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Allcard v Skinner

Religious Influence and Undue Influence

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I. Introduction

Law and religion exhibit a dialectical interaction.[1] In many instances, law and religion cross over and fertilise one another.[2] The study of law and religion is furthered by examining both the religious and the non-religious dimensions of specific areas of law and legal doctrines.[3] In this chapter, I will demonstrate how *Allcard v Skinner*[4] has cross-fertilised both the religious and general understandings of when relational influence becomes unlawful following the equitable understanding of undue influence in the English and Australian courts.

Undue influence is a private law vitiating doctrine used to challenge financial transactions like contracts, inter vivos gifts and testamentary dispositions. It may seem that consideration of such a doctrine is out of place in a book such as this. However, the contribution of *Allcard* to the regulation of religious influence surrounding financial transactions in both jurisdictions, especially involving inter vivos gifts, has proven significant. The theological and religious foundations of equities intervention in cases exhibit a long historical pedigree, after all.[5] Examining the relationship between law and religion in *Allcard* informs how contemporary undue influence laws have developed just as much as it helps to explains the specific considerations of undue influence in religious contexts. In this sense, *Allcard* is a rare case within the study of law and religion; seldom has a case with a religious background had such a direct and long-lasting impact on a private law doctrine in both jurisdictions.

[1] J Witte Jr and FS Alexander (eds), *Christianity and Law: An Introduction* (Cambridge University Press, 2008) 1.

[2] ibid.

[3] P Edge, 'The Contribution of Law to Interdisciplinary Conversations on Law and Religion' in S Ferrari (ed), *Routledge Handbook on Law and Religion* (Routledge, 2015) 80.

[4] *Allcard v Skinner* (1887) 36 Ch D 145.

[5] See generally R Hedlund, 'The Theological Foundations of Equity's Conscience' (2015) 4(1) *Oxford Journal of Law and Religion* 119.

Prior to the development of religious and spiritual undue influence case law, English law had always held a deep concern about clergy members and other religious officials pressuring adherents into gifting land or leaving property through testamentary dispositions to religious institutions.[6] Canon law also shared this concern at one time.[7] Reported religious and spiritual undue influence cases heard before *Allcard* was decided in 1887 were uncommon and concerned disgraced former religious officials and exploitative conduct.[8] Undue influence was found in each of the three cases.[9]

Allcard demonstrated less obvious abuses of religious capital and was concerned with presumed undue influence and inter vivos gifts given to a closed religious sisterhood. The judgment remains the leading case on religious undue influence in England. More generally, it is defined as the locus classicus of undue influence.[10] Consequently, the judgment has retained a persuasive role in English law, as well as Australian law, and it is regularly cited by the highest courts in both jurisdictions.[11] *Allcard* has been examined by judges to assist in determining when religious influence becomes undue and how doctrinal elements of the test for undue influence should be applied. Beyond this, *Allcard* has proven significant to theoretical debates about the correct rationale for undue influence[12] and to scholars examining the concerns raised by the regulation of financial transactions motivated by religious faith.[13]

Despite the judgment's twofold contribution to understandings of presumed undue influence, *Allcard* arguably provides limited practical assistance for courts to effectively determine when religious influence, an inevitable part of any religious experience, becomes undue and thus unlawful. In this context, Hedlund has rightfully observed that: 'The religious context is rather unique in how it expects obedience without too

[6] Mortmain statutes were introduced from 1279 to protect the feudal aristocracy by limiting the abuse of religious power to acquire property from testamentary dispositions and later inter vivos gifts. The statutes restricted religious institutions from holding land and imposed restrictions on charitable organisations from acquiring land, and how donors and testators could make charity bequests. The last of these laws were repealed in 1960; see AH Oosterhoff, 'The Law of Mortmain' (1977) 27(3) *University of Toronto Law Journal* 259, 294–96. ibid 296.

[7] Canon law included *restitutio in integrum*, which allowed parties to undo transactions where they had been disadvantaged by it – for example, where there was coercion. See R Hedlund, 'Undue Influence and the Religious Cases That Shaped the Law' (2016) 5(2) *Oxford Journal of Law and Religion* 301.

[8] See *Norton v Relly* (1764) 2 Eden 268, 28 ER 908; *Nottidge v Prince* (1860) 2 Giff 245; *Cocks v Manners* (1871) LR 12 Eq 574, 581; *Lyon v Home* (1868) LR 6 Eq 655 (concerning spiritual influence).

[9] *Norton v Relly* (n 8); *Nottidge v Prince* (n 8); *Cocks v Manners* (n 8) 581.

[10] AP Bell, 'Abuse of a Relationship: Undue Influence in English and French Law' (2007) 15(4) *European Review of Private Law* 557, fn 7.

[11] In the House of Lords, now the UK Supreme Court, see *Barclays Bank plc v O'Brien* [1993] UKHL 6, [1993] 4 All ER 417; *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2001] 3 WLR 1021 (the leading case). In the High Court of Australia, see *Johnson v Buttress* [1936] HCA 41 (the leading case); *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14; *Thorne v Kennedy* [2017] HCA 49.

[12] See P Birks and CN Yin, 'On the Nature of Undue Influence' in J Beatson and D Friedmane (eds), *Good Faith and Fault in Contract Law* (Clarendon Press, 1997); M Chen-Wishart, 'Undue Influence: Vindicating the Relationships of Influence' (2006) 59(1) *Current Legal Problems* 231; P Saprai, *Contract Law without Foundations: Toward a Republican Theory of Contract Law* (Oxford University Press, 2019) 102–23.

