2019

Introduction

[1] Thomas Paterson ("the deceased") was a dairy farmer on the Cobairdy Estate near Huntly. He died on 21 April 2016. He was survived by five daughters. The pursuers are two of these daughters; the defender is the husband of one of the other daughters. By disposition dated 9 October 2011 the deceased disponed to the defender about 255 acres of the Cobairdy Estate. In early December 2011 the deceased gifted each of his five daughters

the sum of £30,000 under explanation from his wife that "a bit" of the estate had been sold to the defender.

[2] By will executed on 17 October 2012 the deceased left his estate to his wife, provided she survived him for 30 days after his death, whom failing to so survive to his five daughters equally amongst them. By will dated the same date the deceased's wife made essentially the same provision, leaving her estate to the deceased, provided that he survived her for 30 days after her death, whom failing to so survive to her five daughters equally. On the death of the deceased his estate passed to his wife. His wife died on 22 November 2016. The pursuers, as two of the five daughters, are beneficiaries in terms of her will.

[3] The present action was raised on 28 July 2017.

These proceedings

[4] Each of the pursuers seeks two remedies against the defender – (a) payment of damages plus one-fifth of the Capital Gains and Inheritance Tax liability together with interest and likely penalties together with interest thereon, and (b) declarator that the defender is under an obligation to pay to each pursuer a sum representing one-fifth of tax and other losses sustained by the estate of the deceased's widow caused by the sale of the agricultural land at Cobairdy Estate by the deceased by disposition dated 9 October 2011 in favour of the defender. The pursuers aver that the sale of the land in October 2011 was at gross undervalue. It is averred that the actual consideration paid for the land was £420,000, and that the actual or likely market value of the land was approximately £1,050,000. The pursuers aver that the deceased left his whole net estate to his wife. The deceased's wife left her net estate in five equal portions to the pursuers and her other three surviving daughters. The value of the land remained the same as at the date of the death of the deceased's wife in

2016 as it was in 2011. The pursuers each claim damages amounting to one-fifth of the difference between £1,050,000 and £420,000, ie £126,000 on the death of their mother. They also aver that as a result of the disposition in October 2011 the deceased's estate will have to pay Capital Gains Tax of £10,000, which will have the effect of diminishing (a) the value of the estate passing from the deceased to his late wife's estate and (b) under and in terms of the deceased's wife's will the net bequests to the pursuers. They also claim that as a result of the disposition the deceased's wife's estate cannot benefit from agricultural property relief/entrepreneurial tax relief, resulting in further loss to each pursuer relative to the equal bequest to each of them from their mother.

[5] When the matter came before the commercial judge for debate, the pursuers sought damages from the defender on three bases:

> "(1) Intentional delict. The defender deliberately, and without legal justification, arranged for the deceased to execute the said Disposition at a price approximately one-half of the subject's actual or likely market value ... the defender's conduct constituted fraud.
>
> (2) Facility and circumvention. At the time of the execution of the disposition, the deceased was in a facile ie weak condition ... his will was overcome by the defender when signing the disposition.
>
> (3) Undue influence. ... At the material time the defender exercised over the deceased a dominant or influential ascendancy exercised by the defender contrary to law."

[6] At debate the defender submitted (1) that the pursuers had no title to sue, (2) that the action had prescribed in terms of section 6 of the Prescription and Limitation (Scotland) Act 1973, (3) that the pursuers' pleadings were so lacking in specification as to be irrelevant, and (4) that damages were not a competent remedy where facility and circumvention or undue influence were the bases of the action.

[7] In his opinion dated 30 January 2018 the commercial judge held that the case of fraud was irrelevant. In addition, he held that the pursuers had no title to sue on any of the bases relied upon – they did not stand in a legal relation to the defender which gave them some right which the defender infringed. He held that the remedy of damages was not a competent one in a claim based on either facility and circumvention or undue influence. He rejected the defender's prescription argument. By interlocutor of the same date he dismissed the action. It is against that interlocutor that the pursuers now reclaim.

