Case No: PT-2022-LIV-000016

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS IN LIVERPOOL

PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Liverpool Civil and Family Courts

35 Vernon Street,

Liverpool L2 2BX

Date: 05/04/2023

**Before** :

HHJ CADWALLADER SITTING AS A JUDGE OF THE HIGH COURT

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**Between :**

1. **ALAN CALVERT**
2. **IAN CALVERT**

|  |  |  |
| --- | --- | --- |
|  |  | Claimants |
|  | **- and -** |  |
|  | 1. **GRAHAM CALVERT** 2. **SAMANTHA RACHEL CALVERT** | Defendants |

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**Harry East** (instructed by **Brown Turner Ross**) for the Claimants

**Graham Sellers** (instructed by **Jackson Lees**) for the Defendants

Hearing dates: 28 February, 1, 2 March 2023

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JUDGMENT

**HHJ Cadwallader:**

**Introduction**

1. This was the trial of a claim to set aside the will dated 8 May 2018 of Helena Calvert, who was born on 24 April 1921 and died on 9 April 2021 aged 99, on the ground of the undue influence of the defendants upon her, alternatively of their fraudulent calumniation of the claimants to her. The claimants and the first defendant are brothers. Alan Calvert is 80 now, and had a stroke in 2015. Colin, who does not figure largely in this case, came next; and then Ian, who is 73; followed by Graham who is 67. The second defendant, Samantha Calvert, is Graham’s daughter. The claimants, Alan and Ian, had made allegations that Mrs Calvert lacked knowledge and approval of the 2018 will, but those allegations were struck out by my order made on 16 January 2023 at the pre-trial review. They had also raised a devastavit claim in the same proceedings, which was stayed and, if pursued, will have to be the subject of further directions after this judgment. Alan, the first claimant, had also raised a claim under the Inheritance (Provision for Family and Dependents) Act 1975 which was also stayed and, if pursued, will likewise have to be the subject of further directions after this judgment.

**The wills**

1. So far as relevant, the 2018 will made the following provisions. It appointed Graham and Samantha executors and trustees. It left the entire estate of Mrs Calvert to the trustees upon trust for sale, in the events which happened, as to 60% for Graham absolutely, and as to 40% to such of her grandchildren, Samantha, Benjamin Calvert (Graham’s children), Adam Calvert and Ajay Calvert (Alan’s children) as should survive her by at least 28 days and if more than one in equal shares upon attaining the age of 21 years absolutely. The 2018 will made no provision, therefore, for Alan, Colin, or Ian. The execution of the 2018 will was witnessed by Kelly Monaghan, a solicitor at Maxwell Hodge, solicitors of Woolton and by Natalie Allcock, a legal secretary at the same firm.
2. On the same date as the 2018 will, Mrs Calvert made a formal written statement under section 21 of the 1975 Act. So far as material, it read as follows.

“Alan is financially secure and he is not financially dependent upon me. I had a dispute with Alan after he and Ian tried to appoint themselves as my attorneys. They instructed solicitors and made the application to the Office of the Public Guardian. They tried to claim that I did not have capacity and he arranged for a Doctor to assess my capacity. The Doctor assessed me as having full mental capacity and I applied to have the lasting power of attorney revoked. The power of attorney was successfully revoked. Alan also caused trouble with my tenants after he told them that he was acting as my attorney and told them that there would be a rent review on the property they rent from me. I have not had any contact with Alan since we fell out in approximately 2015. I do not want Alan to inherit from my estate.

Ian is also financially secure and he is not financially dependent upon me. We have a very poor relationship. We fell out after he made the application to be appointed as my attorney alongside Alan. We also had a dispute in approximately 2012 after Ian overcharged me for greenbelt land at the back of the property I reside in. The property is currently held as tenants in common in the names of Ian and my son Graham Calvert. Ian charged me £8,000 for the greenbelt land situated at the back of my property. He also charged our neighbours an extortionate amount for the land. To date, Ian has only paid me back £2,000. I do not have any contact with Ian and I do not intend to have any contact with him in the future. I do not want Ian to inherit from my estate.”

There was also a passage explaining her decision not to make provision for Colin. The statement was signed by Mrs Calvert, and witnessed by the same persons as witnessed the 2018 will. Both that document and the 2018 will were prepared by Kelly Monaghan, then of Maxwell Hodge, solicitors, of Woolton.

1. It was not in dispute that Mrs Calvert had made a number of previous wills, including one on 5 June 1996, 16 December 2009, 3 July 2014, and 3 December 2015. The 1996 will had been drawn by David Scholes, solicitors; the 2009 will by Suzanne Wilson at Widdows Mason; the 2014 will had been drawn by Suzanne Wilson, now at Forster Dean; and the 2015 will had been drawn by Charles Asbury of Byrne Frodsham, solicitors. If the 2018 will is set aside, it is the 2015 will which stands.
2. So far as relevant, the 2015 will made the following provisions. It appointed Alan, Ian and Graham as executors and trustees. It left legacies of £25,000, free of tax, to each of the grandchildren mentioned above. It made a small specific legacy to Samantha in addition. The residue was to be divided equally between Alan, Ian and Graham in the events which happened. It stated that no provision had been made for Colin for the reasons set out in a letter signed by her. That letter is not extant.
3. There was a codicil to the 2015 will dated 25 September 2017, which revoked the appointment of Ian as executor.

**The law**

1. A will, or a testamentary gift, obtained as the result of undue influence, will be set aside. This is a common law doctrine of the court of probate, and is to be distinguished from the equitable doctrine in respect of which the leading case is *Royal Bank of Scotland v Etridge (No. 2)* [2001] UKHL 44. The equitable doctrine has no place in probate claims for the setting aside of a will or testamentary gift.
2. In the probate context, the definition of undue influence given by Sir J. P. Wilde in *Hall v Hall* (1868) LR 1 P &D 481, 482 was simply this: “Pressure of whatever character… if so exercised as to overpower the volition without convincing the judgment”; or, as stated in *Wingrove v Wingrove* (1885) 11 PD 81 “in a word - coercion”. In lifetime transactions, by contrast, undue influence may be established even where there has been no pressure or coercion.
3. A helpful modern summary of the law both in relation to probate undue influence and fraudulent calumny is given in the following terms by Lewison J, as he then was, in the case of *Re Edwards* [2007] EWHC 1119 (Ch), which I gratefully adopt.