[13] See P Ridge, 'The Equitable Doctrine of Undue Influence Considered in the Context of Spiritual Influence and Religious Faith: *Allcard v Skinner* Revisited in Australia' (2003) 26(1) *University of New South Wales Law Journal* 66; S Degeling, 'Undue Influence and the Spiritual Economy' in K Barker et al (eds), *Private Law and Power* (Hart Publishing, 2017).

much question, though submission to the institution is generally voluntary. It poses a very difficult legal question.'[14] Of all the cases of this nature, *Allcard* most distinctly underlines the challenges of regulating abuses of religious capital resulting in financial gains in hard cases where there is no clear evidence of exploitation. This concern applies equally to contemporary litigation in England[15] and Australia.[16] Although such litigation has and continues to occur very infrequently in England, there have been five reported religious undue influence cases since the turn of the twentieth century,[17] and of the three which were decided on the substantive issue of undue influence, each case was successfully argued.[18] A similar theme is found in the Australian jurisprudence;[19] in the six cases decided by the Supreme Courts of the Australian legal territories since 2000, all judgments have found that undue influence produced the challenged transactions.

The chapter first outlines the facts of *Allcard* and the first instance and Court of Appeal judgments of the Court of Chancery. Subsequently, it examines the general contributions of the judgments to the regulation of undue influence. The discussion then moves on to examine the legacy of the Court of Appeal judgment on the regulation of gifts motivated by religious faith following the current tests for presumed undue influence. This analysis establishes why *Allcard* is a landmark case in law and religion, and explains why courts should closely re-engage with the reasoning of the Chancery judges to reach more principled decisions on defendant liability in religious undue influence cases.

II. *Allcard v Skinner*

In 1887, when *Allcard* was decided, English society was greatly suspicion of religious sisterhoods,[20] which were akin to Catholic convents.[21] The nineteenth-century religious norms of English society generally considered that sisterhoods relied on their vows and rules to steal, abuse or single out undutiful daughters for their benefit.[22] In this time of great social stigma, the defendant in *Allcard* was therefore incredibly unlikely to retain the gifts received that were challenged for undue influence.

[14] Hedlund (n 7) 308.

[15] ibid.

[16] See Ridge (n 13); Degeling (n 13).

[17] *Chennells v Bruce* (1939) 55 TLR 422; *Tufton v Sperni* [1952] 2 TLR 516; *Catt v Church of Scientology Religious Education College Inc* (2001) CP Rep 41; *Hollis v Rolfe* [2008] EWHC 1747, [2008] 7 WLUK 681; *Kliers v Schmerler* [2018] EWHC 1350 (Ch), [2018] 4 WLUK 57. For similarly reasoned spiritual cases where undue influence was found, see *Roche v Sherrington* [1982] 1 WLR 599; *Nel v Kean* [2003] 2 WLUK 467; *Azaz v Denton* [2009] EWHC 1759 (QB), [2009] 7 WLUK 568; *Curtis v Curtis* [2011] EWCA 1602, [2011] 11 WLUK 381.

[18] See *Chennells* (n 17); *Tufton* (n 17); *Kliers* (n 17).

[19] *Quek v Beggs* (1990) 5 BPR 11,761; *Illuzzi v Christian Outreach Centre* (1997) Q ConvR 54-490; *McCulloch v Fern* [2001] NSWSC 406; *Hartigan v International Society for Krishna Inc* [2002] NSWSC 810; *Khan v Khan* [2004] NSWSC 1189.

[20] See C Smith, '*Allcard v Skinner* Revisited: Historical Perspectives on Undue Influence' in E Cooke (ed), *Modern Studies in Property Law Volume III* (Hart Publishing, 2005) 136, 136–40.

[21] See Hedlund (n 7) 308–09.

[22] Smith (n 20) 140–51.

The claimant was introduced to an Anglican religious sisterhood called the Sisters of the Poor by her priest, Reverend Nihill, the Vicar of St Michaels in Shoreditch, London in 1868, when she was 26 years old. The sisterhood operated in Finsbury in North London and was administered by the Church of England.[23] By formally joining the sisterhood in 1870, the claimant intended to further her religious wellbeing and help the charitable causes of sisterhood, which provided for the poor. She held multiple positions in the sisterhood between 1870 and 1879. From 1871, she started to donate large sums of money and railway stocks to the defendant, known as Mother Superior, who led the sisterhood. The property gifted had been inherited by the claimant after the death of her wealthy father in 1868. The largest gifts were made between 1871 and 1874. At the time those gifts were made, the claimant was a professed member, which required her to agree to the sisterhood's rule of obedience and the vow of poverty. The money received by the defendant was used to further the religious and charitable practices of the sisterhood, which had been agreed to by both parties at the time. The defendant held on to the railway stocks on behalf of the sisterhood. Later in 1879, the claimant renounced her beliefs and left the sisterhood to join the Church of Rome because she had become increasingly dissatisfied with her life at the sisterhood.[24] In 1885, she sought to recover the value of the gifts totalling £10,171[25] on the grounds of undue influence.