[8] The pursuers and reclaimers do not challenge the commercial judge's decision with regard to dismissal of the fraud case. Their submissions before this court were confined to (a) title to sue and (b) the competency of damages as a remedy. The defender and respondent has a cross-appeal against the commercial judge's decision to reject the prescription argument.

Submissions for the parties

Pursuers and reclaimers

[9] Senior counsel for the pursuers and reclaimers began by noting that there had been submissions before the commercial judge about the tripartite test in *Caparo Industries plc* v *Dickman* [1990] 2 AC 605, and the commercial judge dealt with these submissions (although observing that it was perhaps not necessary to look at the *Caparo* test in further detail given his decision). The decision in *Caparo* had nothing to do with a case of facility and circumvention or of undue influence. He submitted that the commercial judge had not carried out any proper analysis of title to sue in a case based on facility and circumvention or undue influence. The closest that he got to this was at paragraphs [95] and [96] of his Opinion, but there was no detailed analysis of the issue of title to sue in a situation where

the claim is being made by a beneficiary. Senior counsel also submitted that the commercial judge did not carry out a full analysis of whether or not damages might be a competent remedy for facility and circumvention or undue influence; if these were a genus of fraud, and if damages were available for fraud, logically damages ought to be available as a remedy in respect of facility and circumvention or undue influence.

[10] On the issue of title to sue, senior counsel submitted that although facility and circumvention was originally treated as a form of fraud, now Scots law recognises this as something different and does not require the high standard of averment which is required for other forms of fraud – see McBryde, *The Law of Contract in Scotland* (3rd ed) paras 16-01 to 16-12. Where a deed granted by a deceased person is challenged on grounds of facility and circumvention (or undue influence) after his death, title will always depend on events which have occurred after the deed was granted. The title and interest of the person who seeks to challenge the deed will depend upon the deceased having died in a situation where the person challenging became his lawful beneficiary. That will depend in particular upon the deceased not having granted a subsequent will in favour of a different beneficiary. In other words, no title and interest can exist in a situation such as the present at the time that the deed is granted (other than in favour of the deceased himself). The subsequent title and interest of a beneficiary will always come into existence only later and upon the death of the deceased.

[11] Senior counsel accepted that the deceased's executor would have had title to sue. He asked why the executor of the deceased's widow would not have title to sue? There might be more than one link in the chain, which might include beneficiaries and issue of beneficiaries. He referred us to the well-known *dictum* of Lord Dunedin in *D&J Nicol* v *Dundee Harbour Trustees* 1915 SC (HL) 7, where he observed (at 12-13):

> "... I am not aware that anyone of authority has risked a definition of what constitutes title to sue. I am not disposed to do so, but I think it may fairly be said that for a person to have such title he must be a party (using the word in its widest sense) to some legal relation which gives him some right which the person against whom he raises the action either infringes or denies".

It was submitted that the pursuers could be said to be in a legal relation with the defender, because, as beneficiaries of the deceased's beneficiary, they claim the defender infringed their right to the full value of the deceased's estate. There was no logical difference between the position of an executor and that of beneficiaries – if an executor has title to sue, there is no reason why a beneficiary should not. In answer to questions by the court, senior counsel submitted initially that a beneficiary can recover a debt due to the estate; however, when faced with the decision of the Inner House in *Morrison* v *Morrison's Executrix* 1912 SC 892 he accepted that a beneficiary did not have title to sue for a debt due to the deceased's estate. Reliance was also placed on *Cleugh* v *Fleming and others* 1948 SLT (Notes) 60; *Matossian* v *Matossian* [2016] CSOH 21; and *Neville* v *Donald* [2016] CSOH 6.

[12] Senior counsel submitted that in a case of facility and circumvention and undue influence, title and interest may only crystallise after the event. In the present case, the pursuers have averred an identifiable entitlement to share in an estate which was diminished by the disposition. The concept of remoteness is not applicable to title to sue; as long as the pursuers can demonstrate, by one or more links, an entitlement to ensure a proper division of the estate, they will have title to sue. So far as interest is concerned, the pursuers must aver a material detriment in their challenge to the disposition as being granted at undervalue (and they do so in this case). The commercial judge's approach to title and interest was at odds with his views on the issue of prescription when considering the need for concurrence of *damnum* and *injuria* – the pursuers accept the commercial judge's

statement of the law at paragraph [63] of his Opinion, and submit that this ought logically to apply to the issue of title and interest in favour of the pursuers.