“i) In a case of a testamentary disposition of assets, unlike a lifetime disposition, there is no presumption of undue influence;

ii) Whether undue influence has procured the execution of a will is therefore a question of fact;

iii) The burden of proving it lies on the person who asserts it. It is not enough to prove that the facts are consistent with the hypothesis of undue influence. What must be shown is that the facts are inconsistent with any other hypothesis. In the modern law this is, perhaps, no more than a reminder of the high burden, even on the civil standard, that a claimant bears in proving undue influence as vitiating a testamentary disposition;

iv) In this context undue influence means influence exercised either by coercion, in the sense that the testator’s will must be overborne, or by fraud.

v) Coercion is pressure that overpowers the volition without convincing the testator’s judgment. It is to be distinguished from mere persuasion, appeals to ties of affection or pity for future destitution, all of which are legitimate. Pressure which causes a testator to succumb for the sake of a quiet life, if carried to an extent that overbears the testator’s free judgment, discretion or wishes, is enough to amount to coercion in this sense;

vi) The physical and mental strength of the testator are relevant factors in determining how much pressure is necessary in order to overbear the will. The will of a weak and ill person may be more easily overborne than that of a hale and hearty one. As was said in one case simply to talk to a weak and feeble testator may so fatigue the brain that a sick person may be induced for quietness’ sake to do anything. A “drip drip” approach may be highly effective in sapping the will;

vii) There is a separate ground for avoiding a testamentary disposition on the ground of fraud. The shorthand used to refer to this species of fraud is “fraudulent calumny”. The basic idea is that if A poisons the testator’s mind against B, who would otherwise be a natural beneficiary of the testator’s bounty, by casting dishonest aspersions on his character, then the will is liable to be set aside;

viii) The essence of fraudulent calumny is that the person alleged to have been poisoning the testator’s mind must either know that the aspersions are false or not care whether they are true or false. In my judgment if a person believes that he is telling the truth about a potential beneficiary then even if what he tells the testator is objectively untrue, the will is not liable to be set aside on that ground alone;

ix) The question is not whether the court considers that the testator’s testamentary disposition is fair because, subject to statutory powers of intervention, a testator may dispose of his estate as he wishes. The question, in the end, is whether in making his dispositions, the testator has acted as a free agent.

1. I take it from this that the doctrine of fraudulent calumny is probably best regarded as a species of probate undue influence, of which the other species is based on coercion. For present purposes, that is probably a merely academic question.
2. A considerable volume of case law was mentioned in written submissions, but the following are the only additional points to which I need to refer in this judgment. In *re Boyes* [2013] EWHC 4027 (Ch) the court adopted and applied the formulation of the law in *re Edwards*. If the supposed calumniator believes he is telling the truth about the potential beneficiary then even if he is wrong about it, the will is not liable to be set aside on that ground.
3. As Mr Recorder Klein (as he then was) pointed out in *Kunicki v Hayward* [2016] EWHC 3199 (Ch) when dealing with fraudulent calumny, in order to succeed the claimant must satisfy the following to a sufficient degree, namely (i) that a false representation was made, (ii) that it was made to Mrs Calvert testatrix, (iii) that it was made about the character of the existing or potential beneficiary, (iv) that it was made for the purpose of inducing Mrs Calvert to alter her testamentary dispositions, (v) that it was made knowing that it was untrue, or recklessly as to its truth, and (vi) that the will challenged was made only because of the fraudulent calumny. The standard of proof is the civil standard, but a high degree of proof is needed to meet that standard.
4. As to causation, the calumny had to be shown, on the balance of probabilities, to have induced the change in the testator’s intentions; but the court does not need to go on to find that there was no other reason operating on the testator’s mind in conjunction with the fraud: *Christodoulides v Marcou* [2017] EWHC 2632 (Ch).
5. However, it is perhaps arguable that, in the case of fraudulent calumny, as in the tort of deceit, it is necessary to show that the representor intended the representee to rely on the representation (although not necessarily in the precise way in which they did rely upon it), but that there was a rebuttable presumption that the representor had that intention; or whether it was necessary to show that the representor had practised the fraud for the specific purpose of inducing the testator to change their testamentary intentions. Such an argument was contemplated on an application for permission to appeal in *Christodoulides v Marcou* [2017] EWHC 2632 (Ch).
6. I was referred to the decision of deputy Master Arkush in *Rea v Rea* [2019] EWHC 2434 (Ch), but my attention was not drawn to the successful appeal against that decision, which was allowed on the basis of procedural unfairness in restricting a party’s cross-examination: [2022] EWCA Civ 195. Since the point for which I was referred to it had to do with drawing factual inferences, I place no reliance on the reasoning in the decision at first instance, which in any event is of doubtful relevance, and would not be binding upon me anyway.
7. I was also referred to *Todd v Parsons* [2019] EWHC 3366 (Ch) for the proposition that although independent advice by a solicitor does not automatically mean that there cannot be any effective fraudulent calumny, it is obviously relevant in considering whether fraudulent calumny could have caused the new will to be made in the terms it was. Although that observation was not part of the *ratio* of the decision (since the judge had already found there had been no fraudulent calumny), it is a common sense factual observation, and was adopted as such by the Upper Tribunal Judge in *re Dale* [2022] EWHC 2462 (Ch). I do not accept the stronger proposition suggested on behalf of the defendants, that absent very exceptional circumstances the interposition of an independent solicitor will nearly always be effective to negative undue influence and/or calumny: it seems to me that what factual inferences are to be drawn in any given case will depend on all the relevant facts established in that case. A rule-like proposition does not assist.

