

# SUPREME COURT OF QUEENSLAND

CITATION: *Birch v Birch & Ors* [2018] QSC 289

PARTIES: **SYLVIA BETTY BIRCH**  
(plaintiff)  
**v**  
**DOUGLAS NORMAN BIRCH**  
(first defendant)  
**JUANITA ANNETTE BIRCH**  
(second defendant)  
**BIRCH PASTORAL PTY LTD (ACN 128 573 704) AS TRUSTEE FOR  
THE BIRCH PASTORAL TRUST**  
(third defendant)

FILE NO/S: BS No 8333 of 2013

DIVISION: Trial Division

PROCEEDING: Claim

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 16 November 2018

DELIVERED AT: Brisbane

HEARING DATE: 4, 5, 6, 7 December 2017

JUDGE: Douglas J

ORDER: **The plaintiff's claim is dismissed.**

CATCHWORDS: EQUITY – GENERAL PRINCIPLES – UNDUE INFLUENCE AND DURESS – PRESUMPTION OF UNDUE INFLUENCE FROM RELATIONSHIP OF PARTIES – OTHER RELATIONSHIPS – where the plaintiff transferred her interest in a rural property to the first defendant – where, at that time of the transfer, the first defendant held the plaintiff's power of attorney – whether the transfer should be set aside – whether the transfer was the result of the plaintiff's free exercise of her independent will – whether the plaintiff had received competent independent advice

EQUITY – GENERAL PRINCIPLES – FIDUCIARY OBLIGATIONS – FIDUCIARY DUTY – OTHER CASES – whether the first defendant's acceptance of the transfer was a conflict transaction – whether the plaintiff gave informed consent to the transfer based on independent advice

EQUITY – GENERAL PRINCIPLES – UNCONSCIONABILITY, UNCONSCIONABLE DEALINGS AND OTHER FORMS OF EQUITABLE FRAUD – SPECIAL DISABILITY – whether the transfer should be set aside – whether the plaintiff was suffering from a special disability at the time of the transfer – whether the first defendant knew or ought to have known about any such disability

*Powers of Attorney Act 1998 (Qld)*, s 87

*Allcard v Skinner* (1887) 36 Ch D 145, cited

*Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; [1983] HCA 14, cited

*Hussey v Bauer* [2011] QCA 91, applied

*Huguenin v Baseley* (1807) 14 Ves Jr 273; 33 ER 526, cited

*Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127, cited

*Jenyns v Public Curator (Qld)* (1953) 90 CLR 113; [1953] HCA 2, cited

*Johnson v Buttress* (1936) 56 CLR 113; [1936] HCA 41, applied

*Maguire v Makaronis* (1997) 188 CLR 449; [1997] HCA 23, cited

*Powell v Powell* [1900] 1 Ch 243, cited

*Quek v Beggs* (1990) 5 BPR 97,405, cited

*In re Coomber* [1911] 1 Ch 723, cited

*Smith v Glegg* [2005] 1 Qd R 561; [2004] QSC 443, cited

*Stivactas v Michaletos (No 2)* (1993) NSW ConvR 55-683, cited

*Whereat v Duff* [1972] 2 NSWLR 147, cited

COUNSEL: A J Greinke for the plaintiff  
R M Treston QC with G J Barr for the first defendant

SOLICITORS: Shine Lawyers for the plaintiff  
Payne Butler Lang for the first defendant  
No appearance for the second and third defendants

- [1] The main issue in this case is whether the transfer of a one-third interest in a rural property by the plaintiff to her son, the first defendant, should be set aside as having been procured by undue influence. There is a presumption of undue influence because the son held her power of attorney, therefore the onus lay on him to discharge that presumption.

### **Background facts**

- [2] The background facts were usefully summarised by the first defendant's counsel in their written submissions and were, generally speaking, uncontroversial. What follows is based on that summary.
- [3] The plaintiff, Sylvia Betty Birch ("Betty Birch"), was born on 22 September 1929. On 28 July 1951 she married James Ernest Birch ("Jim Birch") and their marriage continued until his death on 11 June 2011. They had six children:

1. Colin James Birch born on 30 June 1952 (now deceased);
  2. Stanley John Birch born on 8 November 1954;
  3. Lindsay George Birch born on 19 November 1958;
  4. Geoffrey Michael Birch born on 20 December 1961;
  5. Douglas Norman Birch, the first defendant (“Doug Birch”), born on 9 December 1966;
  6. Sherilyn Gaye Birch born on 22 December 1969.
- [4] In about 1982 Jim and Betty Birch purchased a leasehold property of approximately 8,077 hectares located at 1911 Nathan Gorge Road, Cracow known as “Fairyland”. Fairyland was a cattle farming property with two houses on it, the smaller of the two being described as the “cottage”. From the date of purchase of Fairyland, when Doug Birch was aged 16, he lived at Fairyland with his parents and provided labour to assist in the running of the cattle operations on the property. He spent some time working away from Fairyland but, in 1992, married Juanita Birch and they lived in the cottage at Fairyland. At that time, Jim and Betty Birch were living in the main house on Fairyland. Doug and Juanita Birch continued to live at Fairyland until 2007. Over that period Jim and Betty Birch were also living at Fairyland.
- [5] By wills expressed in identical terms executed on 15 January 2004 each of Jim and Betty Birch dealt with Fairyland in the following way:
1. Leaving a life interest to their spouse;
  2. Upon the death of their spouse, their interest was to go to Doug Birch subject to him paying each of his siblings \$15,000.
- [6] The 2004 wills were accompanied by a “Letter of Instructions” addressed to the children of Jim and Betty Birch which expressed the intention that both wills be construed together as one document. There are handwritten alterations to the 2004 letter that are not otherwise explained in evidence.
- [7] In September 2004 a property known as “Rosevale” was purchased. Rosevale was initially purchased in the names of Doug and Juanita Birch as to 75% and Jim and Betty Birch as to 25%. The purchase price was \$751,000, of which the parents contributed 25% of \$671,000 or \$167,750. Fairyland and Rosevale were separated by about 140 km. Since September 2004 Doug and Juanita Birch continued to work both Fairyland and Rosevale. Initially, they were residing at Fairyland and on 31 October 2007 Doug and Juanita moved to live at Rosevale. In 2006 Jim and Betty Birch transferred their 25% share in Rosevale to Doug and Juanita as a gift.
- [8] In 2008 several things happened. The Birch Pastoral Trust was established to operate the primary production businesses conducted by Jim and Betty Birch and Doug and Juanita Birch on Fairyland and Rosevale. To that end the livestock and machinery owned by the parties were transferred to the trustee, a company called Birch Pastoral Pty Ltd. The relevant trust deed provided that:

1. The appointors of the trust were Doug, Juanita, Jim and Betty Birch;
2. The primary beneficiaries were Doug and Juanita Birch and their children;
3. Jim and Betty Birch were "General Beneficiaries" under the trust deed.
4. Jim and Betty Birch transferred to Doug Birch a one-third interest in Fairyland as tenant in common such that the ownership of Fairyland thereafter was held as tenants in common as to one-third each by Jim, Betty and Doug Birch. That transfer was a gift to Doug Birch.