[13] Turning to the issue of whether damages were available as a remedy for facility and circumvention and undue influence, senior counsel accepted that he could point to no authority which clearly stated that damages were available. He drew our attention to McBryde (*op. cit.*), and to the last sentence of paragraph 16-11 in which the author, dealing with facility and circumvention, expressed the view that "in the absence of fraud it is probable that damages cannot be obtained and remedies are limited to challenge of the deed and, where appropriate, unjustified enrichment." Similarly with regard to undue influence, the author expressed the view (at para 16-36) "... there is no authority to suggest that damages are a competent remedy for undue influence." However, the observations of Lord Sorn in *Cleugh* v *Fleming* (*supra*) suggest that the court considered that a person who is aggrieved by facility and circumvention should have a remedy. There was no reason in principle why that remedy should not include damages resulting from the wrongful acts of facility and circumvention. It was submitted that facility and circumvention and undue influence should properly be regarded as a civil wrong, and if that is correct, damages would be a competent remedy – *McGregor on Damages* (20th ed) at paras 1-004 and 1-020, and the discussion by Peter Birks "Unjust Factors and Wrongs: Pecuniary Rescission for Undue Influence" 1997 RLR 72. The commercial judge should not have held the pursuers' claim for damages to be incompetent – damages were an alternative remedy to reduction, and were a competent and appropriate remedy in respect of both facility and circumvention and undue influence in the present case. He invited the court to allow the reclaiming motion, recall the Lord Ordinary's interlocutor of 30 January 2018, repel the defender's first and third pleas-in-law directed towards title to sue and relevancy, and allow a proof before answer.

Defender and Respondent

[14] With regard to title to sue, senior counsel for the defender and respondent submitted that there was a tripartite test to be applied in the present case – not that discussed in *Caparo*, but in the passage from Lord Dunedin's speech in *D&J Nicol* quoted above. He argued that the three elements required for a person to have title to sue are: (1) he must be a party (using the word in its widest sense) to some legal relation; (2) this must give rise to some right; and (3) that right must be the right which the person against whom he raises the action either infringes or denies.

[15] The pursuers were in error in suggesting that the right of beneficiaries to the estate of a deceased was a right to determine what the estate comprised. Properly analysed, a beneficiary's right is to succeed to the deceased's estate however that may be constituted. It does not extend to a right to seek that the estate is comprised of a particular sort of property or extent.

[16] In the present case the only possible relevant legal relation enjoyed by the pursuers (which was achieved by them long after the acts complained of) was a right to inherit from their mother's estate, howsoever that estate might be composed when the succession to it opened. That is not a right which the defender is said to have infringed or denied. Likewise, the only relevant right their mother had was a right to inherit from her husband's estate, howsoever that estate might be composed when the succession to it opened. That too is not a right which the defender is said to have infringed or denied. The right which the defender is said to have infringed might best be described as the right of the pursuers' father to have decisional autonomy in the conduct of his affairs. He undoubtedly had title to sue in

respect of that claimed infringement. That title may have passed to his executors, and it may still inhere in them; it does not, however, inhere in the pursuers.

[17] The right which the pursuers claim was infringed was not a right to succession at all – it was the right of the deceased, not his beneficiaries. Accordingly, any right to complain about the granting of the disposition rests with the deceased's executor, not his beneficiaries. It is not competent for beneficiaries to seek to collect a debt owed to the estate of the deceased – *Morrison* v *Morrison's Executrix*, *supra*, particularly per Lord President Dunedin at 895.

[18] In the present case the pursuers are not even at one remove from the deceased – they are beneficiaries in terms of the deceased's widow's will, and the deceased's widow was the beneficiary in terms of the deceased's will. Any title to sue rested with the deceased's executor. In addition, the pursuers have no title to sue because they do not stand in a legal relation to the defender which gives them some right which the defender infringed. The cases of *Matossian* and *Neville* to which the pursuers and reclaimers referred were each brought at the instance of an executor or attorney; they support the defender, not the pursuers.