**The issues**

1. The claimants’ amended particulars of claim offered something of a portmanteau pleading, in the sense that a number of different factual allegations were relied upon as supporting both undue influence (which was said to be pursued both in the probate jurisdiction and in equity) and fraudulent calumny (and indeed want of knowledge and approval, until that was struck out). The skeleton argument prepared on the claimants’ behalf rather reflected that approach. Constraints of time which were unavoidable by the date of trial meant that there was little or no opportunity for this to be clarified in opening, and indeed neither the claimants nor the defendants wished to spend time on a formal opening. There was no oral closing, for the same reason: instead, I have sequential written submissions.
2. The claimants’ written submissions focus exclusively on fraudulent calumny. The claim in undue influence by coercion was not formally abandoned, however, and I deal with it below.
3. I approach the matter on the footing that the claimants’ case is that addressed in the written submissions. On that footing, what the claimants rely upon as false representations made to Mrs Calvert by Graham are the following:
4. that Ian was attempting to make Graham bankrupt in 2016
5. that Graham was in financial difficulty (this is not an allegation about the character of either Alan or Ian, of course, and is best understood in relation to the allegation that Ian was attempting to make Graham bankrupt in 2016)
6. that Alan had not been acting in her best interests while acting as her attorney under a lasting power of attorney
7. that her financial affairs were not being properly managed
8. that Alan had caused a dispute with the tenants at Mrs Calvert’s commercial property at Breck Road
9. that Alan and Ian had connived to be appointed as her attorneys
10. that Ian had overcharged Mrs Calvert on the sale of a strip of land behind her home at Lavender Cottage.
11. Each of these was set out in the amended particulars of claim. The allegation in the particulars of claim that Ian had stolen £20,000 from Graham was not addressed in closing submissions, or in the claimants’ skeleton argument.
12. There is no distinct particular allegation of coercion, either in the statement of case, or reflected in the skeleton argument or written submissions.
13. It is apparent from the terms of Mrs Calvert’s statement under the 1975 Act that the making of the 2018 will was to be explained by her belief that Alan and Ian had tried to appoint themselves attorneys, that Alan had caused trouble with the tenants, and that Ian had overcharged her for the land. This was not in issue. That statement, however, did not address the question of Ian’s attempting to make Graham bankrupt in 2016, or Graham as being in financial difficulty, or Alan’s not acting in her best interests (unless in relation to the tenants), or her financial affairs not being properly managed.

**The trial**

1. At the trial I heard oral evidence for the claimants from Alan and Ian; and, for the defendants, from Graham and Samantha, and Kelly Monaghan. There were also witness statements from Yelena Myles and from Frances Brophy, which were agreed, though they took matters little further. I had the benefit of skeleton arguments from counsel for both sides and, since there was not time for oral closing submissions, written closing submissions from both counsel.

**The main protagonists**

1. Alan is a retired senior project manager who had worked for BNFL, United Utilities, GEC and other companies in the Far East. As he said, and I accept, he had a great deal of experience in negotiating commercial contracts and issues arising out of commercial disputes. He had a stroke in 2015 from the after-effects of which he still suffers. He returned from abroad in 2000 and stayed at his mother’s for approximately 6 months, where he continued to work in Liverpool, and thereafter moved to Anglesey to live and to work, although he now lives in Widnes.
2. In the 1990s Ian had been a retailer, with a small number of shops, and he invested in property for his retirement. He and Graham became partners in a development at Greensbridge Farm, in Prescot in 2000, which was successfully developed into 9 housing units: Ian and Graham each bought a house, and sold Mrs Calvert a cottage, on the development. Ian’s house is called the Farmhouse, which he bought with his wife Jacqueline in 2001. Graham and his wife Susan bought High Barn and lived there from 2002 to 2006, and when Graham left and the marriage broke down, Susan and their daughter Samantha continued to live there until 2013. They were next-door neighbours. Mrs Calvert’s cottage was 30 yards away. She named it Lavender Cottage and lived there from 2003 to 2018.
3. Graham was an estate agent, but sold his business in 2006 to become a full-time property developer.
4. This is by no means the first dispute between the brothers. As far as the contemporaneous correspondence goes, it appears that there had been friction and disagreement since at least 2015, but my impression is that the bickering between them may have carried on, on and off, more or less all their lives, at varying levels of intensity. In the period with which I am concerned, their mother, her assets and her estate, was one of the main battlegrounds, though not the only one. It all seems to have caused Mrs Calvert considerable distress, as well as inconvenience and indeed expense.