Counsel for the claimant argued that 'spiritual influence is the most subtle of all, and there was produced and maintained in this lady such a state of mind and subjection as to invalidate any gift made by her to the person exercising that influence'.[26] Considering what undue influence required, counsel submitted that the test is 'how the intention was produced' and referred to *Huguenin v Baseley*[27] to support that understanding,[28] reasoning that:

> [The defendant's] object [was] to efface absolutely the free will of the individual and to substitute the will of the lady superior, and the result is, that the individual becomes a mere cipher and does automatically and in obedience to the will of the lady superior what she is directed to do. The law requires that gifts made under such circumstances shall not be upheld unless the donor had competent independent legal advice.[29]

Competent advice was considered to amount to legal advice. This argument was based on the determination of the role advice in previous cases.[30] Since the claimant had not received such advice during the party's influential relationship, the gifts were argued to have been unduly influenced.[31]

[23] ibid.
[24] *The Times* (1 February 1887), www.thetimes.co.uk/archive/article/1887-02-01/3/3.html#.
[25] This is roughly estimated to be worth £1,346,171.30 in 2020; see www.officialdata.org/uk/inflation/1887?amount=10000.
[26] *Allcard* (n 4) 150.
[27] *Huguenin v Baseley* (1807) 14 Ves Jun 273.
[28] *Allcard* (n 4) 150.
[29] ibid 153.
[30] ibid.
[31] ibid.

Counsel for the defendant replied: 'This is not a case, like *Huguenin v Baseley*, of a person using her influence for her own benefit … In all the reported cases the undue influence has been exerted for the benefit of the donee.'[32] Counsel cited several examples of previous case law, most significantly *Nottidge v Prince*,[33] a successfully proved case of religious undue influence against the leader of the Agapemonites, as evidence of this understanding of undue influence.[34] Counsel argued that the gifts could not be revoked years after the money had been spent with the claimant's approval because she was bound by the defences of laches and acquiescence. When leaving the sisterhood, the claimant was independent of spiritual influence. In addition, counsel submitted that even if such influence existed at a time prior to this, the claimant had received advice from her brother that allowed her to reflect on her beliefs and the nature of the gifts.[35] Accordingly, the claimant had failed to show that the gifts had been unduly influenced.[36]

At first instance, the Court of Chancery examined six gifts of money made to the defendant from 1871 to 1876, valued at £8,500. The claimant did not seek to recover other gifts, some of which were of considerable value.[37] Justice Kekewich decided that the gifts had not been unduly influenced. Emphasis was placed on the gifts made by cheque in September 1871 in reaching this conclusion.[38] Justice Kekewich considered the timing of the gifts alongside the state of the relationship between the parties at each stage in time.[39] The most significant stage in the party's relationship was found to be when the claimant initially became aware of the sisterhood and its vows and rules. It was held that this indicated that the claimant had acted without undue influence and had made the gifts based on 'intelligent intention' and external advice from her brother, a practising barrister.[40] Justice Kekewich did not discuss a distinction between presumed and actual undue influence explicitly, and the relationship was not subjected to a presumption of influence. In finding that there had been no undue influence, Kekewich J noted his efforts to remain impartial to the religious beliefs of the sisterhood:

> I have endeavoured, to the best of my ability, to treat this as a question of law, regardless of feelings which might otherwise sway the judgment, and, so far as I could control thoughts or command language, I have endeavoured to express my conclusions so as to avoid wounding susceptibilities or causing pain to any person directly or indirectly interested in the matter in hand.[41]

The claimant subsequently appealed this decision. The Court of Appeal judgment was limited to two gifts of railway stock made to the defendant in 1874. The judgment created the first distinction in expressions of influence. Lord Justice Cotton submitted that there were two categories of undue influence – one that gave rise to a presumption

[32] ibid 152.
[33] *Nottidge v Prince* (1860) 2 Giff 245.
[34] *Allcard* (n 4) 152.
[35] ibid.
[36] ibid 151.
[37] ibid 175.
[38] ibid 167–68.
[39] Also highlighted by Bowen LJ in the Court of Appeal judgment (ibid 191).
[40] ibid 167.
[41] ibid 168.

of influence and one now known as actual undue influence – which required some fraud or coercion on behalf of the defendant.[42] A presumption of influence was held to have arisen between the parties because of the religious circumstances of their relationship.[43] Lord Justice Lindley stated that 'religious influence is the most dangerous and the most powerful'.[44] He also considered that the vow of poverty and the rule of obedience did not require the claimant to gift her property to the sisterhood; it could also have been donated to the poor.[45] It was nevertheless concluded that the claimant must have felt some obligation to gift some of the property to the sisterhood and that she would feel that the defendant expected this of her.[46]

Interestingly, Bowen LJ submitted that'[t]his is a case of great importance. There are no authorities, which govern it',[47] but this is inaccurate. Since 1764, the Court of Chancery had decided several cases relating to the question of whether religious influence had reached the level of undue influence.[48]

Lord Justice Cotton held that in cases of this nature, a court could interfere based on public policy to prevent the influential relationships from being abused rather than any wrongful act committed by defendants.[49] Adding to this, Bowen LJ elaborated on when equity's intervention would be justified in religious cases:

> It is plain that equity will not allow a person who exercises or enjoys a dominant religious influence over another to benefit directly or indirectly by the gifts which the donor makes under or in consequence of such influence, unless it is shewn that the donor, at the time of making the gift, was allowed full and free opportunity for counsel and advice outside the means of considering his or her worldly position and exercising an independent will about it …[50]
>
> This is not a limitation placed on the action of the donor; it is a fetter placed upon the conscience of the recipient of the gift, and one which arises out of public policy and fair play.[51]

The Court of Appeal examined the parties' relationship over the full course of their interactions in more detail than Kekewich J, even though the appeal was limited to the gifts made in 1874. Disputing the approach of Kekewich J, Bowen LJ contended:

> It seems to me that the case does not turn upon the fact that the standard of duty was originally created by the Plaintiff herself, although her original intention is one of the circumstances, no doubt, which bear upon the case, and is not to be neglected. But it is not the crucial fact. We ought to look, it seems to me, at the time at which the gift was made, and to examine what was then the condition of the donor who made it.[52]