[19] With regard to the availability of damages as a remedy, the commercial judge was correct to hold that this was not a competent remedy in the particular circumstances of facility and circumvention and undue influence in the present case. Senior counsel did not suggest that in no circumstances could damages be competently sought, but in the circumstances of this case, in which fraud has now disappeared, there were not sufficient averments of a civil wrong, and therefore there was no right to damages (although there might be a right to restitutional remedies such as reduction, an award for the enjoyment of the benefits of the land since the disposition, or possibly pecuniary restitutional remedies to

restore unjust enrichment). These were not damages – they focused on enrichment to the defender rather than damage to the pursuers.

[20] In modern usage, facility and circumvention and undue influence are descriptive of a situation which may arise in a number of ways. They may be achieved by means of a civil wrong, such as breach of contract or breach of fiduciary duty, or misrepresentation or duress. However, there may be circumstances in which they are achieved innocently, without the commission of a wrong; facility and circumvention is to be assessed objectively rather than subjectively, and there is no need to establish intention. Undue influence can arise from the most innocuous circumstances without any wrongful act. Senior counsel accepted that if facility and circumvention or undue influence were to be achieved by a wrongful act, damages would flow. However, if no wrongful act has been committed, there is no right to damages. Looking to the pursuers' pleadings in article IX.2 relating to facility and circumvention, and article IX.3 relating to undue influence, the pursuers do not offer to prove a civil wrong. All that they offer to prove is that the deceased granted a deed which he would not have done. These averments do not justify an award of damages, but only a restitutional remedy. Senior counsel relied on the passages already referred to in *McGregor on Damages* and in the article by Peter Birks in 1997 RLR 72, and also on *Banque Keyser Ullmann SA* v *Skandia (UK) Insurance Co Limited* [1990] 1 QB 665, particularly at pages 779/780.

[21] The intentional delict aspect of this case having been deleted, the pursuers' averments are vague, inspecific and do not amount to an offer to prove a civil wrong, so there is no remedy in damages. In any event, the weaker alternative rule applied – if the actions complained of may or may not amount to a civil wrong, then damages were not available. The Lord Ordinary was accordingly correct to hold that the pursuers' pleadings

were irrelevant as they only sought damages. The case is founded on claimed obligations of reparation, so all the conclusions are inept.

[22] With regard to the issue of prescription raised in the cross reclaiming motion for the defender, senior counsel asked the rhetorical question – if there is a right of action in a beneficiary to sue for reparation, when was the concurrence of *damnum* and *injuria*? The action was raised on 28 July 2017. The latest date on which any wrongful conduct on the part of the defender could have occurred was the date on which the disposition was executed, ie 9 October 2011. The loss in respect of which the pursuers complain is the diminution effected in the value of the estate of their mother, which in turn flowed in its entirety from the earlier diminution in the value of the estate of their father said to have been caused by the wrongful acts of the defender. *Damnum* must have occurred when the value first left the deceased's estate, namely in October 2011. The commercial judge erred in law in holding that there was a conjunction of *damnum* and *injuria* only on the date of the mother's death. That event resulted in no alteration in the value of the estate, nor did the death of the deceased. Any diminution in the value of the estate occurred in October 2011, and accordingly the pursuers' right of action prescribed in October 2016.

[23] The pursuers' argument to the contrary was fallacious. If the mansion house at Cobairdy had been destroyed by fire as a result of the defender's negligence, on the pursuers' argument there would effectively be no prescriptive period, as the prescriptive period would start again when each beneficiary died. This cannot be correct.