**Fraudulent calumny**

Making Graham bankrupt in 2016/Graham in financial difficulty

1. There had been proceedings between Peel House Properties Ltd (Ian’s and Jacqueline’s company) and Graham in the County Court at Chester. By an order in Tomlin form made at a hearing on 25 January 2016, Graham was required to pay that company’s costs and interest in the sum of £15,000 by 4 pm on 25 April 2016, and the proceedings were stayed on terms that Graham should pay the company £30,150 by 4 pm on 25 April 2016; and should purchase Ian’s beneficial interest in certain partnership properties of IGC Estates (a partnership between Ian and Graham) based on an agreed valuation of £436,000; that Graham should purchase the shareholding of Ian and his wife Jacqueline in Calco Properties Limited (in which Graham was the other shareholder) at a valuation by 25 May 2016; and that cessation accounts for IGC Estates (a partnership) should be prepared.
2. At the time, Mrs Calvert had only recently made her will dated 3 December 2015, leaving substantial legacies to the grandchildren and, despite Graham’s best efforts (I refer to his communication of 8 November 2015 to his brothers, and his separate communication to Alan of the same date, for example), leaving the residue to her 3 sons equally, thus bringing Ian back into her testamentary provision (he had been excluded from her previous will on 3 July 2014). She had also decided after changing her mind several times, that she would like all 3 of her sons to have her lasting Powers of Attorney for both property and financial affairs, and health and welfare.
3. The Tomlin order appears not to have represented an overwhelming success for Graham. At least, it involved him in substantial expenditure within a short period of time. As he accepted in evidence, Graham promptly prepared a note dated 31 January 2016 for his mother to sign to tell the Coventry Building Society to close her savings account and transfer the balance of about £52,000 to her current bank account. This was with a view to her making a substantial payment to Graham to help him meet his obligations under the Tomlin order. Ian got wind of it, and the account was reopened. No money was paid to Graham. He did not meet his obligations under the Tomlin order. By a statutory demand dated 3 May 2016, Peel House Properties Ltd demanded £45,150 from him under that Tomlin order. The demand contained the requisite and accurate warning that it was an important document, but if Graham wished to have it set aside he must apply within 18 days, and that if he did not apply in time or otherwise deal with it within 21 days, he could be made bankrupt and his goods might be taken away from him. At the time Graham was, as an independent financial advisor, a self-employed representative of Empire Commercial Finance Ltd. Mr Matt Davies was effectively his boss. On 11 May 2016 Jacqueline Calvert, on behalf of Peel House Properties Ltd, wrote to Matt Davies at Empire Commercial Finance to tell him, that since Graham was conducting his personal mortgages through your company, that he had not complied with the court order and therefore judgment had been requested, and proceedings were under way for the recovery of monies due under the order, and suggesting that Empire Commercial Finance was party to his activities, and that this communication was to ensure that Mr Davies was fully aware of the situation. This was, in my judgment, an unambiguous attempt to place pressure on Graham in relation to the Tomlin order by damaging his relationship with his source of earnings. Solicitors instructed on behalf of Graham wrote on 18 May 2016 to those acting for Peel House Properties Ltd seeking confirmation that no petition would be presented, and attempting to raise a dispute over the debt. No such confirmation was received. Graham wrote another letter for his mother to the Coventry Building Society, signed by her and dated 23 May 2016, again instructing them to close her account and pay the proceeds to her current account at Barclays Bank or forward a cheque to her. It appears from the correspondence of the financial ombudsman, and I accept, that the building society’s financial crime team contacted Mrs Calvert to query that instruction, and she confirmed that she did want to close the account. On 26 May 2016, she used that money to pay Graham £45,150. Ian reported the matter to Action Fraud, and Knowsley Adult Safeguarding Team, but nothing came of it. In particular the safeguarding investigation ceased at Mrs Calvert’s own request. On 8 July 2016 Ian raised a formal complaint with Empire Commercial Finance, on the basis that Mrs Calvert was its client, in relation to the supposed advice from Graham to close the building society account, and his then taking £45,150 to pay a personal business debt and legal costs. He did not mention that the debt was to his company. He demanded the money be repaid. Mr Davies responded that Mrs Calvert was not a client, and that this was a personal matter which should be kept out of his business. Again, this was designed to injure Graham in his work for that company. He followed it up with another mischief-making letter dated 11 July 2016 complaining that Empire Finance had interfered in the renewal of the lease on Mrs Calvert’s property at Breck Road, on the basis that Graham had used his business email account to write to the agents. Eventually this campaign (which continued in particular in August 2016) succeeded, and Graham’s business connection with Empire Finance was terminated by that company.
4. What Mrs Calvert understood about all of this appears, not only from her actions in agreeing to make this payment to Graham, but from a letter from her solicitor, Charles Asbury, of Byrne Frodsham, dated 18 November 2016 following a meeting the day before, a Thursday. The letter recorded, among other things, that Mr Astbury had had a call from Ian’s solicitor on Thursday morning to say that Ian had won a court case against Graham as a result of which Graham had been ordered to pay £30,000 to Ian and approximately £45,000 in costs, and that Ian suspected that Mrs Calvert had paid this money for Graham. It recorded also that Mrs Calvert had confirmed to Mr Asbury that she had paid some of the money to Graham, but not all of it, that it was all above board, and that she had paid it because she felt that Ian had backed Graham into a corner, and Graham did not have enough money to pay the full amount due. She said that everyone in the family knew about the payment, and that this was to come out of Graham’s inheritance from her estate, and that Graham was aware of and accepted this. She looked out her cheque stubs and bank statements and confirmed that a payment of £45,000 had been made to Graham on 26 May 2016. Graham accepts that this is what he had told his mother. I accept this account of what occurred, as set out in the letter. Accordingly, I also accept, as following naturally, that Graham had also told his mother that Ian was trying to make him bankrupt.
5. I do not accept that this representation on Graham’s part was false. Whether Ian actually wanted or expected to bankrupt Graham is not the point: he had threatened bankruptcy and taken the initial steps. He had attempted to ensure that Graham did not have money from his mother in order to meet his liability, and quite ruthlessly to damage his standing with Empire Finance. It is true to say that Samantha had set up the meeting for her grandmother, and was present at it. Moreover, I accept that Graham had attempted to cue Samantha with points to raise at the meeting in his email to her of 16 November 2016; but the points he wanted her to raise were not to do with her will, or Ian’s serving him with a statutory demand, but were concerned with her LPA. Indeed, that was what the meeting was about, and I find that Mrs Calvert raised the whole matter of Graham’s being backed into a corner in response to the unexpected enquiry arising from the telephone call with Ian’s solicitor. Furthermore, what Graham had told his mother about these matters was true, and in any event it is plain that he believed it and still does.
6. Accordingly, while there was a representation by Graham to Mrs Calvert about Ian’s character, it was not made for the purpose of inducing her to alter her testamentary dispositions, was genuinely believed to be true, and was in fact true. Moreover, this does not feature in her stated reasons for cutting Ian out of her last will, and I am not satisfied on the balance of probabilities that it was one of the reasons why she did so, although it can hardly have improved their relationship.
7. It is submitted on behalf of the claimants that in fact Graham was well able to meet his obligations under the statutory demand, and must have been aware that he was at no risk of bankruptcy. Certainly, it appears that at the date of the statutory demand, Graham had nearly £38,000 in his bank account with Royal Bank of Scotland, and a very substantial amount of property. Moreover, his solicitor stated on his behalf that the demand had not been served properly, and Graham was able to pay the sum and would pay the sum. He had raised mortgage facilities for the purchase of the 6 properties mentioned in the schedule to the Tomlin order. However, I accept his evidence that he believed he needed the money from his mother on the basis that he had other commitments and needed money to live. If he had not been backed into a corner and placed in financial difficulty, it was certainly not the result of any lack of effort on the part of Ian.
8. Accordingly, this part of the claim based on fraudulent calumny fails.