Several factors were examined by the Court of Appeal before a decision was reached. A leading factor relied on was that the claimant had not received sufficient independent

[42] ibid 171–72.
[43] ibid 171.
[44] ibid 184.
[45] ibid 177.
[46] ibid.
[47] ibid 180.
[48] See *Norton v Relly* (n 8); *Nottidge v Prince* (n 8); *Cocks v Manners* (n 8) 581; *Lyon v Home* (n 8).
[49] *Allcard* (n 4) 171.
[50] ibid 190.
[51] ibid.
[52] ibid 191.

advice prior to making the gifts or joining the sisterhood[53] and could not seek such advice without the defendant's consent.[54] In addition, the defendant had ended up controlling the claimant's contact with the outside world.[55] The rule that adherents of the sisterhood could not seek advice outside of the sisterhood was treated as suspicious by the court because it could be used 'in a very tyrannical way, and so as to result in intolerable oppression'.[56] Also, the claimant had expressed a desire to leave the sisterhood on various occasions, but was told by the defendant that she was bound to the sisterhood for life.[57] The claimant continued living with the sisterhood on each occasion.

However, other factors were considered by the Court of Appeal in support of the defendant's plea that the gifts had not been unduly influenced. First, there was no excessive pressure found in the defendant's conduct during the parties' relationship.[58] Lord Justice Lindley confirmed that no pressure had been put on the claimant when entering into or subsequently living at the sisterhood and that all religious obligations followed by the claimant were consented to voluntarily.[59] Second, the gifts had not been used for the defendant's personal gain.[60] Third, the claimant only asked for her money back in 1885, six years after leaving the sisterhood, when she was in need of money.[61]

Furthermore, the judges were sensitive to the religious circumstances of the case. Lord Justice Bowen reasoned:

> It is a question which must be decided upon broad principles, and we have to consider what is the principle, and what is the limitation of the principle, as to voluntary gifts where there is no fraud on the part of the Defendant, but where there is an all-powerful religious influence which disturbs the independent judgment of one of the parties, and subordinates for all worldly purposes the will of that person to the will of the other … It seems to me that persons who are under the most complete influence of religious feeling are perfectly free to act upon it in the disposition of their property, and not the less free because they are enthusiasts.[62]

Considering the significant stigma experienced by religious sisterhoods at the time, Lindley LJ was conscious of the emotional connection between the claimant's religious beliefs and the necessity of donating substantial gifts to enhance spiritual growth:

> It is important, however, to bear in mind that the fetter thus placed on the Plaintiff was the result of her own free choice. There is no evidence that pressure was put upon her to enter upon the life which she adopted. She chose it as the best for herself; she devoted herself to it, heart and soul; she was, to use her own expression, infatuated with the life and with the work. But though infatuated, there is no evidence to shew that she was in such a state of mental imbecility as to justify the inference that she was unable to take care of herself or to manage her own affairs.[63]

[53] ibid 173 (Cotton LJ).
[54] ibid 184.
[55] Including the claimant's correspondence with her brother on general and financial matters: ibid 178–79 (Lindley LJ).
[56] ibid 178 (Cotton LJ).
[57] ibid 176 (Lindley LJ).
[58] ibid 179–80, 186.
[59] ibid 178.
[60] ibid (Cotton LJ).
[61] ibid 180.
[62] ibid 189.
[63] ibid 178.

Similarly, Cotton LJ noted the possibility of changes to the claimant's religious beliefs and financial situation after the donations were made:

> She had devoted herself and her fortune to the sisterhood, and it never occurred to her that she should ever wish to leave the sisterhood or desire to have her money back. In giving away her property as she did she was merely acting up to her promise and vow and the rule of the sisterhood, and to the standard of duty which she had erected for herself under the influences and circumstances already stated.[64]

The Court of Appeal ultimately held that the defendant could not disprove the presumption of influence. It proved too difficult for the defendant to show evidence that the gifts were free of undue influence. However, relief was denied due to the time lapse between the claimant leaving the sisterhood and making the claim.[65]

Allcard is a perfect illustration of a court's formidable task of determining when religious influence motivating gifts becomes undue and unlawful. The Court of Appeal was aware of this great difficulty, and it seems that the Chancery judges were concerned about the possible impact the decision could subsequently have on religious gifts made to religious institutions of any background. Given the Court of Appeal's difficulties in reaching a decision, a presumption of influence was considered a strongly justified element of the law on undue influence, especially in religious cases. The usage of the presumption was intended to protect vulnerable religious donors from being taken advantage of by religious figures, but also to take account of the religious circumstances agreed to by donors. Further, the decision reveals the difficulties facing religious defendants seeking to bring evidence to disprove the presumption of influence when independent advice has not been received by donors, even if the defendant has not taken advantage of their faith and enthusiasm.

Temporality was also an inherent factor in the decisions. Changes in influence and to the religious grounding of the party's relationship were assessed in different ways in the two judgments. At first instance, Kekewich J treated the claimant's initial decision to join the sisterhood and the advice received before some of the earlier gifts were made as the determinative factors in not finding undue influence. This approach fails to recognise or understand the importance of changes in influence over time in relationships. Arguably, Kekewich J placed too much weight on the parties' relationship at the beginning and failed to examine how that influence could have subsequently become undue. Such an approach unfortunately freezes the analysis of influence in time at the earliest possible stage in the relationship and fails to adequately protect the claimant's interests later on. In contrast, in the Court of Appeal judgment, Bowen LJ disputed this approach (as discussed above), which indicates a more temporally nuanced approach to the reasoning of when religious influence becomes undue.