[24] The pursuers could not rely on the terms of section 11(3) of the Prescription and Limitation (Scotland) Act 1973. The pursuers accepted that they were aware that a portion of the lands were sold in 2011, and each of them was given a sum of money at about that time and told that this came from the sale of land. The fact of the sale, the extent of the land

sold, the price and the identity of the purchaser were all matters of public record; all these items of information could have been ascertained in 2011, as could the alleged undervalue. Section 11(3) does not postpone the start of the prescriptive period until a creditor of an obligation is aware actually or constructively that he or she has suffered a detriment in the sense that something has gone awry rendering the creditor poorer or otherwise at a disadvantage. The creditor does not have to know that he or she has a head of loss. It is sufficient that a creditor is aware that he or she has not obtained something which the creditor had sought or that he or she had incurred expenditure – *Gordon's Trustees* v *Campbell Riddell Breeze Paterson LLP* 2017 SLT 1287, particular at paragraphs [18] to [22].

[25] The commercial judge accordingly ought to have held that any case which the pursuers might otherwise have had had prescribed, and granted decree of absolvitor accordingly.

Response for the pursuers and reclaimers

[26] Senior counsel for the pursuers and reclaimers submitted that the argument for the defender that in no circumstances did a beneficiary in terms of a will have a right to do anything after the date of death, including trying to recover a debt due to the estate or seeking to reduce a transaction impetrated by fraud, went too far. There are circumstances in which a beneficiary may have a direct right of action – for example, a beneficiary under an earlier will may have a right to challenge a subsequent will. *Morrison* v *Morrison's Executrix* was the only authority for the proposition that a beneficiary on the executry estate of a deceased was not entitled to sue for a debt due to the estate, and there was no substantive reasoning as to why the court reached that conclusion. In any event, that case raised procedural possibilities which might enable the present action to continue, albeit in the

name of the executor, even if the submissions for the pursuer on title to sue were wrong. Senior counsel submitted that the pursuers have met Lord Dunedin's test in *D&J Nicol* v *Dundee Harbour Trustees* (at page 12/13); there was nothing in that test which would deny the pursuers the right to pursue the defender in the present case.

[27] With regard to the availability of damages as a remedy, it was now accepted on behalf of the defender that there may be cases of facility and circumvention or undue influence in which it is competent to seek damages, although these may be confined to cases involving some sort of moral turpitude on the part of the person who induced the disposition or other disposal. Even if there is no right to damages, it is now accepted on behalf of the defender that there may be restitutional remedies. The question of competency therefore no longer arises – the issue is simply one of relevancy. The commercial judge held that there were sufficient averments made to amount to a relevant allegation of circumvention, and his conclusion in this regard (and similarly his conclusion that a relevant case of undue influence was averred) is not attacked by the defender. The remedy of damages cannot be rejected at this stage as incompetent.

[28] With regard to prescription, senior counsel accepted that he needed to point to a date at which there was concurrence of *damnum* and *injuria*. This occurred at the earliest when the executor of the widow of the deceased took office, ie some time after the widow's death in 2016. Before that date the pursuers were only in the position of parties who could, potentially, suffer loss. The reasoning of the commercial judge at paragraph [63] of his Opinion was sound. At the date of the disposition the deceased had made no will in favour of either pursuer; after the execution of the deceased's will in favour of, among others, the pursuers he could have altered his will so as to exclude the pursuers as beneficiaries thereunder; and finally prior to the death of the pursuers' mother, she could equally have

altered her will excluding the pursuers as beneficiaries. It is only at the point when the pursuers' mother dies and there is a will in place whereby the pursuers inherit that loss that damage crystallises and there is thus conjunction of *damnum* and *injuria*.

[29] In any event, in terms of section 11(3) of the Prescription and Limitation (Scotland) Act 1973, the pursuers have averred a relevant case. At the time of the disposition the pursuers had no reason to apprehend that a sale at gross undervalue had taken place and reasonable diligence did not require them to carry out enquiries at that time. Moreover, the knowledge of the deceased was material for the purpose of section 11(3); standing his facility, the extent to which the deceased could be said to have been aware of the fact that he was granting a disposition of his land at gross undervalue was a matter of fact which required to be determined after proof.