The LPA

1. I will deal next with the allegation that the defendants, in particular Graham, had been guilty of fraudulent calumny against the claimants in telling Mrs Calvert that the claimants had connived to be appointed her lasting power of attorney. That is based on the statement accompanying her will, which says.

“I had a dispute with Alan after he and Ian tried to appoint themselves as my attorneys. They instructed solicitors and made the application to the Office of the Public Guardian. They tried to claim that I did not have capacity and he arranged for a Doctor to assess my capacity. The Doctor assessed me as having full mental capacity and I applied to have the lasting power of attorney revoked. The power of attorney was successfully revoked.”

and

“We fell out after he made the application to be appointed as my attorney alongside Alan.”

1. What actually happened, as appears from the contemporaneous documents, is as follows. The idea for a lasting power of attorney for their mother was raised by Alan, on behalf of himself and Ian, in an email to Graham dated 5 November 2015. He wanted it to be in all their names. Graham had a meeting with Alan on 7 November 2015. They discussed their mother’s will and a lasting power of attorney. Graham drafted a letter to Ian the following day to say he agreed there should be an LPA in favour of all three of them ‘to protect her estate’, but wanted a side agreement, and wanted the attorneys only to be able to act jointly. He seemed himself to have discussed a side deal with Alan, purportedly guaranteeing to Alan that Alan would receive one third of Mrs Calvert’s entire estate in any event. Graham described this in his oral evidence as an attempt to stop Alan taking sides. The letter to Ian seems not to have been sent.
2. There was then a meeting on 10 November 2015, as appears from the letter to Mrs Calvert dated 16 November 2015, attended by Alan and Ian, but not Graham, at which they agreed that she would appoint all 3 brothers to act both jointly and independently as her lasting attorneys. There is no mention of a side agreement, or of only being able to act jointly. The following day, on 17 November 2015, Ian wrote to Byrne Frodsham saying the family had had another meeting on Saturday, attended by all 3 brothers at which both the will and the LPA had been discussed and they had decided to proceed with both. The email was copied to his brothers.
3. Graham then wrote privately to Mr Asbury on 19 November 2015 describing himself as effectively the only person caring for his mother, and purporting to express her concerns about the land at Greensbridge Farm (to which I will return later), proceedings against Graham over a debt, and Ian now being back in the family fold and trying to run the show. He said that Mrs Calvert had not actually agreed that a new will should be written, and did not want Ian to have any part in controlling her financial affairs. He suggested that Alan and Ian should have a lasting power of attorney for health and welfare, and Alan and Graham a lasting power of attorney for money. He did not copy that letter to his brothers or his mother.
4. This appears to have resulted in a further meeting, referred to in the letter dated 26 November 2015 from Byrne Frodsham, at which it appears the brothers were not present. The letter records Mrs Calvert’s agreement to that proposal. No doubt Mr Asbury mentioned Graham’s letter to her.
5. However, after she had signed her 2015 will, on 4 December 2015 her solicitor wrote to Mrs Calvert recording that after further consideration she had decided she would like all 3 of her sons to have lasting powers of attorney for both health and financial purposes, saying he had discussed it with her sons and they all agreed. On Christmas Eve he wrote again to arrange a meeting to sign the LPAs. In February, after the events described above in relation to the Coventry Building Society account, Graham wrote to say he had asked his mother to choose 1 of the brothers to manage her affairs, because it was fanciful to think the 3 of them could do it. He did not want to speak to Ian and asked Alan to be a go-between. This led to a long telephone conversation between Mrs Calvert and Mr Asbury, in which she instructed him that she had decided to grant Alan alone her lasting power of attorney, and he was willing: this appears from their letter to her dated 12 February 2016.
6. However, on 17 February 2016 Mr Asbury wrote to Mrs Calvert again referring to a further discussion with her, and noting that it had been decided that Alan and Ian would take the grant, and that not only was Graham happy, he had suggested it. Graham then wrote to say Mrs Calvert actually wanted Alan to be the only attorney, or not to have an attorney at all. He expressed distress at the undue influence being exerted by his brothers, and said that Mrs Calvert was now totally confused.
7. Mr Asbury sent a copy of that email to Mrs Calvert on 23 February 2016 and expressed concerns at the conflicting instructions that he was receiving, stating that he needed to be satisfied she was not being influenced by any one or more of her sons. He suggested a meeting.
8. I take it that such a meeting occurred because on 15 March 2016 he wrote to Graham to say that after further careful and extensive consideration Mrs Calvert had decided to dispense with a property and affairs LPA altogether because it was clear to her that it was impossible to achieve a result which was acceptable both to her and all the brothers. She wanted to appoint all three of them as health and welfare attorneys, however.
9. Shortly thereafter, however, she wrote to Mr Asbury on 19 March 2016 saying that, as her sons could not agree to her latest request (presumably the proposal referred to in the letter dated 15 March 2016), she had asked Alan to act as her sole financial attorney for both sets of purposes, which he had agreed to do on the strict understanding there would be no more interference from the other brothers. I accept Graham’s evidence that Alan had not wanted to do it, since he did not want the aggravation, and had suffered a stroke, but he was the one who had tried to be a mediator. On 11 April 2016 Mrs Calvert signed the LPAs in favour of Alan. Mr Asbury wrote to Graham to tell him.
10. So far, Mrs Calvert appears to have been clear that LPAs would be necessary, and to have been seeking a workable solution given the differences between her sons about who should do what, against the background of profound distrust and dislike between them, while they all proposed solutions to suit themselves. This is not what Mrs Calvert was talking about in the statement with her will. It has nothing to do with it unless as background.