The two judgments affirmed that religious influence can easily be abused because of its subtle and powerful impact on an enthusiastic donor's motives gift property. The judgments also highlighted how religious institutions that commonly accept donations or gifts from adherents are vulnerable to undue influence challenges because of the inevitable influence and the sorts of relationships of religious figures and adherents.

[64] ibid.
[65] ibid 172 (Cotton LJ).

The Court of Appeal judgment showed much greater caution about over-regulating and under-regulating the religious influence that inevitably motivates such transactions. If undue influence was not found in *Allcard*, the doctrine might not have adequately protected vulnerable parties in subsequent cases because of a particular court's respect for more favourably viewed religious institutions. In contrast, based on the same judgment, a religious institution could be wrongly stripped of gifts where a court considered that a religious official took advantage of a donor's religious enthusiasm without effectively showing this to be an accurate description of the party's relationships.

Ultimately, the Chancery judges engaged specifically with the religious context of the case, but neither judgment made a clear determination about when religious influence becomes undue. Consequently, when courts apply *Allcard*, the locus classicus of presumed undue influence,[66] the equitable doctrine does not sufficiently guard against either of the two negatives consequences just mentioned relating to the rebuttal stage of presumptions of undue influence and the issues concerning temporal assessments of relationships. Even when courts rely less on the ruling in *Allcard* in religious cases, the same concern still arises because of *Allcard*'s impact on the contemporary tests for presumed undue influence more generally in English and Australian law.

III. *Allcard's* Doctrinal Contributions

In England, it is generally considered that undue influence defies accurate definition.[67] In *Etridge*, for instance, Lord Clyde submitted: 'It is something which can be more easily recognised when found than exhaustively analysed in the abstract.'[68] Beyond considering the propriety of influence and when a transaction is motivated by a person's free will, Lord Nicholls stated: 'The circumstances in which one person acquires influence over another, and the manner in which influence may be exercised, vary too widely to permit of any more specific criterion.'[69] Even though there is no exact definition, Sir Martin Nourse observed in *Hammond v Osbourne*:[70] 'The doctrine of presumed undue influence is now very well settled and ought to be well understood.'[71] The requirements of both actual and presumed influence are set by the Court of Appeal judgment in *Allcard* and more recently by the House of Lords in *Etridge*.[72]

Allcard firstly established a distinction between two expressions of undue influence, as already briefly mentioned.[73] However, the two expressions have now been restated by the House of Lords in *Etridge*,[74] a case concerning eight joined appeals by homeowners who successfully challenged the legality of surety agreements on mortgaged property that they had signed on behalf of their husbands. Actual undue influence

[66] See Bell (n 10).
[67] *Bullock v Lloyd's Bank* [1955] Ch 317, 324 (Vaisey J).
[68] *Etridge* (n 11) [92].
[69] ibid [7].
[70] *Hammond v Osbourne* [2002] EWCA Civ 885.
[71] ibid [24].
[72] *Evans v Lloyd* [2013] EWHC 1725 (Ch) [36] (Keyser QC).
[73] *Roche* (n 17) 606–07 (Slade J).
[74] *Etridge* (n 11).

requires the defendant's express conduct to overpower a person's free will,[75] which can include some form of fraud or coercion.[76] It is hard to prove and is more commonly used to challenge testamentary dispositions. *Allcard* has not really inspired this sort of undue influence and so there is no need to examine it further.

Presumed undue influence examines relational influence and imposes a presumption of influence, which can subsequently be rebutted by defendants by showing that a transaction was of the parties' free will. It is an equitable doctrine used to challenge inter vivos gifts and contractual bargains,[77] and is more commonly argued. *Allcard* affirmed that automatic presumptions of influence apply to relationships between religious advisors and adherents. Automatic presumptions now also apply to a broader range of status-based relationships[78] that are typically described as being of a fiduciary nature.[79] Claimants must prove a relationship of trust and confidence existed when status-based relationships are not applicable. In order for a presumption of influence to crystallise, claimants must also prove that a transaction 'calls for an explanation' because it is not explicable by the nature of the party's relationship.[80] This part of the presumption analysis is directly inspired by *Allcard*. Justice Lindley made a distinction between small and large gifts made to defendants; where 'the gift is so large as not to be reasonably accounted for on the ground of friendship, charity, or other ordinary motives on which ordinary men act',[81] influence is presumed.

Defendants can rebut presumptions of influence to prove the lawfulness of transactions. In *Inche Noriah v Sheik Allie Bin Omar*,[82] Lord Hailsham LC held that in order to do so, the defendant must satisfy the courts 'that the donor was acting independently of any influence from the donee and with full appreciation of what he was doing'.[83] More specifically, the House of Lords affirmed in *Zamet v Hyman*[84] that evidence relied on by defendants must show that donors acted with 'full, free and informed thought' when making the challenged transaction.[85] Such reasoning was later accepted by the House of Lords in 2002 in the *Etridge* judgment, where it was also held that it is a question of fact determined on the evidence whether the presumption of influence has been rebutted by defendants.[86]

The most common way for defendants to rebut the presumption of influence is to show that donors or promisors received independent advice prior to the challenged transaction.[87] As demonstrated above, the lack of advice in *Allcard* was an