[9] Jim and Betty Birch moved away from Fairyland and into a house in Eidsvold so that they could be close to medical attention. They executed wills that, again, were in identical terms, subject to necessary adaptation to reflect the difference in testator. In the 2008 wills Jim and Betty Birch each dealt with Fairyland in the following manner:

1. A life interest to their spouse;
2. Upon the death of their spouse, their interest to go to Doug subject to him paying each of his siblings 6.66% of the value of Fairyland.

[10] The figure of 6.66% represented one-fifth of the one-third share of the respective testators on the basis that each of Jim and Betty Birch's children (excluding Doug) would obtain an equal payment from Doug Birch once the last survivor of the testators died, in exchange for Doug Birch receiving the testator's share of Fairyland.

[11] The 2008 wills were accompanied by a handwritten letter signed by each of Jim and Betty Birch and dated 5 November 2008 (the same date as the execution of the wills). That letter was in these terms:<sup>1</sup>

"To our family,

You will be reading this when we are both no longer here so we hope you take it in the spirit that it is written. We wish to let you know why we have divided our assets the way we have, and trust that you abide by our wishes as we have done the best we can under the circumstances.

Firstly we would like our property to continue on and as such we have tried to make it possible for Doug to carry it on without having too much of a debt load as he will have to supply most of the cattle for it and pay out other members of the family with cash plus what they get from our other assets.

He will be getting a debt load that may take him years to wipe out, so we feel he should be compensated to some extent for the years work he has put into our assets. He has put in most of his time since he left school working at home helping build our assets that all the family will be getting some benefit from by the improved valuation of the assets."

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<sup>1</sup> Ex 1, p 152.

- [12] On 19 May 2009 Betty executed an enduring power of attorney by which she appointed both Jim Birch and Doug Birch as her attorneys. Jim was hospitalised on 15 November 2009 and remained there until his death on 11 June 2011. While Jim remained in hospital, Betty continued to live in the house in Eidsvold. After Jim died and following his funeral each of the children met Betty and her co-executor under the 2008 will, Bill Birch, her brother in law, at the Nanango RSL. Copies of the 2008 will and the 2008 letter were handed to each of the children. At the same time Bill Birch told those present that the effect of Jim Birch's will was that everything passed to Betty Birch and nothing further would happen until Betty died.
- [13] On 26 August 2011 Betty Birch attended at the offices of JA Carroll & Son, solicitors in Kingaroy, where she signed a transfer document. That document:
1. related to the one-third interest Betty owned in Fairyland;
  2. transferred Betty's interest in Fairyland to Doug Birch;
  3. in item 4 stated the consideration for the transfer to be "by way of gift";
  4. was signed by Betty as transferor; her signature was witnessed by Paul Laurentiussen, a solicitor at JA Carroll & Son;
  5. was signed by Mr Laurentiussen as solicitor for the transferee.
- [14] I shall discuss the circumstances that surrounded the signing of the transfer later. The transfer was registered on 18 November 2011 following which the ownership of Fairyland was and remains to the present time:
1. Douglas Norman Birch as owner of two-thirds as tenant in common; and
  2. Sylvia Betty Birch and William Herbert Birch as personal representatives of the estate of James Ernest Birch as owner of one-third as tenant in common.
- [15] On 13 November 2012 Betty Birch attended on Charltons Lawyers, a firm of solicitors in Bundaberg, where she executed a further will. That 2012 will did not refer to Fairyland because it had already been transferred to Doug Birch. At the same time as the 2012 will Betty wrote another letter that was sent to her children. The 2012 letter said:<sup>2</sup>
- "I am writing this letter to let you know what I have done about your father's Will.
- I am acting on advice received from Chris Parker, a Solicitor at Charltons Lawyers in Bundaberg in relation to your father's Will and my estate plan.
- As you know he wished to keep 'Fairyland' in the family with Douglas having to borrow a large amount to buy Dad's share of 'Fairyland' so you could all get your share of his estate.

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<sup>2</sup> Ex 1, p 221 (emphasis omitted).

I promised your father before he died that everything he wanted would be done according to his wishes and as fairly as possible. I knew Douglas would have to borrow a large amount of money so I signed over my share in 'Fairyland' to him so he would be able to buy your Father's share and you would all receive your share which is to be divided equally between our other five children.

I owned a one-third share which I could give away and I did this so we could keep 'Fairyland' in the family as that was your father's wish. Regardless of the time, it was always our intention to give a one third share to Douglas so that he would only have to purchase the remaining one-third share.

I would appreciate it if you could respect our wishes. I have been advised that you have no legal entitlement to receive any money from your father's estate until my death but I am trying my best to make sure that everything is finalised as soon as possible.

If you want to discuss this any further it would be best if you directed your enquiries to Bill Birch as he is also one of the executors of your Father's Will.

Love

Mum"

- [16] Betty moved from Eidsvold to Toowoomba in early to mid-2013 and lived with Colin Birch for a short period before moving into an aged care facility run by Blue Care in Toowoomba. At that time both Colin and Geoffrey Birch were living in the Toowoomba area. By 24 April 2013 Wonderley & Hall, solicitors, had been consulted by or on behalf of Betty Birch. Advice was sought from those solicitors in relation to matters involving the Birch Pastoral Trust and the transfer of assets. Those solicitors sent a preliminary letter of advice to Betty Birch dated 24 April 2013. It was consistent with the solicitors having spoken to her. On 6 May 2013 Betty revoked the power of attorney in favour of Doug Birch and executed a fresh enduring power of attorney on the same date by which she appointed Colin Birch and Geoffrey Birch as her attorneys.
- [17] This Claim was commenced on 6 September 2013. The original Claim and Statement of Claim named Doug Birch as the sole defendant and sought relief relating to the transfer on the basis that it was procured by undue influence and/or unconscionable conduct.
- [18] With leave of the Court granted on 24 September 2014, Betty Birch joined Juanita Birch as second defendant, and Birch Pastoral Pty Ltd as trustee for the Birch Pastoral Trust as third defendant. By the Amended Claim and Amended Statement of Claim filed on 25 September 2014 Betty maintained her claim for relief associated with the property transfer, and additionally sought relief regarding the operation of and distribution of funds from the Birch Pastoral Trust.
- [19] On 31 July 2015, Atkinson J ordered that the plaintiff have leave to proceed by her litigation guardian. A consent of the litigation guardian was filed on 25 August 2014. The Trust claim was resolved and on 4 October 2017 the settlement of that part of the claim was sanctioned by order of Flanagan J. The pleadings have subsequently been amended to reflect the omission of the Trust claim which leaves the property transfer claim as the only issue to be

determined. That being the case, there is no longer any relief sought against the second defendant or the third defendant and so they take no active role in the proceeding.

- [20] In this proceeding Betty Birch contends that the transfer was the result of undue influence or unconscionable conduct or breach of fiduciary duty. Those claims are resisted by Doug Birch on the basis that the transfer in 2011 was made freely and voluntarily by Betty who had a full understanding of the nature and effect of that transfer.
- [21] Alternatively, Doug Birch counterclaims for relief on the basis that Betty Birch is bound by obligations of a mutual Will with her late husband which prevents any different outcome than that contemplated by the combined effect of the respective Wills of James Ernest Birch and Sylvia Betty Birch dated 5 November 2008.