11. Shortly afterwards there occurred the episode with the statutory demand and the attempts to draw monies from the Coventry Building Society account. By 13 June 2016 the LPAs had been registered and Alan wrote to Graham to say that henceforth he alone would be dealing with all of Mrs Calvert’s affairs, and Graham was to cease. Graham’s response was that Mrs Calvert would handle her own affairs until it was deemed in law that the LPA should step in; the suggestion being that the LPAs would be ineffective unless and until Mrs Calvert lost capacity. They were both wrong: Mrs Calvert was certainly entitled to continue to handle her own affairs unless and until she lost capacity, and to authorise persons other than Alan to act on her behalf as well, albeit that would be contrary to whatever assurances Alan might have received about being solely responsible. But only the health and welfare power of attorney would come into effect only if she lost capacity, while the financial power of attorney was effective immediately. Graham then tried to prevent Alan from dealing with the Breck Road lease renewal. The tussle between Alan and Graham over this caused a delay, confusion, irritation and expense, as is amply clear from the correspondence at the time. Mr Asbury attempted to resolve it by explaining to Graham that Alan had sole authority to act in relation to Mrs Calvert’s affairs, but Graham took no notice and continued to involve himself. At some point, but certainly by 22 August 2016, Mrs Calvert was aware of the problem. Despite further correspondence from Alan, Graham continued to act. It was suggested on behalf the claimants that he was treating the Breck Road property as if it were his own, but I do not accept that: however misguidedly, he was attempting to deal with it on his mother’s behalf. Moreover, I accept his evidence that he was acting, at least to some extent, on her instructions; instructions of course influenced by what he himself was telling her about the position, and what needed to be done.
12. Alan seems to have got Mrs Calvert to write to one of the firms of solicitors involved on 22 September 2016 to say that she wanted Alan as her attorney to act in the Breck Road lease renewal: she would certainly not have prepared such a letter herself. Graham carried on. By 15 November 2016, Ian was contemplating an application to the Court of Protection for an injunction to stop Graham from interfering, but on 18 November 2016 in the letter which I have already referred in the context of the statutory demand, Mr Asbury wrote on behalf of Mrs Calvert, setting out her instructions given at a meeting at her home on the previous Thursday attended by the writer’s secretary, Christine Davies, and Samantha, confirming Mrs Calvert said that she would like to cancel her lasting powers of attorney as she was not happy with Alan who, she said, had become very bossy, and was not acting in accordance with her wishes, and that she had full capacity and was perfectly capable of making her own decisions and managing her own affairs. Mr Asbury agreed with her about that.
13. Graham was emphatic in his evidence that although he had visited his mother as recently as 15 November 2016, he had not influenced her decision, and had not told her to revoke the LPA. I do not accept that. His email to Samantha 16 November 2016, to which I have already referred, was plainly directed to at least getting Alan’s LPA revoked. He was not, as he said in evidence, just giving Samantha the information which he had: he was arming her with points to raise and, although he denied coaching her, and she denied having been coached, it is plain that that is exactly what he was doing. However, I accept her evidence (and his) that she did not raise these points at the meeting. I accept the impression given on the face of the solicitor’s letter, that Mrs Calvert gave her own instructions and expressed her own mind. So much is apparent, in particular, from the uncharacteristically emphatic way in which the solicitor records a reference to her being perfectly capable of making her own decisions and managing her own affairs. One sees here the expression of the indignation felt by a lady of considerable age and decided views at being pushed around, as she saw it. She decided to cancel the LPAs, and not to replace them.
14. This did not go down well with Alan and Ian, who instructed their solicitors to write to Mr Asbury on 28 November 2016 to express concern that she might be at risk, and saying he had instructions to apply to the Court of Protection for an injunction. As recorded in a letter to Mrs Calvert dated 18 November 2016 from Byrne Frodsham & Co., Solicitors acting on her behalf, setting out instructions given at a meeting at her home on the previous Thursday attended by the writer’s secretary, Christine Davies, and Samantha, Mrs Calvert said that she would like to cancel her lasting powers of attorney as she was not happy with Alan who, she said, had become very bossy, but was not acting in accordance with her wishes, that she had full capacity and was perfectly capable of making her own decisions and managing her own affairs. The solicitor agreed. (Alan followed up with another letter on 12 December 2016 to similar effect.) I do not need to imagine the indignation this must have generated in Mrs Calvert’s heart, since she expressed it in the formal statement to go with the 2018 will. The solicitor arranged a medical report confirming that she did have capacity, including capacity to revoke her LPAs and change her will. He wrote to her on 16 December 2016 to say so, and that she had given a great deal of thought to it. He raised with her the allegation that Alan and Ian raised, that Graham was putting pressure on her to revoke her LPA so that Graham could take advantage of her, although from what she had told him this was most definitely not the case. However, he sought her assurance that her decision was made of her own free will and without any duress applied to her by Graham or Samantha. There appears to be no record of her response but evidently Mr Asbury, who was plainly a sensible and experienced solicitor judging by his correspondence, was satisfied because on 24 January 2017 he attended a meeting at her home at which she revoked the LPAs.
15. It is clear, therefore, that Mrs Calvert was aware from her own solicitor of the attempt by Ian and Alan to prevent her from revoking the LPAs in favour of Alan, and to involve the Office of the Public Guardian, on the basis that she lacked mental capacity. I do not accept that Graham told her anything untrue about that, or anything that he did not genuinely believe. Nor do I accept anything he might have told her was directed to inducing her to change her will.
16. The allegation that Mrs Calvert was told that the claimants had connived to be appointed her LPA is entirely directed to the statement accompanying the 2018 will, so that is an end of that matter. No fraudulent calumny on that basis is established.
17. If and in so far as it might be said that it covers an allegation that Alan and Ian had conspired together to get themselves appointed as her LPA otherwise than in the context of the capacity issue, I reject that allegation. There had been an extremely unfortunate, but very blatant and self-explanatory, competition between all of the brothers over the lasting power of attorney of which it is plain, simply from the correspondence from her solicitor, Mrs Calvert was all too well aware. I reject the claim of fraudulent calumny on these grounds.