[75] ibid [103] (Lord Hobhouse).
[76] *Re Edwards* [2007] EWHC 1119 (Ch), [2007] 5 WLUK 72.
[77] For example, surety agreements; see *Etridge* (n 11).
[78] For example, between trustees and beneficiaries, parents and children, medical advisers and patients, and solicitors and clients: Law Commission, Consultation Paper 231, *Making a Will* (2017) [7.40].
[79] R Flannigan, 'Presumed Undue Influence: The False Partition from Fiduciary Accountability' (2015) 34(2) *Queensland University Law Journal* 205.
[80] *Etridge* (n 11) [22]–[24] (Lord Nicholls).
[81] *Allcard* (n 4) 185.
[82] *Inche Noriah v Sheik Allie Bin Omar* [1929] AC 127 (PC).
[83] ibid 135.
[84] *Zamet v Hyman* (1961) 1 WLR 1442.
[85] ibid 1444, 1446, 1450 (Lord Evershed).
[86] *Etridge* (n 11) [20] (Lord Nicholls).
[87] See Law Commission (n 78) [7.49].

essential element in determining when influence became undue. This approach has since been expressly followed by the Court of Appeal in *Hammond*.[88] If a presumption of influence is not rebutted, the transaction is void and the most typical remedy awarded is rescission.

Australian jurisprudence features similar definitional comments made by the High Court of Australia (the highest court of appeal in the Australian legal states) conveying a lack of demand for a specific definition for undue influence. In *Thorne v Kennedy*,[89] a case concerning an undue influence challenge to a pre-nuptial agreement by the wife of the defendant, Gordon J relied on Lindley LJ's comment that 'no court has ever tried to define undue influence' before concluding that: 'It is neither possible nor desirable to provide an all-encompassing description of a court's jurisdiction to grant relief on the ground of undue influence.'[90]

The tests for both expressions of undue influence in Australian law are set by *Johnson v Buttress*.[91] The claimant appealed a finding of undue influence alleged by the son of the deceased donor, the executor of his father's estate. The claimant had looked after the business affairs of the deceased, who at one time was gifted some land. At that time, the donor was aged 67, illiterate and had not received legal advice about the transaction. At first instance, the trial judge held that undue influence had caused the transfer. On appeal, the High Court of Australia held that the tribunal judge was correct to find that the transaction had been unduly influence because the defendant could not rebut the presumption of influence. Chief Justice Latham based his understanding of presumed undue influence on the Court of Appeal's reasoning in *Allcard*, which has since been confirmed in *Thorne*.[92] He explained:

> Where certain special relations exist, undue influence is presumed in the case of such gifts … Wherever the relation between donor and donee is such that the latter is in a position to exercise dominion over the former by reason of the trust and confidence reposed in the latter, the presumption of undue influence is raised.[93]

Citing *Allcard*, the High Court submitted that certain categories of relationships involve 'protected persons',[94] which included religious adherents involved in religiously influential relationships, and persons seeking advice from solicitors and physicians acting in their professional capacity.[95] For a presumption of influence to arise, claimants must also show that challenged transactions cannot be explained by 'ordinary motives'[96] and are 'not readily explicable by the relationship of the parties'.[97]

[88] After considering the judgments of Cotton LJ and Bowne LJ in *Allcard* (n 4) at length (see [42]–[47]), Ward LJ concluded: 'Independent advice is thus usually the crucial evidence going to the rebuttal of the presumption' (at [49]).

[89] *Thorne* (n 11).

[90] ibid [84], citing *Allcard* (n 4) 183.

[91] ibid. The understanding of actual undue influence is very similar to the English test – see *Johnson* (n 11) 134 – but is not one substantially inspired by *Allcard*. This explains why I do not consider it any further here.

[92] *Thorne* (n 11) [24], [34], fn 48 (Kiefel CJ).

[93] *Johnson* (n 11) 119.

[94] ibid 124 (Starke J).

[95] ibid 119 (Latham CJ).

[96] *Thorne* (n 11) [34] (Kiefel CJ), citing *Allcard* (n 4) 185 (Lindley LJ).

[97] ibid citing *Etridge* (n 11) [21] (Lord Nicholls).

Defendants can rebut presumptions of influence in the same way as in English law by showing that transactions are 'voluntary and a well-understood act of the mind' of donors.[98] On this basis, the Australian test is also based on determining whether a transaction was freely entered.[99] An important means of doing so is to demonstrate that the donor received independent advice.[100]

IV. *Allcard's* Impact on Contemporary Regulation

Allcard has clearly had a significant impact on the general doctrinal and judicial understandings of when relational influence becomes undue. *Allcard*'s contribution to the regulation of religious influence surrounding financial transactions is arguably less explicit. The judgments of English and Australian courts have arguably not furthered *Allcard*'s application in contemporary settings in a meaningful way. This has led to scholarly commentary specifically focused on the concerns about the suitability of the test for presumed undue influence in religious and spiritual cases.[101]

More specifically in English law, *Allcard* has had little substantive impact on contemporary religious cases beyond establishing that religious and spiritual advisors are part of a status-based relationship that does not require proof of sufficient trust and confidence. In the five reported cases decided since 2000, limited weight has generally been placed on the specific religious contexts involved in cases, or the challenges of regulating religious influence raised in *Allcard* many years ago.[102] Courts have not re-examined the concerns of the Chancery judges concerning how difficult it is to determine the lawfulness of influence in religious contexts. Instead, in contemporary presumed undue influence cases,[103] the test is considered by courts in a general sense with no regard to the claimant's initial consent to their religious experience and whether there had been any degree of pressure at this point in the party's relationships. This omission in judicial reasoning was also made in *Kliers v Schmerler*.[104] The claimant challenged the lawfulness of the influence of family members, the defendants, and a rabbi's advice to sign a mortgage agreement. The influence and advice were motivated by the beliefs of a particular Hasidic sect that the claimant was part of in London, which was described by Mr MH Rosen QC as a 'patriarchal body'.[105] The claimant consented to those beliefs and practices at one stage and then left the faith and later challenged the transaction for undue influence. The High Court established undue influence without assessing the claimant's former beliefs in any depth.