Decision

(i) Title to sue

[30] A beneficiary on the executry estate of a deceased is not entitled to sue for a debt due to the estate – *Morrison* v *Morrison's Executrix* 1912 SC 892. The executor of a deceased's estate has the duty of ingathering that estate. If there are debts due to the estate, or if there have been improper alienations from it, title to sue for the recovery of these rests with the executor, and not with the beneficiaries of the deceased's estate. In some circumstances it may be possible for the beneficiary to sue in the name of the executor where the executor will not raise an action which a beneficiary seeks to raise. However, there is no suggestion that such a course of action has been sought or attempted in the present case.

[31] We agree with the submission by senior counsel for the defender and respondent that the right of beneficiaries to a deceased's estate does not amount to a right to determine

what the estate constitutes. The right of the beneficiaries is to inherit the estate as it is. The right to determine what is in the estate – its composition and extent – rests with the executor as the representative of the former proprietor of the estate. It is necessary to consider what is the nature of the right which the pursuers allege to have been infringed. There is no right of succession which is averred to have been infringed; rather, it is the right of the deceased himself which is averred to have been infringed, not a right of his beneficiaries. Title to sue (by whatever remedy is sought) rests with the executor, not with the beneficiaries.

[32] This is particularly so in the present case, where the pursuers are seeking to found a title to sue as beneficiaries of the deceased's beneficiary. In the circumstances which occurred, the deceased left his whole estate to his widow. The deceased's executor did not challenge the disposition, nor did the deceased's sole beneficiary, namely his widow. When the deceased's widow died, her executor did not challenge the disposition. The pursuers, as beneficiaries in terms of the widow's will, now seek damages in relation to the granting of the disposition. They have no title to do this.

[33] When the deceased granted the disposition on 9 October 2011 he had not prepared a will. He did not execute his will until 17 October 2012. As at 9 October 2011 the pursuers were not a party to some legal relation which gave them some right against the defender. They were not even co-beneficiaries or more loosely connected in some way through the will of the deceased, because the deceased had not executed any will at that time, and did not do so for more than a year thereafter. As Lord Dunedin observed in *D&J Nicol* v *Dundee Harbour Trustees*, "I think it may fairly be said that for a person to have such title he must be a party (using the word in its widest sense) to some legal relation which gives him some right which the person against whom he raises the action either infringes or denies." Despite the eloquent submissions for the pursuers and reclaimers, and even using the word

in its widest sense, we are unable to conclude that the pursuers were a party to any such legal relation. They have no title to sue. The commercial judge was correct to sustain the defender's first plea-in-law.

[34] We are reinforced in that view by considering the decision of the UK Supreme Court in *Roberts* v *Gill & Co* [2011] 1 AC 240, and in particular the remarks of Lord Hope of Craighead DPSC at paragraphs 80-84 and Lord Rodger of Earlsferry JSC at paragraphs 87-93. As Lord Rodger observed (at para 87):

> "Unquestionably, the general rule is that the beneficiary of a trust cannot sue a debtor of the trust: the relevant right of action is vested in the trustees and it is for them to enforce that right by raising an action, if appropriate. Where the trustees decline to take proceedings but the beneficiary insists, he can require them to assign the right of action or to permit him to use their name, provided that he gives them an indemnity for any liability for expenses."

At paragraph 88 Lord Rodger referred to the Opinion of Lord Shand in *Rae* v *Meek* (1888) 15 R 1033 at 1050-1051:

> "If the trustees do not think fit to raise an action against the debtors for certain debts, having doubts it may be how far they may be certain of success, is it for a beneficiary or beneficiaries to do so in their own name? I think they have no such right. And I do not think this is a matter of mere form; it is, in my view, a matter of substance, because if the law were otherwise, then the debtors of trust-estates, including amongst them law-agents who may have been employed by the trustees, would be liable to actions at the instance of many different persons – of anyone having a beneficial interest in the trust-estate – requiring them to pay the amount of their debts to the trustees. I think such actions are not competent, and that the only persons who can maintain actions to recover debts due to an executry or trust-estate are the administrators of the estate, the trustees or the executors."