### **The transfer of one-third of Fairyland from Betty Birch to Doug Birch in August 2011**

- [22] The critical factual issues in the case occurred in the period after Jim Birch's death up to the transfer of Betty Birch's one-third interest in Fairyland to Doug Birch in August 2011. Subsequent events, particularly Betty Birch's dealings with Geoffrey and Colin Birch after that event, are also significant. Betty Birch was unable to give oral evidence but a statement by her was tendered as was one by the deceased, Colin Birch.

#### ***Betty Birch***

- [23] Betty Birch's statement is dated 13 May 2013 but does not provide much information about the transfer. She says that she went to see a solicitor in Kingaroy about the Will who had previously acted for her and her husband. That solicitor had retired by then and had sold the business to Mr Laurentiussen who was then new in the practice. The rest of her statement that was relevant was as follows:<sup>3</sup>

“80. When we walked out we had not had lunch. I thought I have to have something to eat because I am a diabetic. Doug was not talking and I knew he was cross about something and he said words to the effect ‘Dad did not leave me anything’. It never dawned on me for ages not until just recently that Jim did leave him something it was all that he had paid into the money into ‘Rosevale’ and the one third of ‘Fairyland’.

81. I thought well Doug has to pay the others out. One million dollars is pretty hard to find so that if he had the 2 shares he would be able to raise the money. Now Doug is telling me he can't borrow the money.

82. What I did in all innocence I thought I was doing the best thing for the whole family and I should not have done it because it [sic] I had known he would not be able to raise the money anyway I would not have given it to him.

83. Doug had me in tears on the way home saying that his father did not do this and did not do that for him because he never left him any money.”

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<sup>3</sup> Ex 1, p 55, paras 80-83.

### **Colin Birch**

- [24] Colin Birch's statement also had little to say about the circumstances of the transfer. He mentions a heart attack suffered by Betty Birch in late 2009 from which she recovered. He also said that Doug Birch claimed to him that his mother could get the pension in spite of having given a third of Fairyland to him. The statement does not say when Doug Birch said that to him. Doug Birch also told him that he was providing their mother with substantial resources and that she had nothing to complain about, a view with which Colin Birch disagreed. He also said that his mother told him that her reason for transferring the second third of Fairyland was on the clear understanding that Doug Birch would then borrow the money "to pay the rest of us out".<sup>4</sup> Much of the rest of his statement consisted of speculation about Doug and Juanita Birch's motives for what he described as an exercise in parental manipulation. Such a suspicion coloured the approach of others of Doug Birch's siblings to what had happened involving him and their mother. I shall discuss their evidence later.

### **Doug Birch**

- [25] Doug Birch recalled driving his mother to JA Carroll & Son at the end of July 2011. He sat in on a meeting with Mr Laurentiussen and his mother. Mr Laurentiussen told her that the rest of Doug Birch's siblings were to get the one-third interest in Fairyland once she had died. He also told her that Doug Birch basically got nothing as he had to pay out the full valuation of that one-third. Mr Laurentiussen also told her that her life interest had a limited value. She asked him whether there was anything that she could do to remedy a situation which she described as unfair. Mr Laurentiussen said that she could do what she liked with her third of Fairyland. She then asked him if she could make it over to Doug Birch to which Mr Laurentiussen replied: "You can do what you like".<sup>5</sup>
- [26] Doug Birch drove his mother to and from that appointment. Neither of them were particularly jovial after the meeting as it had been pointed out to him that his father had effectively left him nothing and that his mother's life interest effectively gave her nothing from the father's will. He said they were both at least mildly upset. His mother also told him that she might be able to transfer her share to him. He told her that she would need to get legal advice and that he probably should too.
- [27] Under cross-examination he denied telling his mother that his father had not left him anything, saying that it was Mr Laurentiussen who had said that. Mr Laurentiussen's own evidence was to the same effect, namely that while Doug Birch had been left "one-third of the property, the effect that he has to pay 6.66% to the five siblings means he's really getting nothing."<sup>6</sup>
- [28] Doug Birch denied the suggestion that he did not point out to his mother other ways in which he had benefited from his parents before the making of the will because he did not want to jeopardise his mother's stated intention to transfer one-third of Fairyland to him. He also

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<sup>4</sup> Ex 1, p 66, para 70.

<sup>5</sup> T 2-60/12.

<sup>6</sup> T 3-42/37-39.

disagreed that he ever had any intention of borrowing money to pay out the other siblings until his mother's death. That was on the basis of what was contained in the will. He also denied that his mother was in tears on the way home from the visit to JA Carroll & Son, because of him "saying that his father did not do this and did not do that for him, because he never left him any money."<sup>7</sup> She was well aware of what had happened previously in respect of the transfer of one-third of Fairyland to him and of the interests in Rosevale to him and was quite lucid at that stage.

- [29] He also understood that his mother was to be looked after, after his father died, through the mechanism of the trust rather than from her life interest in the estate. He agreed in cross-examination that certain provisions in his father's will made on 5 November 2008 relating to the holding of his interest in commercial cattle for the five siblings other than Doug Birch had been superseded by the transfer of those cattle into the trust.<sup>8</sup> In fact the cattle had already been transferred into the trust in January 2008, before the execution of that will by his father. The cattle were transferred into it for taxation purposes in 2009 but it seems that the agreement to go ahead with the trust was made in September 2007 and the trust started trading in the cattle as if the cattle belonged to the trustee from April 2008.<sup>9</sup>
- [30] He agreed that his siblings may have misunderstood the nature of the trust and its legal effects. He said that it was not a matter he raised with his mother because he did not necessarily have that knowledge at that time.<sup>10</sup> He went on to point out that the trust was set up to ensure that everyone's needs in respect of the operation of Fairyland were met and said that it would have been inconsistent, if one person died, for the cattle to move off to another person when it was his parents and his and his wife's cattle that went into the trust in the beginning.<sup>11</sup> He pointed out that his mother knew that the cattle were in the trust for all of that time.
- [31] He subsequently sought legal advice from a firm called Payne Butler Lang in Bundaberg through a Mr Krebs. That occurred on 23 August 2011. In the next few days he became aware that his mother had made a decision about the transfer of her interest in Fairyland to him. Accordingly, he went to JA Carroll & Son's office on 26 August 2011 having been told by his mother that there were some documents there to be signed. He did not believe that he and his mother were at the office of JA Carroll & Son on 26 August 2011 at the same time. He drove there in his 15 tonne cattle truck which had three or four steps to climb to get into it. She would not have travelled in it as she would not have been able to get up into it. He had no idea how she managed to get to the solicitors on that date.
- [32] When cross-examined he admitted that, once one of the four partners involved in the trustee company that ran the cattle on Fairyland died, then the other couple would be likely to control

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<sup>7</sup> T 2-96/25-33 and ex 1, p 55, para 83.

<sup>8</sup> T 2-87/25-47.

<sup>9</sup> T 2-88.

<sup>10</sup> T 2-89/1-2.

<sup>11</sup> T 2-89/23-36.

that trust.<sup>12</sup> He explained the cutting of a payment of \$2,000 a month to his mother from about August 2013 as a step taken to prevent the trust from meeting the legal costs of his mother as the plaintiff as well as the legal costs of the defendants.