[98] *Johnson* (n 11) 123 (Latham CJ), quoting Eldon LC in *Huguenin v Basely* (1807) 14 Ves 273.
[99] *Johnson* (n 11) 120 (Latham CJ).
[100] ibid 120.
[101] See Ridge (n 13); Degeling (n 13).
[102] *Catt* (n 17); *Hollis* (n 17); *Kliers* (n 17). For similarly reasoned spiritual cases where undue influence was found, see *Roche* (n 17); *Nel* (n 17); *Azaz* (n 17); *Curtis* (n 17).
[103] ibid.
[104] ibid.
[105] See *Kliers* (n 17) [35].

Furthermore, in contemporary cases, courts do not give any weight to the fact that the claimant's beliefs motivating gifts are likely to form part of a legally recognised belief system and are therefore significant to the motivations of a great number of gifts to religious institutions. The omission of courts to consider the effect of specific religious beliefs and practices on an adherent's motivations to make gifts similarly applies to cases involving spiritual movements.[106] In these cases, judgments have not made any real distinctions between the conduct of religious ministers and the manifestation of religious beliefs accepted by all followers of the same legally recognised religions.

In Australian legal states, *Allcard* has generally contributed more to judicial understandings of when religious influence becomes undue. The Court of Appeal judgment has been cited regularly in religious undue influence cases by courts seeking to make principled judgments on whether religious undue influence has motivated challenged transactions. The most notable example of this is *Hartigan v International Society for Krishna Inc.*[107] The claimant, a follower of Hare Krishna, gifted her family home worth $87,000 to the founders of a Hare Krishna community after reading religious scriptures on conceptions of 'giving'. The transaction was completed even after the defendants had informed the claimant that the gift was too large and that she had misunderstood the community's meaning of giving. The transaction was overseen by the defendant's agents, who were not members of the community. *Allcard* was significant to Bryon J's reasoning who assessed the judgments of Cotton LJ and Bowen LJ.[108] Justice Bryson subsequently found that the defendants had unduly influenced the claimant's donation because it was not a fully voluntary decision, even though there were no signs of exploitative conduct exerted on the claimant or impropriety from the defendants.[109] The size and improvidence of the gift were both highly significant factors to this finding.[110] Close consideration was also given to the interaction of religious teachings and undue influence based on the reasoning in *Allcard*.[111]

However, more generally, courts in both jurisdictions have more generally either failed to properly engage with the judgments in *Allcard* in a consistently justified way or have omitted to do so entirely. The concerns discussed by both Kekewich J at first instance and the Court of Appeal in *Allcard* have therefore not been suitably addressed by the courts in both jurisdictions. In practice, this means that it is difficult to understand how courts determine when religious influence becomes undue in a principled way. Following a universal approach, it is questionable how courts consistently reach principled outcomes, given the types of relationships and motivations for gifts in religious cases that are not present in non-religious cases. There are numerous challenges with regulating religious influence in a general way without considering the specific religious relationships of the parties and their beliefs motivating religious practices.[112]

[106] See *Chennells* (n 17); *Nel* (n 17); *Azaz* (n 17); *Curtis* (n 17).
[107] *Hartigan* (n 19).
[108] ibid [32]–[33].
[109] ibid.
[110] ibid [36]–[37].
[111] ibid [30].
[112] For instance, all gifts, regardless of value, should be capable of being challenged for undue influence. Lord Nicholls' reasoning (discussed above) about this feature of the test is arguably unprincipled since the

I now focus on three challenges relating to the tests for presumed undue influence that are compounded in religious cases. My analysis helps to justify why *Allcard* should inspire the regulation of religious influence as much as it has inspired the tests for presumed undue influence in both jurisdictions.

An overarching challenge concerning when religious influence becomes undue relates to the rationale for presumed undue influence.[113] Courts have affirmed that the rationale is based on the donor's impaired will, as noted above. However, it is not always clear when someone's will has been sufficiently impaired for relief to be justified in cases where there is clear evidence of consent and no signs of exploitation. *Allcard* is a prevalent part of these rationale discussions.[114] In particular, Chen-Wishart has described *Allcard* as a 'clean case' because of the absence of obvious unlawful influence, but believes it is still right to infer undue influence– as in *Allcard* – if the claim had been brought sooner.[115] However, in the rationale debates, the most developed accounts of undue influence do not make any meaningful references to the potential differences that may exist between a finding of undue influence in religious contexts and a finding of undue influence in a more general doctrinal sense.[116] Instead, the leading rationale premised on a claimant's impaired will, which most closely captures the reasoning of the House of Lords in *Etridge*, makes 'an implicit judgment about the normative acceptability of the transaction[s]'[117] in *Allcard*. This critique is also an accurate description of how the presumed undue influence tests operate in practice in religious cases for the two reasons examined below.