[35] As we have observed, not only were the pursuers not parties to any legal relation which gave them some right which the defender infringed or denied, but none of the possible steps discussed in *Morrison* v *Morrison's Executrix* and *Roberts* v *Gill & Co* have been taken in the present case. We should add that we did not find the cases of *Cleugh* v *Fleming*, *Matossian* and *Neville* to be of assistance to us.

[36] Our decision in relation to title to sue is sufficient to dispose of this reclaiming motion, which must be refused. However, standing the submissions made on the other two issues raised, we shall express our views on these issues briefly.

(ii) The availability of damages as a remedy

[37] The remedy which one would normally expect to see pursued where a disposition has been obtained as a result of facility and circumvention or undue influence is reduction of that disposition. There is no conclusion for reduction of the disposition in the pleadings before us. Reduction may be precluded in some cases, if *restitutio in integrum* is impossible for some reason; in the present case there are no averments to indicate this. The pursuers simply seek damages. The question therefore arises as to whether damages are a competent remedy in these circumstances? It was submitted on behalf of the defender before the commercial judge at debate that payment of damages was not a competent remedy where either facility and circumvention or undue influence was the basis of the action, and that the sole remedy was reduction. (We note in passing that there was no plea-in-law directed to the competency of the remedy sought). The commercial judge observed (at para [114] of his Opinion) that he was referred to no authority that in the absence of fraud damages could not be obtained, but equally he was referred to no authority where in such circumstances damages had been held to be a competent remedy. The only basis for the commercial judge's decision that damages were not competent appears to have been *McBryde on Contract*, in which, in relation to facility and circumvention, the learned author expresses (in rather tentative terms) the view that "in the absence of fraud it is probable that damages cannot be obtained and remedies are limited to challenge of the deed and, where appropriate, unjustified enrichment". A similarly tentative view is expressed in relation to

undue influence at paragraph 16-36, where the author observes that "there is no authority to suggest that damages are a competent remedy for undue influence."

[38] Before us, senior counsel for the defender and respondent accepted that damages might be a competent remedy in respect of both facility and circumvention and undue influence, but only if there were sufficient and relevant averments that a wrong had been committed. The submission before this court was therefore significantly different from the submission before the commercial judge.

[39] The commercial judge gave careful consideration to the averments about facility and circumvention, and reached the conclusion that they were relevant. That conclusion was not challenged before us. With regard to facility, the pursuers averred that by 2011 the deceased was exhausted, vulnerable, weak and facile. He suffered from obvious anxiety and fatigue. He would frequently become tearful and emotional at family gatherings. He had contracted very serious shingles which left him with continuing material intermittent pain from which he never recovered. He had poor eyesight, deficient hearing, and suffered from curvature of the spine. He was also illiterate. With regard to circumvention, the commercial judge observed that it was not necessary to aver specific instances of deceit (*Gloag on Contract* at page 484), and referred to the helpful definition of circumvention given by Lord Glennie in *Smyth* v *Romanes' Executors* [2014] CSOH 150 at paragraph 49. There were averments that although the deceased was at the relevant time an established client of a firm of solicitors in Aberdeen for approximately 50 years which had recognised expertise in agricultural, property and tax law and that he also had an established tax accountant, neither were involved or instructed in the disposition and that the defender arranged that the transaction be carried out by a different firm of solicitors. It is also averred that this firm of solicitors acted for both parties, there were no missives, and no advice was given with regard to

capital gains and inheritance tax consequences, and without any independent valuation. With regard to undue influence it is averred that the deceased could not have continued his business until 2011 but for the supportive acts of the defender.

[40] Senior counsel for the defender and respondent suggested that facility and circumvention and undue influence might arise in some cases entirely innocently and without any question of a wrongful act. This may perhaps be possible, although we find it difficult to imagine such a situation occurring often in practice, at least in relation to facility and circumvention (although different considerations may apply to undue influence). Both facility and circumvention and undue influence require to be assessed objectively. As Lord Glennie put it in *Smyth* (*supra*):

> "Circumvention is the name given to improper pressure applied to such a person by another ... That pressure may, at one extreme, be direct, forceful and overpowering or, at the other, be more subtle or insidious, working by solicitation or importuning. ... bullying or browbeating may equally amount to circumvention ... But facility is a spectrum; it comes in degrees. A deed will only be at risk of being reduced (or set aside) if the pressure applied is unacceptable having regard to the extent to which the person on whom it is exerted is facile. If a person with a weak and pliable mind – whether that condition is permanent or temporary and whether caused by age, infirmity, pain, grief or something else altogether – is pushed or led by fraud, force or solicitation to do what he would, or might, otherwise have resisted doing had his mind been stronger, then his act can be reduced by the court."