- [33] He agreed that he knew that she was then using an overdraft account with a cap at \$80,000. He said that at that point he and his wife were isolated from her because they had been told that all communications should be through her solicitors. He also agreed that he removed her as a signatory on the overdraft account after she withdrew \$5,000 from it at the end of March 2014. The withdrawal of \$5,000 was made without his knowledge. He also agreed that he and his wife contemplated moving assets out of the hands of the trust into their own names pursuant to legal advice but did not do it. He had spoken of doing it as a means of protecting the assets of the trust from going essentially to his siblings, Colin Birch and Geoffrey Birch, who held powers of attorney for their mother.<sup>13</sup>
- [34] He agreed that the trust stopped paying money into his mother's overdraft account in August 2013 but said that a resolution shown in ex 14 of the trustees by which it was resolved to apply the income of the trust to him and Juanita half each did not reflect the reality of the situation in the financial year ended 30 June 2012 as he said she had been receiving money in the normal way out of the trust during that financial year.
- [35] He was re-examined about the evidence in ex 14 relating to the distribution of funds to his mother from the trust and gave evidence of the distributions to her from the trust and the actual drawings paid to her over the years between 2007 to the end of 2015 which had been originally prepared for the dispute that had been resolved between the parties about the trust and the cattle. He gave other evidence about the relative size of the contributions to the trust by him and his wife compared to his parents in respect of plant and equipment as well as cattle. He also gave evidence about the value of the work that he and his wife contributed to the operations of the trust. Those figures appeared in ex 15.
- [36] He expressed the view that Colin and Geoff Birch had influenced his mother's attitude to him and his wife during 2012 when she changed from being very much a part of their lives and began asking legal questions "that were coming from somewhere else, I believed."<sup>14</sup> There was also an attempt by Colin and Geoffrey Birch to operate the Birch Pastoral Trust's bank accounts on behalf of the trust in May 2013 evidenced in ex 17.
- [37] He gave evidence about the options considered with the trust's accountants at the time it was set up. He was confident that his parents were fully aware of how the trust worked and what its ramifications were including the effect on succession planning within the family.<sup>15</sup>
- [38] He said that there had been discussion between him and his parents when he was given 25% of the land value of Rosevale in about 2006 as recognition of a substantial contribution from

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<sup>12</sup> T 2-74/25-38.

<sup>13</sup> See Ex 13 and T 2-79 - T 2-82.

<sup>14</sup> T 3-25/12-13.

<sup>15</sup> T 3-30/22-26.

him and his wife for a long period of time and some recompense for that.<sup>16</sup> Exhibit 18 was a record of the advice that he, his wife and his parents received in 2007 before the establishment of the trust. His parents sought separate legal advice from him and his wife when they entered into the trust deed.

- [39] My overall impression of Doug Birch as a witness was that he was intelligent and reliable. I believed that he was telling the truth.

***Paul Laurentiussen***

- [40] Mr Paul Laurentiussen was the other major witness with firsthand knowledge relevant to the transfer of Betty Birch's one-third interest in Fairyland. He had taken over the practice of JA Carroll & Son in 2009. He became aware of the history of the practice's relationship with Jim and Betty Birch when Jim died and the firm commenced work on the deceased's estate file. He said they appeared to be long term clients of the practice. He had not previously met Doug Birch.

- [41] He created a file for the transfer of Betty Birch's one-third interest in Fairyland to Doug Birch. He attended on her on 19 August 2011 to explain the transaction to her after having spoken to a law clerk in his firm who told him that Betty wanted to know what she could do in relation to the property other than through her will. He also recalled an earlier meeting involving the law clerk, Doug Birch and Betty Birch in about July 2011 in relation both to the Jim Birch estate file and the file relating to the proposed transfer of the land. It was then, in July, that he recalled advising that, while Doug Birch had been left one-third of the property under his father's will, the fact that he had to pay 6.66% to each of the other five siblings meant that he was really getting nothing. He also told Betty Birch that what she got from the property was the life interest. He did not have a diary note of that meeting in July. Nor did he have one of the meeting on 19 August 2011. His usual practice was to dictate a file note and he could not offer an explanation for their absence.

- [42] He believed that he saw Betty Birch on 19 August 2011 partly in reliance on an invoice for the work done and also because his calendar showed an appointment on that date for a meeting with Betty Birch. He said the appointment on 19 August 2011 lasted one and three-quarter hours and that his law clerk, Tony Slade, was also with him on that date. The purpose of that meeting was to advise Betty Birch of her options in relation to dealing with the one-third of her share of her husband's estate. He recorded options he discussed with her on a Department of Natural Resources and Mines title search for the leasehold land known as Fairyland before the meeting of 19 August but he could not recall the exact date he did that.<sup>17</sup>

- [43] He described her physically as frail and small and said that she moved relatively slowly when she came into his office. He believes she was about "80 something" years old. He recalled her walking without any aids or implements. She appeared still upset from the loss of her husband but apart from that was quite alert and receptive to what was being said and appeared to understand it. He had significant experience of dealing with elderly clients. He was conscious

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<sup>16</sup> T 3-33/29-31.

<sup>17</sup> T 3-43/26-47 and ex 1, p 388.

of the need to ensure that they understood what they were doing. He regarded her as realistic about the situation she was in, having lost her partner of many years which she recognised was an emotional trauma. He did not have any alarm bells ringing about whether she was understanding the matters being discussed.

- [44] He said that she understood the three options that he believed she had, namely converting the tenancy in common to a joint tenancy between her and Doug Birch, leaving the property on the title as it was or transferring her share of the property to him. He discussed those three options with her according to his normal practice, explaining each option clearly and then asking which she would prefer to do.
- [45] He recalled that she wanted to ensure that Doug Birch ended up with her one-third share of the property. When asked whether she told him why she wanted to do that he said "she had some concerns about other family members."<sup>18</sup> She did not identify those other family members to him. She did say that they might be upset that the one-third would be left to Doug Birch under the will. He advised her in respect of the proposal to give her share of Fairyland to Doug Birch then that, as long as she understood what she was doing, she was free to deal with her one-third share as she saw fit.
- [46] He had regularly given advice of this nature to elderly people before and said that it was not uncommon for a couple wanting to leave a farm to a particular child, because that child had been on the farm for their whole life and had worked it, to have concerns about the other siblings wanting to either contest the estate or getting upset. Such people came in, in his experience, asking him to make sure that their son or daughter got that property.
- [47] She instructed him to transfer the property to Doug Birch. He also had some knowledge of how dispositions like this might affect Centrelink payments as he had worked for Centrelink for 13½ years before he was admitted as a solicitor. It was not his practice, however, to give commercial advice and he said that he advised Betty Birch to contact the financial information services officer at Centrelink in Gympie, giving her the woman's direct number.
- [48] He could not recall Betty Birch telling him that any pressure was being brought to bear on her by any person in relation to the transfer and said that if there had been such a suggestion that would have rung alarm bells with him. He could not recall giving any advice to Doug Birch about the transfer nor could he recall him participating in the meeting in July apart from being there. At the conclusion of the meeting of 19 August 2011 he was satisfied that he had instructions from Betty Birch to proceed with the transfer which he commenced to put into effect.
- [49] He then attended on Betty Birch for the execution of transfer documents on 26 August. He believed Doug Birch would have been with her at that time because he witnessed some of Doug Birch's signatures on that date. The transfer does not record a signature by Doug Birch, however, but shows that Mr Laurentiussen signed as solicitor for the transferee.<sup>19</sup> He said that was done simply for convenience in a small town. Doug Birch's signature does appear,

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<sup>18</sup> T 3-47/4-5.