Breck Road

1. Mrs Calvert certainly thought that Alan had caused a dispute in relation to the Breck Road property and it was a cause of her making her new will: in her formal statement, she stated,

“Alan also caused trouble with my tenants after he told them that he was acting as my attorney and told them that there would be a rent review on the property they rent from me.”

1. It is likely, and I accept, that this impression came from Graham. It sounds as if Mrs Calvert thought that Alan had said he was acting as her attorney when he was not. However, he was her attorney at the time. Graham’s account is, briefly, that Mrs Calvert wanted him to deal with Breck Road and was trying to do so on her behalf, and he thought Alan was not entitled to deal with it because he had erroneously thought the power of attorney was not effective until she had lost capacity. Perhaps Mrs Calvert thought so too: if so, she probably got that impression from Graham.
2. It was not Alan, so much as the conflict between Alan and Graham, which caused trouble with the tenants, though I accept that Alan’s seeking to promote a rent review will probably have contributed. I have no doubt that Graham blamed Alan, and will have said as much to his mother. It was submitted to me that it was incredible for Graham to say he really thought the power of attorney was not effective until she lost capacity, given the number of times he had been told both by Mr Asbury and by Alan the exact opposite. On the contrary, I accept Graham’s evidence on this: he expressed his mistaken belief at the time in terms which indicated that not only did he believe it, he thought that anyone who disagreed was being stupid. He stubbornly persisted in this misapprehension until he could do so no longer. I consider that he did not want to believe it, having become very attached to dealing with the Breck Road property himself.
3. I am not satisfied that what Graham told his mother about this was done for the purpose of inducing her to change her will: his concern in this context was with the Breck Road property, and the powers of attorney.

Greensbridge Farm: the strip of land

1. In coming to the conclusions set out above, I have been well aware that Graham in particular did not perform well in the witness box, and that his account contained a number of inaccuracies. I have taken that into account. It is one of the reasons why I have spent so much time on the contemporaneous documentation in this judgment so far. The strength of the ill-feeling between the three brothers was so apparent from the papers, and so palpable in the court room, that I did not feel I could safely rely on the evidence of any of them, unless inherently plausible or satisfactorily corroborated. For that reason, in expressing my conclusions I have not needed to go into the minutiae, many of them completely irrelevant, of the inconsistencies exposed and sought to be exposed in the course of cross-examination of each brother. In dealing with the allegations over the strip of land at Greensbridge Farm, however, there is little contemporaneous documentation and accordingly I need to discuss the statements of case and witness evidence to a greater degree.
2. The claimants allege that Graham fraudulently informed Mrs Calvert that Ian had overcharged her and her neighbours for land adjoining their property. Plainly she believed that, and it influenced her in the making of her will, because she refers to it in her statement accompanying the 2018 will in the following terms.

“We also had a dispute in approximately 2012 after Ian overcharged me for greenbelt land at the back of the property I reside in. The property is currently held as tenants in common in the names of Ian and my son Graham Calvert. Ian charged me £8,000 for the greenbelt land situated at the back of my property. He also charged our neighbours an extortionate amount for the land. To date, Ian has only paid me back £2,000.”