First, it is unclear what the role of independent advice is at the rebuttal stage of cases.[118] Such ambiguity is more likely to have a detrimental effect on the judgments of religious cases.[119] In the case law of both jurisdictions, there are two interpretations on this. One view contends that if legal advice is received by donors or promisors, but is not heeded and followed, where it is seen as independent and relevant to the transaction by courts, a presumption of influence can still be rebutted by defendants.[120] On the other hand, another view submits that unless independent advice is followed by donors or promisors, it is almost impossible for the presumption to be rebutted by defendants.[121] It is important to determine how advice operates in religious cases because improvident gifts

wrongfulness of the defendant's conduct is the same. Persuasive arguments have been made suggesting that this part of the test should be abandoned. See *Evans* (n 72) [42], [63] (Keyser QC); and M Haughey, 'The Fiduciary Explanation for Presumed Undue Influence' (2012) 50(1) *Alberta Law Review* 145.

[113] Ridge (n 13) 67.

[114] Chen-Wishart (n 12) 238.

[115] ibid 237.

[116] A slight exception is Birks and Yin's account ((n 12) 67), which considers that: 'Religious enthusiasm … might be thought to be distinct from dependence. But there are no further discussions of the possible differences between what might amount to religious undue influence and how this may differ to general instances of undue influence.'

[117] Chen-Wishart (n 12) 238.

[118] Ridge (n 13) 88.

[119] ibid 84.

[120] In *Hartigan* (n 19) [31], Bryon J cited *Watkins v Coombs* [1922] HCA 3, 194 (Isaacs J) to support this view. This view is also echoed by Lord Nicholls in *Etridge* (n 11) [20].

[121] R Meagher et al, *Equity: Doctrines and Remedies*, 4th edn (LexisNexis Australia, 2002) [15]–[135], citing *Powell v Powell* [1900] 1 Ch 243, 246.

motivated by religious faith may be the leading reason why donors ignore legal advice.[122] Furthermore, as considered by Kekewich J in *Allcard*, external legal advice might be distrusted and seen as an evil temptation.[123] If the second view mentioned is favoured in hard cases, religious defendants will face an ever more challenging task when rebutting presumptions of influence.

Second, and closely related to the previous analysis, it is necessary to develop understandings about the significance of the improvidence of religiously motivated gifts.[124] It is unclear whether improvidence is enough for a gift to be set aside by English courts in particular,[125] which gives rise to a possibility of incompatibility between religious and legal conceptions of gift-giving.[126] The incompatibility is produced by the English 'calls for a transaction' requirement and also the Australian 'ordinary motive' standard included in the tests for presumed undue influence. Judges may consider that the amount of money or property gifted cannot be explained by ordinary motives and thus fail to consider religious viewpoints associated with religiously motivated gift-giving. Judicial scrutiny is likely to be much stricter where the donor holds strong religious beliefs or where religious practices are viewed as particularly severe.[127] The threshold test of what constitutes ordinary motives can be considered as an extension of the problem identified in law and religion scholarship by Bradney when family law imposes objective moral standards that do not match up to the standards of obdurate believers.[128] In cases like *Allcard*, gifts cannot be explained by ordinary motives, but can be explained by religious motives. Consequently, the two requirements of the presumption stage of the presumed undue influence tests do not have any filtering effect in religious cases. In practice, this means that religious defendants are more likely to unfairly face the difficult task of rebutting presumptions of influence. In hard cases, the difficulties are compounded further where no independent advice has been received prior to the challenged gift.

V. Conclusion

The facts of *Allcard* are still as applicable to many religious experiences of adherents today. It is not unusual for religious beliefs to involve vows of poverty and rules of obedience to religious figures. Many religions require, or at least expect to, receive donations or tithes as part of common religious practices. Accordingly, the challenge of deciding the legality of religious influence surrounding financial transactions has not become less relevant to contemporary religious practices and institutions. The legal challenge has certainly not evaporated despite the efforts of courts and scholars.

[122] Ridge (n 13) 84.
[123] *Allcard* (n 4) 159.
[124] Ridge (n 13) 83.
[125] ibid 83.
[126] ibid 84–85.
[127] ibid 84.
[128] A Bradney, 'Faced by Faith' in P Oliver et al (eds), *Faith in Law: Essays in Legal Theory* (Hart Publishing, 2000) 90 – for example, Roman Catholic adoptions agencies that reject applications from homosexual couples wishing to adopt a child.

Allcard has proven significant in relation to how English and Australian courts regulate relational influence and, to a lesser extent, religious influence. Therefore, it is undoubtedly a landmark case in law and religion. However, the rationale and procedural challenges mentioned in this chapter confirm why English and Australian courts should re-assess *Allcard* and take the concerns of the Chancery judges about regulating religious influence more seriously. Smith has rightfully argued that: 'Perhaps such uncritical use of this case risks the perpetuation of religious and social concerns, stereotypes and prejudices which should arguably have no place in the formulation of the modern law.'[129] Re-evaluating *Allcard* with reference to the contemporary tests for presumed undue influence and jurisprudence will reinvigorate an often-forgotten area of law that is important to the regulation of specific forms of religious financing.

One possible means of doing so is to reinvigorate the rationale debates by introducing an account that gives greater focus to the contexts and grounding of relational influence. The predominant focus of such an account should be religious and spiritual relationships that involve a shared belief system between donors and donee that require gifts or donations in exchange for religious services.

A more pragmatic approach could also be pursued by the courts of both jurisdictions. Courts could seek to add further explanation to when a donor's will has been impaired and how this can alter over time, given the potential for changes to relationships and influence. Such developments could help to address when religious influence becomes undue by elaborating on the role of independent legal advice and the improvidence considerations examined. As a result of judicially led developments to understandings of presumed undue influence, religious institutions would be less vulnerable to such challenges to property gifted by adherents. Consequently, this expression of undue influence is less likely to be used as a generous and unjust returns policy by aggrieved former adherents seeking rescission of large gifts made to religious institutions.

[129] Smith (n 20) 153.