<sup>19</sup> See ex 1 at p 431 and p 447.

however, on a “dutiabale transaction statement” dated 26 August 2011 but it is not witnessed, nor did it appear to need to be witnessed.<sup>20</sup> There was, also, a statutory declaration dated 26 August 2011 made by Doug Birch agreeing to be bound by the lease of Fairyland which is witnessed by Mr Laurentiussen.<sup>21</sup>

- [50] He could not recall any changes to Betty Birch’s demeanour when she attended his office on 26 August 2011. He said the appointment was considerably shorter than the earlier appointment on 19 August as that consisted only of the signing of documents. He rendered a tax invoice to Doug Birch in recognition of a practice in the firm of simply sending the bill to the transferee in a case like this, irrespective of who the firm was acting for.
- [51] He did not recall making any particular recommendation to Betty Birch as to which of the three courses he identified would be better for her, leaving it to her to make the choice. He also had the impression that she had already made up her mind about how she wanted to proceed even before he spoke to her. He had also opened a file under Doug Birch’s name in respect of the transfer of his mother’s interest in Fairyland to him. He identified a file from his firm<sup>22</sup> as one opened by his staff to do the documents to transfer the property as a mechanical exercise using conveyancing software.
- [52] He said, however, that Doug Birch did not give him any instructions apart from in respect of the witnessing of the transfer documents. He did not draft the tax invoice through which Doug Birch was charged fees by his firm for the transfer. Mr Laurentiussen was not approached by anyone on behalf of Betty Birch, including her solicitors to give a statement before she issued proceedings in this matter. Again, my impression of Mr Laurentiussen’s evidence was that he was a careful witness and a reliable and honest one. I saw no reason to disbelieve him.
- [53] Two other witnesses called for the defendant were Bill Birch, Jim Birch’s brother, and Sherilyn Birch, Doug Birch’s youngest sibling.

### **Bill Birch**

- [54] Bill Birch had known Betty Birch for the whole of her marriage with Jim Birch. He described her as physically sound and well at Jim Birch’s funeral and said that, emotionally, she appeared normal for a woman who had just lost her husband. He said her mobility was what you would expect in a woman her age and that her sight and hearing were quite good. He was her co-executor of Jim Birch’s estate. Jim had told him that he wished Doug Birch to receive Fairyland after his death.
- [55] Betty Birch did not speak to him about transferring her share of Fairyland to Doug Birch before she did it but did speak to him afterwards. That occurred sometime towards the end of 2011. She assured him that everything had been done correctly by the letter of the law and that there were no worries in respect of it. She said that she had gone to the office of JA Carroll &

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<sup>20</sup> See ex 1 at p 442.

<sup>21</sup> See ex 21 at p 458.

<sup>22</sup> Ex 19, the file numbered 11/0560.

Son in Kingaroy, that a friend had driven her down and that she had signed her third over to Doug Birch in the office of JA Carroll & Son.<sup>23</sup>

- [56] He also went with her to a solicitor's office in Bundaberg. The particular solicitor was called Chris Parker and he believes that they attended on him at the end of 2012. She discussed a new will with Mr Parker while he was there and she assured him again in front of Mr Parker that the transfer of her interest in Fairyland had all been done by the letter of the law. She said she was concerned to make it easier for Doug Birch to get a loan to pay out the last third of Fairyland to the other beneficiaries. He understood that the occasion for that would arise on her death.
- [57] He also recalled a social visit to Betty Birch at Eidsvold when she said again that she had made the transfer to make it easier for Doug Birch to get a loan. In late 2012 she also rang him after she had received a letter from Geoffrey Birch's solicitor to her solicitor which distressed her. She asked him to write a letter to the members of the family to ask them to stop harassing her for money. He did that in ex 4. He described her as a stronger willed woman than a lot of people gave her credit for.
- [58] Geoffrey Birch, Colin Birch and Stan Birch all replied to the letter he sent.<sup>24</sup> He agreed that there were expressions of concern in that correspondence about the money available for Betty Birch's living expenses. He said that Betty had never expressed any such concerns to him. As far as he knew, Betty Birch was being adequately provided for. He knew nothing about the trust but believed that Betty Birch was part of it. He also recalled aggressive phone calls from Geoffrey Birch and Stanley Birch to him.

### ***Sherilyn Birch***

- [59] Sherilyn Birch visited her mother on weekends while her father was in hospital, travelling from Biloela from Eidsvold. She gave evidence about Betty Birch's living conditions in Eidsvold and the treatment and care available to her. She said that she had joined a singing group and that she was part of the Country Women's Association. She maintained an interest in cattle and Sherilyn Birch took her to shows and sales and to the property at Rosevale on some weekends. That was during the period between about November 2009 and when her father died in June 2011. She said that her mother managed her diabetes quite well and that it had no side effects on her health. Her mobility was fine during that period. She described her as a fairly strong-willed personality who could not be pressured to do anything.
- [60] It was hard for Betty Birch at first after Jim Birch's death and Sherilyn Birch tried to be there every weekend to give her some normality. She did not observe any change to her health. There were Blue Care nurses coming to see her and she had a good relationship with her local general practitioner. She continued with her interests in activities outside the house such as singing and the Country Women's Association and cattle shows. Sherilyn also continued to take her out to Rosevale to visit Doug and Juanita Birch near Eidsvold. Betty Birch also had an interest in horses and Sherilyn would take her to Fairyland also. She observed her, when she

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<sup>23</sup> T 3-78/1-6.

<sup>24</sup> See exs 5, 11 and 22.

went to Rosevale, discussing the cattle and the business and property with Doug Birch. She remained involved in those issues. At that stage she was always very welcome at Rosevale.