Similar phraseology is considered in *McBryde on Contract* at the passages to which we were referred – for example, Lord Kyllachy's unreported charge in *Parnie* v *MacLean* quoted from *Gibson's Ex* v *Anderson* 1925 SC 774 at 778 at paragraph 16-16:

> "... whether, facility existing, there had been either distinct machinations, tricks, importunities, solicitations, even suggestions ... it is not necessary that there should be deceit. It is enough that there should be solicitation, pressure, importunity, even in some cases, suggestion."

The learned author also refers at paragraph 16-18 to the *Encyclopaedia of Scottish Legal Styles*, (Vol 5 at 397) which gives as the form of issue:

> "Whether at the date of the deed ... AB was weak and facile in mind and easily imposed upon and whether the defender taking advantage of the said weakness and facility did by fraud and circumvention impetrate and obtain the said deed from the said AB to his lesion?"

[41] The language used in each of these examples appears to us to carry a connotation of what senior counsel for the pursuers and reclaimers described as moral turpitude. We see no justification for suggesting that a person who behaves in this fashion towards another person who is facile should not be described as committing a wrong.

[42] We agree with the commercial judge's conclusion that the pursuers have made sufficiently relevant averments of facility and circumvention and of undue influence. On the basis of these averments we would have been inclined to allow the pursuers' claims for damages to proceed to proof, were it not for our decision on the other issues.

(iii) Prescription

[43] We agree with the submissions for the defender and respondent. The action was raised on 28 July 2017. We consider that there was a concurrence of *damnum* and *injuria* as at 9 October 2011 when the disposition was executed. It was on this date that the estate of the deceased was diminished by the sale at an alleged undervalue. The allegedly wrongful diminution in the value of the deceased's estate occurred in October 2011. The commercial judge fell into error in accepting the argument for the pursuers that it was only at the point when the pursuers' mother died and there was a will in place whereby the pursuers inherited that loss and damage crystallised and there was a conjunction of *damnum* and *injuria*. Neither the death of the pursuers' mother, nor indeed the death of their father, resulted in any diminution in the value of the estate. That diminution occurred, on the

pursuers' averments, in October 2011. The pursuers' right of action accordingly prescribed in October 2016.

[44] The pursuers' argument to the contrary involves an argument that the prescriptive period applicable to them is different to that which attached to the deceased's executor. The pursuers submit that time begins to run at the earliest from the date on which the deceased's widow's executor took office, namely at some date after 22 November 2016. This argument is in our opinion unsound. What the pursuers complain about in this action is actings by the defender culminating in a disposition granted on 9 October 2011, on which date as a result of those actings the deceased's estate was diminished. We consider that the prescriptive period starts on that date.

[45] Section 11(3) of the Prescription and Limitation (Scotland) Act 1973 does not avail the pursuers, for the reasons given by the UK Supreme Court in *Gordon's Trustees* v *Campbell Riddle Breeze Paterson LLP* at paragraphs [19] to [22]. The pursuers were aware that land belonging to the deceased was sold in 2011, and each of them was given a sum of money which they were told came from this sale of land. The fact that the land was sold at an (alleged) undervalue could have been ascertained in 2011 just as easily as in 2017 when the action was eventually raised. If the pursuers had had a title to sue in respect of the granting of this disposition by the deceased in favour of the defender on 9 October 2011, such right had prescribed in October 2016.

Conclusion

[46] For these reasons we shall refuse the reclaiming motion and allow the cross reclaiming motion. We shall sustain the defender's second, fifth and sixth pleas-in-law and grant absolvitor.