1. The claimants’ pleaded case on this is that the statement says that in 2012 Ian overcharged Mrs Calvert for the purchase of greenbelt land behind her property. In fact, what it says is that they had a dispute about it in 2012. The claimants’ case was that Ian did not sell his land to anyone on the farm, but that it was purchased from the farmer, at the behest of the neighbours, who were not overcharged, and they were happy with it, as was Mrs Calvert who gained a garden area which she used. She and Ian had not fallen out at this point ‘or at all’.
2. Graham’s pleaded case was that the transaction completed in 2010 but he had had no knowledge of it until 2012. His case was that Ian purchased the strip of land for £30,000 and sold it for a total of £49,000 and retained his part of it. Graham alleges that Ian deceived Mrs Calvert by misrepresenting and selling the plot as a domestic curtilage for £8000, whereas no planning permission had been granted from any competent authority and the land was greenbelt, without there being a realistic prospect of that changing. Further, he alleged that the conduct of Ian amounted to land banking, being a scheme involving pooling investor funds where the investors have little or no control over the management of their plot. The true value of the land was a mere few hundred pounds. Ian had done the same to two other sets of neighbours. When in 2012 Graham found out, he confronted Ian, and as a result Ian refunded £2000 of the price to Mrs Calvert. Ian had made a substantial profit (between £19,000 and £27,000) on a transaction that was supposed to be simply distributing land at the price paid to the farmer.
3. So far as relevant, Ian’s evidence in chief about this was in summary as follows. In 2009 a neighbour, Stephen Scott, approached Ian and Graham about buying a garden/recreation area. They had no space to offer him. But Mr Scott persuaded a neighbouring farmer to sell a strip of land 12 m wide and running the entire length of all the properties at Greensbridge Farm. Mr Scott only wanted about 15m, but the strip was 120 m long. The owners at Greensbridge Farm all wanted a piece, including Mrs Calvert, apart from Graham who no longer had an interest in the property at High Barn, which his wife was in the process of selling. Ian agreed to represent all the purchasers and then transfer the plots to the respective owners. Mrs Calvert, Mr Scott and Mr and Mrs Dunn agreed to pay £7000 each for their plots, and he agreed to take the balance for £9000, together making up the purchase price of £30,000. There were additional costs of £6000 for legal, and surveying costs, and landscaping. Mrs Calvert paid £1000 towards the costs, and Mr Scott, Mr and Mrs Dunn, and Ian each paid £1700. Ian told Mrs Calvert that if he was able to sell part of the land at some future point he would return her £2000 ‘purely as a goodwill gesture’. In 2014 he did sell it, for £20,000, to Mr and Mrs Cavenden, who had bought High Barn. When he received the £20,000, he paid his mother the £2000. The receipt which she signed on 11 August 2014 was in evidence. Ian’s profit after the purchase price of £9000, purchase costs of £1700, maintaining the land for 5 years (£2500), repaying his mother £2000, and allowing for a further rebate to the Cavendens for road access (£3000), was a mere few hundred pounds.
4. Actually, the arithmetic suggests £1800, and of course he had only sold part of the strip which he had acquired for £9000: he retained the balance.
5. Ian’s evidence went on to point out, correctly, that in separate proceedings Graham had alleged that Ian had made a profit of £19,000 in selling the various plots of land out of the strip, charging £25,000 to the largest purchaser, and £8000 to each of the 3 others including Mrs Calvert, making a total of £49,000, when he had only bought for £30,000 - a profit of £19,000 on top of the value of the land he retained. Graham’s evidence in those proceedings stated that when he found out about this some time later, Mrs Calvert said she had been asked to keep it to herself, and when he tackled Ian about it, expressing outrage, Ian gave Mrs Calvert back £2000 saying he had always planned to refund her this amount as a family discount. The following Monday he received a solicitor’s letter which led to proceedings about other matters. Ian’s evidence in chief says that he believes Graham convinced Mrs Calvert that she had been the victim of a scam perpetrated by Ian. He noted that Graham alleged that two neighbours were also victims of this scam, but in fact one of them only purchased until May 2017, 8 years later.
6. Curiously, Graham’s witness statement says nothing about this, save that his relationship with Ian broke down in 2009. Ian was cross-examined on his evidence, however. He was taken to a plan of the area marked up with Graham’s notes, referring to the supposed sales of £25,000 and £8000 each. Ian maintained his evidence, and asserted that Graham knew all about it because at the time they had been close. He had not provided any of the documentation to support his figures because it was not relevant.
7. It is perfectly true that there is little or nothing in the way of documentary evidence to support Ian’s, or Graham’s, account of how the transaction proceeded (though the burden of proof lies upon the claimants, of course). It is troubling that Ian’s evidence was that he had not produced documentation about this because it was not relevant. I do not accept that he really believed that it was irrelevant, as the issue was one he had raised himself. That throws doubt upon the figures themselves.
8. Graham was cross-examined about this. He explained that although he had known about the purchase of the strip of land at the time it took place, he had not known the details until 2012. I found myself unable to believe him. That was because of his demeanour, and also because of an email dated 20 February 2011 referring in passing to a deal out of which “Ian would get his £25K for the land at the side of the Barn” in a way which suggested he knew the writer had familiarity with the details by at least then.
9. He accepted that his assumption at to the time as the way in which the £30,000 would be split was merely an assumption. He agreed that where his witness statement referred to a 5 way split, there were only 4 parties at the time. He did not know whether Ian had bought the land first and then sold on. On the basis of the completion statement, he accepted that the sale to Mr and Mrs Cavenden had not been at the £25,000 which he had mentioned, but for £20,000. He had said £8000 rather than £7000 was paid by his mother on the purchase, because of the additional £1000 as part of the cost of purchase. He accepted there was nothing wrong with having to contribute to the costs of purchase. He accepted that the sale price to the other purchasers had been £7000 each, plus another thousand pounds for expenses, making £8000. He did not know for sure what Ian had paid, whether as to the £30,000 or as to the £9000. He accepted that Ian had not sold the excess land on for 4 years. However, he did not accept that there could have been no misrepresentation to his mother. He accepted that there could have been be no misrepresentation to Mr and Mrs Johnson, at least, because they only acquired in 2017.
10. The evidence is unsatisfactory, but one thing at least is perfectly clear: Graham believed his account that Ian had overcharged their mother, and was only shaken in that belief as to parts of that account during the course of cross-examination. I find that his indignation over the years was not confected. I do not accept, therefore, that he knew at the time of the transactions concerned what the correct figures were. I find that he had probably been given some, but not complete or documented, information at the time, and picked up more as time went on. On the evidence of his performance in the witness box, he is quite likely to have misunderstood what he thought he had been told. Some of his account was certainly wrong, but I am not satisfied on the balance of probabilities that his general thrust was wrong. I accept that he will more likely than not have told his mother what he thought had happened. I accept the evidence that she had been told by a neighbour that the neighbour thought she was not contributing anything, and that this will also have raised concerns in her mind. It was not surprising, given the passage of so many years, that there was no evidence before me, either written or oral, of Ian’s setting out, in his own defence, what he said had actually happened. Although it is possible, I am not satisfied on the balance of probabilities that Graham expressed his view to his mother with a view to affecting the dispositions in her will: certainly she cut Ian out of her will in 2014, but by 2015 he was back in it on an equal footing with his brothers. By the time of her 2018 will Mrs Calvert had other reasons, more than sufficient on their own without harking back to 2009, to make the provisions which she did.
11. Accordingly, I reject this claim of fraudulent calumny also.
12. Looking at the matter overall, I find that the claimants have not made out their claim of fraudulent calumny against the defendants.

**Undue influence**

1. To the extent that the claims of fraudulent calumny feed into the allegation of undue influence, I therefore reject them in that context also. The claimants placed some reliance on an allegation that Graham had been involved in the instruction of solicitors for the 2009, 2014 and 2018 wills, but there was nothing in it capable of supporting an allegation of undue influence. In fact, there is simply no satisfactory evidence that Graham or Samantha exercised undue influence over Mrs Calvert in relation to her 2018 will. On the contrary, Mr Asbury expressed himself perfectly satisfied that she could make up her own mind and manage her affairs; in relation to her LPAs he was satisfied that she was not being unduly influenced by her sons; she was described by third parties as fiercely independent. But quite apart from that, the evidence of Kelly Monaghan (who was, as I accept, a competent and wholly independent solicitor selected by Mrs Calvert from a list of 3 perfectly properly provided by Graham) as to the process of taking instructions for her 2018 will was patently truthful and accurate, and ruled out the possibility of the exercise of undue influence. I therefore reject that claim.

**Conclusion**

1. Accordingly, I dismiss the claim to set aside the 2018 will.
2. The parties are directed to file an agreed order and, to the extent necessary, written short submissions as to the directions required to deal with any remaining matters.