- [61] Her mother told her about the transfer of the one-third share of Fairyland after it occurred. It was the weekend directly after it was done. She asked her mother why she did not ask her to take her to Kingaroy to see the solicitor and she told her that she did it independently so it would not seem that there was any pressure or coercion put on her in relation to doing it.<sup>25</sup> Betty Birch told Sherilyn that she arranged for a Blue Care worker to transport her to Kingaroy to see the solicitor. She also told her at some subsequent time that she transferred her share in the property to Doug Birch perhaps because it would make things easier for him down the track to finalise their father's final wishes in regards to Fairyland.<sup>26</sup> Sherilyn had not formed any expectation that she would be paid her share of her father's estate before her mother's death.
- [62] She was also involved with taking her mother to see solicitors in Bundaberg in 2012. That was the trip where Bill Birch attended also. She waited outside and took her mother home. She observed a handwritten document the majority of which was written by her mother and which the solicitor then converted into a typed document directed to her children and explaining why she had signed over her share of Fairyland to Doug Birch: "so he would be able to buy your father's share and you would all receive your share which is to be divided equally between our other five children". The letter went on to say that: "It was always our intention to give a one-third share to Douglas so that he would only have to purchase the remaining one-third share."<sup>27</sup>
- [63] That solicitor was Chris Parker of Charltons in Bundaberg. The plaintiff, through her litigation guardian, Geoffrey Birch, refused to waive her privilege in respect of her communications with Mr Parker so he was not called as a witness by either party, something the defendant submitted would permit me to infer that his evidence would not assist the plaintiff's case.
- [64] Betty Birch later told Sherilyn, in respect of this letter which was sent to the siblings in November 2012, that Colin Birch, Stanley Birch, Lindsay Birch and Geoff Birch were questioning her about the one-third transfer, telling her it was a bad idea. Her mother said to her that she was getting a lot of pressure and phone calls in regard to that issue which was why the letter was written. That upset her and Sherilyn called a few of her brothers to ask them to leave their mother alone and said that she was abused by Geoff Birch, Stan Birch and Colin Birch.
- [65] When cross-examined she disagreed with the proposition that her mother liked to keep the peace and said that her mother liked conflict. She also disagreed with the proposition that her mother was a "stiff upper lip type of person" saying that she could be emotional at times.

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<sup>25</sup> T 3-97/8-10.

<sup>26</sup> T 3-97/35-38.

<sup>27</sup> See ex 1, pp 218-221 and T 3-99 - T 3-101.

- [66] The credit of Bill Birch and Sherilyn Birch was not challenged seriously in cross-examination. Again, I found them to be credible witnesses.

***Geoff Birch***

- [67] The plaintiff's witnesses who gave oral evidence were not able to provide useful evidence about the circumstances in existence when the transfer of their mother's one-third interest in Fairyland occurred. They did give some background evidence. Geoff Birch described their mother as subservient to their father who, he said, had a very strong personality and was very strong-willed. He likened Doug Birch to his father in that way. His mother had a mild heart attack in 2003 and a serious one in 2009. He believes she made a full recovery from that heart attack. By 2011 she had had diabetes for a period which was under control. She did not need insulin injections.
- [68] He first became aware of the content of his father's will shortly after his death. He was then told by Bill Birch that everything had been left to their mother and nothing was to happen until after their mother died. He received a copy of the will then. He first heard of the transfer of Betty Birch's one-third interest in Fairyland to Doug Birch in early October 2012. That came from a telephone call from his brother, Colin Birch.
- [69] Shortly after that, he visited Betty Birch and asked whether she had transferred her share of Fairyland to Doug Birch. She told him that she had done that so that Doug Birch could pay the rest of them out by borrowing the money. She also told him that Doug Birch already had one-third of Fairyland which he did not know then. A close reading of his father's will may have alerted him to that possibility but I accept that he did not then know that had happened.
- [70] His evidence included an assertion that he was told by his mother that Doug Birch had said to his mother that if he did not get some ownership of Fairyland he would leave. He said his mother told him that was why Jim Birch and she agreed to sign the first third over to Doug Birch. I accept that as possibly relevant to Betty Birch's state of mind then but do not regard it as probative of the facts asserted.
- [71] Then, early in 2013, Betty Birch rang Geoff Birch and told him she thought she had made a mistake and that she needed some help. He put her in touch with a solicitor called Damian Black at Wonderley & Hall in Toowoomba. His brother, Colin Birch, then took his mother to a meeting with that solicitor.
- [72] He said that her state of health at the time of the trial was degenerating. She was "seeing things" and had a doctor who was trying "to get it under control".<sup>28</sup> Her income at the time of the trial was from the aged pension. She received it as an emergency pension according to his evidence because she had signed the property over to Doug Birch. She also owned a house at Eidsvold which was up for sale and had been reduced in price to try to sell it. She owed about \$52,000 in respect of a mortgage on that house and also had an overdraft of approximately \$54,000. She received about \$200 a week in rental payments from the property at Eidsvold less agent's fees. That money was used to service her overdraft. The overdraft was used to

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<sup>28</sup> T 1-54/43-47.

pay rates and anything to do with the property. Earlier in her life she had expressed views to him that she did not want to be on the aged pension.

- [73] He had not visited his mother at Eidsvold since the occasion in October 2012 until she moved to live with Colin Birch in about mid-2013 in Toowoomba. From Colin's home she went into care in Toowoomba. He could not answer the question about the number of occasions he had seen his mother between his father's funeral in June 2011 and October 2012. He would sometimes speak to her on the telephone. He displayed little familiarity with the day to day circumstances of his mother's life at that time. He also agreed that his brothers, Colin Birch and Stan Birch, were upset about their mother having given her share of Fairyland to Doug Birch and remembered receiving the letter from her on advice from Chris Parker in November 2012.
- [74] He agreed that, as litigation guardian, he refused to waive privilege in respect of the file held by Mr Parker's firm, Charltons Lawyers in Bundaberg. He consulted Greenhow & Yeates, Solicitors, for an interpretation of his father's will. That firm wrote to Mr Parker at Charlton's Lawyers on 7 December 2012. He was unaware that that letter had been sent.<sup>29</sup>
- [75] He also recalled receiving a letter from Bill Birch dated 12 December 2012. That letter of Bill Birch recorded an assertion that Betty Birch had been distressed after receiving a letter from Geoff Birch's solicitors.<sup>30</sup> In replying to Bill Birch's letter by his own dated 1 January 2013, Geoff Birch asserted that, since Doug Birch then had two-thirds of Fairyland, he should have no problem in raising the finance for the one-third of the value of the property to pay out the other siblings. He does not, in that letter, assert that his mother told him that Doug Birch was pressuring her. Nor does he assert that Doug Birch asked Betty Birch to transfer Fairyland to him.<sup>31</sup> He agreed that his mother appeared not to feel guilty about what she had done at that stage.
- [76] Geoff Birch said that his parents had not previously told him of the transfer of one-third of Fairyland to Doug Birch in 2008. In ex 5 he says that he was unaware of that fact until about six weeks after a phone call in the first week of October 2012. He agreed that he thought at the time he wrote ex 5 that Doug Birch should have to borrow the money straight away and pay out his siblings because, in his belief, the will had been short-circuited by his mother's transfer of her interest to Doug Birch. He appears to have believed in January 2013 that his father held a half share of Fairyland.
- [77] His letter also expressed concern whether undue pressure had been exerted on Betty Birch. He went on to say that his mother had mentioned influence or pressure but he could not recall the exact date or time. He was also concerned at the fact that the cattle were, by the time of the will, held in a trust and were not available to his father to disburse through his will. He expressed, in ex 5, concern about his mother's ongoing issues with lack of money and suggested that disbursements could be made from the income from the sale of the

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<sup>29</sup> See ex 3 and T 1-65/17 - T 1-66/13.

<sup>30</sup> The letter from Bill Birch is ex 4.

<sup>31</sup> See ex 5.

commercial cattle in the trust for her living expenses. Later in 2013 these proceedings were instituted. He has been the sole litigation guardian for his mother since Colin Birch's death in December 2015.

- [78] He was also cross-examined about serious allegations made by Colin Birch in an email to a solicitor at Wonderley & Hall about the conduct of Doug Birch and Juanita Birch and Sherilyn Birch who was alleged to have been able to sign her mother's signature exactly. There was a suggestion in it of forgery of the mother's signature on the transfer. Colin Birch also suggested that the accountant advising Doug and Juanita Birch about the transfer of the cattle had been compromised and should be encouraged to "squeak" rather than be disqualified or even potentially face jail.<sup>32</sup> Ms Treston QC suggested to Geoff Birch that he supported the making of such allegations, which was a matter going against his credit. That was, in my view, a valid observation.
- [79] It seems likely that the beliefs expressed in that email reflected ignorance of the fact that the cattle had been placed into the trust long before in about 2008. It must be said, however, that the email does reflect an overheated imagination applied to the facts then known and suggest that Colin Birch at least held suspicions that were not justified on the objectively available material. The action that had been commenced in respect of the transfer of the cattle into the trust was eventually discontinued. Geoff Birch admitted that he was concerned that a costs order may be made against him personally in respect of that action.
- [80] He was also cross-examined about the new will made by Betty Birch dated 13 November 2012 which makes no disposition in respect of Fairyland but gives the rest and residue of her estate to her six children or, if they failed to survive her, to their children.<sup>33</sup> He accepted that if his mother's pre-existing share of Fairyland came back into her estate as a result of these proceedings that it would then be divided amongst those beneficiaries which would be inconsistent with his parents' previously expressed testamentary intentions about where Fairyland was to go.

### ***Stanley Birch***

- [81] Stanley Birch also gave evidence for the plaintiff. He became aware of the transfer of the first third of Fairyland to Doug Birch in February 2010 when he was visiting his father. His father told him they had transferred that share to Doug Birch so that he would stay on Fairyland. His father also told him that Doug had not stayed on Fairyland. He went to Rosevale and Stanley Birch said that his father did not appear to be really happy about that in February 2010.
- [82] He became aware of the second transfer by his mother of a one-third interest to Doug Birch in Fairyland in June 2012. He said his mother had spoken about doing it on two earlier occasions, July 2011 and September 2011. In July 2011 his mother told him she was thinking about transferring the second third and he advised her that he did not think it was a good idea. He said that she seemed to be under the impression that, if she did that, Doug Birch would be able to pay out the other members of the family according to their father's will and that she

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<sup>32</sup> See ex 7.

<sup>33</sup> See ex 1 at p 211, cll 7.4 and 7.5.

would be able to get a pension. He advised her that he did not think she would get a pension after she gave that much out and that she had to look after herself at that point in her life as the rest of them were younger and could look after themselves.

- [83] He also said that his mother said to him that Doug Birch was pressuring her to give her the third, claiming that he had received nothing in his father's will so that his mother had to fix it by giving him the second third. I received that evidence as potentially relevant to Betty Birch's state of mind but not as truth of its contents.
- [84] In September 2011 he saw his mother again. She was concerned about the amount of money she was receiving into her bank account and as to how she could live on the amount she was receiving. He said she was concerned about that issue, as was he. He again advised her against transferring her interest to Doug Birch and said that she would not get a pension. She then told him that she had been to a meeting with someone in Biloela where she had been told that she could get onto a pension. He said she seemed very fragile and easily upset and in tears on a number of occasions. He also described his father as having a very forceful personality where his mother would do almost anything to keep the peace. He described Doug Birch as having a forceful personality like his father.
- [85] In cross-examination he agreed that his mother, when still living at Eidsvold after his father died, was still actively involved in her local CWA and her singing group, if somebody could pick her up. He used to visit her every couple of months during the period after his father died. Either he or his wife would also ring her every second or third day. He said they were concerned about the state of her health.
- [86] He recalled receiving a letter in the form of ex 4 from Bill Birch, his uncle, to which he replied by a letter dated 31 December 2012.<sup>34</sup> He was cross-examined at length about that letter. It expressed concerns about the adequacy of the funds being received by his mother for her living expenses, the failure to place a headstone on his father's grave and the lack of accounting to other beneficiaries. It also asserted that Doug Birch was pressuring his mother to sign over her third of Fairyland to him and resentment at what he perceived to be the better treatment Doug Birch had received compared to other members of the family. He also appeared to resent having been asked to contribute to his father's headstone. He was a combative and argumentative witness. It was apparent that he did not trust his brother, Doug Birch.
- [87] He accepted that it was his parents' intention that the property at Fairyland would carry on in the family through Doug Birch and that Doug Birch would have to supply cattle for it. At least that was what he accepted was the situation in November 2008 when his father wrote the letter accompanying his will.<sup>35</sup>
- [88] He initially refused to accept that the letter, which the pleadings and the evidence established was composed by his mother when seeing Chris Parker, the solicitor at Charltons Lawyers in

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<sup>34</sup> Ex 11.

<sup>35</sup> See T 22/15-21 and ex 1, p 152.

November 2012, was actually produced by her.<sup>36</sup> After appearing to have conceded that she did create it he later emphasised again, however, that he did not believe his mother wrote that letter.<sup>37</sup> In that context the plaintiff's failure to waive privilege in respect of Chris Parker's evidence struck me as having some further significance.

[89] He agreed that his parents never put Fairyland on the market. He also agreed that he had not asked Bill Birch or his mother as executors of his father's estate to request that Doug Birch pay money for his share of Fairyland.

[90] He was particularly concerned, however, that his mother was not receiving enough money to reflect the value of the assets she had in the past, particularly from the trust. He suspected that Doug Birch had been manipulating his parents since 2008, apparently in respect of the operations of the trust. He was particularly upset also by the letter he received from his uncle, Bill Birch, in ex 4. He agreed that his letter of reply in ex 11 to Bill Birch did not mention the assertion from his mother that Doug Birch promised to pay out his siblings if she transferred Fairyland to him. He excused that by saying that it was not meant to finish up as a legal document.

[91] He said that, around July 2011, he was undergoing a particularly difficult time because his son was ill and died later that year. It was suggested to him that he would have told his siblings if he had known his mother was thinking about transferring Fairyland in July 2011. He said he did not mention it to his siblings because of what was going on in his family but had made notes. There was no re-examination about the notes. I found his evidence unreliable for that and other reasons to which I shall refer later.

### ***Peter Mortimer***

[92] Mr Peter Mortimer was Jim and Betty Birch's accountant but not in respect of the Birch Pastoral Trust whose accounting was done by another firm. He gave evidence that Jim Birch transferred 909 cattle to that trust with a then market value of \$202,500. That was recorded in an email dated 29 June 2009.<sup>38</sup> He agreed that the Birch Pastoral Trust was a relatively conventional family farm trust in the sense that Jim and Betty Birch might have contributed slightly more in terms of the cattle but Doug and Juanita Birch were contributing slightly more in terms of labour. There was some doubt expressed by him about the value of the cattle at the time and he said that he understood that the trust accountants did not adopt that value of \$202,500 when they brought the value of the cattle into their accounts.

[93] That figure of \$202,500 was, however, the only reliable evidence led as to the value of those cattle. Dr Greinke relied on evidence from Doug Birch about the prices he was obtaining for cattle at about \$500 to \$600 a head in 2008. He asked me to infer, therefore, that the prices referred to by Mr Mortimer were really the book price rather than the market price. He submitted that Doug Birch did not draw any distinction between the different types of cattle

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<sup>36</sup> See T 2-22/23 - T 2-23/14 and ex 1, p 221.

<sup>37</sup> T 2-24/1-2.

<sup>38</sup> See ex 10.

that were being sold. I could not conclude on that sparse evidence, however, what the overall value of the herd transferred at the time was.

***Professor Gerard Byrne***

- [94] There was a medical report dated 27 January 2015 from Professor Gerard Byrne, a consultant psychiatrist and Associate Professor of Psychiatry concerning Betty Birch's capacity to understand financial matters among other things. His opinion was that she was not likely to have the capacity to understand complex transactions or their consequences because of her current level of cognitive impairment, apparently at the time of a long interview by him on 25 November 2014. He expressed the view that her legal interests might be better suited by a litigation guardian. The opinion does not address, however, her abilities in August 2011. There was no oral examination of Professor Byrne.

**Defence submissions about the Geoff, Colin and Stan Birch's evidence**

- [95] Geoff Birch's evidence was criticised by the defendant. Counsel made that submission particularly in dealing with his evidence that Betty Birch phoned him to ask him for his help in the new year of 2013 after a "tense" discussion said to have occurred on 12 October 2012. Ms Treston compared that with the chronology of events after that date showing Betty Birch writing to each of her children in November 2012 telling them that she had transferred the property to Doug Birch and was sending correspondence to them with the benefit of legal advice.<sup>39</sup> She then rang Bill Birch on 12 December 2012 distressed and crying at the correspondence she had received from Geoff Birch's solicitors.<sup>40</sup> On 12 December 2012, Bill Birch wrote to Geoff and the other children asking them to leave their mother alone in ex 4. Counsel for the defendant also pointed to Geoff Birch writing to Bill Birch assertively criticising him for the transfer and conduct of the administration of his father's estate on 1 January 2013 as a further step in the chronology making Geoff Birch's evidence of his mother telephoning him to ask for his help shortly after then unbelievable.
- [96] He was criticised as someone uncompromisingly seeking to assert his own rights rather than to vindicate his mother's. He was also criticised for his apparent complicity in the instructions given to Ian Dempster by Colin Birch in ex 7. It also seems to me to be relevant to take into account his instructions on behalf of his mother not to waive privilege in respect of the possible evidence from Chris Parker, the solicitor at Charltons Lawyers whom Betty Birch consulted in November 2012. Colin Birch's evidence was also criticised by reference to ex 7 and characterised as stemming from concern at the perceived preferential treatment given to Doug Birch.
- [97] Ms Treston also submitted that Stan Birch's evidence should not be accepted in any respect. He was described as aggressive to the point of belligerence, a fair view of his evidence. His views that Doug Birch had been manipulating things since 2008 I also accept were excessive and coloured by the same perception that Doug Birch was gaining an early inheritance under

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<sup>39</sup> See ex 1, p 221.

<sup>40</sup> See exs 3 and 4.

his father's will although he had not received any advance whatever, the transfer by his mother being a separate and independent gift.

- [98] Stan Birch's reaction to Bill Birch's letter of 12 December 2012 was also criticised and his behaviour described as unreasonable. That seems to me to be a fair criticism. Nor do I accept his evidence about the conversation he had with his mother in July 2011 asserting that it was about Doug Birch pressuring her to sign the second third over to him. If that were truly the case I would have thought that he would have then contacted other members of his family despite his own tragic personal circumstances involving the sickness of his son. Even if I should not expect him to behave like that, I would not accept that evidence based on the other contemporaneous and more reliable evidence from people such as Mr Laurentiussen about the reasons why Betty Birch wished to make the transfer.

### **Legal issues**

- [99] Against that background of the relevant evidence I shall now examine the legal issues argued, namely that the transaction should be avoided as having been entered into under undue influence or in breach of Doug Birch's fiduciary duty or through unconscionable conduct. I shall then consider the separate argument based on the existence of mutual wills.

### ***Undue influence***

- [100] The applicable principles were not in dispute. Betty Birch relied on the statutory presumption of undue influence pursuant to s 87 of the *Powers of Attorney Act* 1998 because at the time of the transfer Doug Birch was her attorney although he did not use that power to effect the transfer.<sup>41</sup>
- [101] The principal Australian authority dealing with the presumption of undue influence is the decision of the High Court in *Johnson v Buttress*.<sup>42</sup> Latham CJ pointed out that it may not be necessary in all cases to show that the donor of the power of attorney received competent independent advice but went on to say that evidence that such advice had been given was one means, and the most obvious means, of helping to establish that the gift was the result of the free exercise of independent will.<sup>43</sup>
- [102] Similarly, Dixon J said:<sup>44</sup>

“One occupying such a position falls under a duty in which fiduciary characteristics may be seen. It is his duty to use his position of influence in the interest of no one but the man who is governed by his judgment, gives him his dependence and entrusts him with his welfare. When he takes from that man a substantial gift of property, it is incumbent upon him to show that it cannot be ascribed to

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<sup>41</sup> It has been held not to matter whether or not the attorney actually used the power personally: *Smith v Glegg* ; [2005] 1 Qd R 561, 570 at [40].

<sup>42</sup> (1936) 56 CLR 113.

<sup>43</sup> (1936) 56 CLR 113, 119-120.

<sup>44</sup> (1936) 56 CLR 113, 135.

the inequality between them which must arise from his special position. He may be taken to possess a peculiar knowledge not only of the disposition itself but of the circumstances which should affect its validity; he has chosen to accept a benefit which may well proceed from an abuse of the authority conceded to him, or the confidence reposed in him; and the relations between him and the donor are so close as to make it difficult to disentangle the inducements which led to the transaction. These considerations combine with reasons of policy to supply a firm foundation for the presumption against a voluntary disposition in his favour. But, except in the well-recognized relations of influence, the circumstances relied upon to establish an antecedent relation between the parties of such a nature as to necessitate a justification of the transaction will be almost certain to cast upon it at least some measure of suspicion that active circumvention has been practised.”

[103] A court interferes in a case of presumed undue influence on the ground of public policy to prevent the relations which existed between the parties and the influence arising therefrom being abused.<sup>45</sup> The onus lies on the donee of the power to rebut the presumption of undue influence on the balance of probabilities by showing that the plaintiff knew and understood what she was doing and that she acted independently of any influence of him.<sup>46</sup> The court will look on a substantial gift “with a very jealous eye and very strictly examine the conduct of persons in whose favour it is made.”<sup>47</sup>

[104] The duty of a solicitor providing independent advice includes the obligation to satisfy himself or herself that the “gift is one that it is right and proper for the donor to make under all the circumstances.”<sup>48</sup> The solicitor must also be “free from any taint of the relationship” or interests that would compromise his or her independence.<sup>49</sup> The context in which that statement appears was as follows:

“All that is necessary is that some independent person, free from any taint of the relationship, or of the consideration of interest which would affect the act, should put clearly before the person what are the nature and consequences of the act.”

[105] The adviser must also be informed of all the relevant material facts.<sup>50</sup>

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<sup>45</sup> *Allcard v Skinner* (1887) 36 Ch D 145, 171.

<sup>46</sup> See the authorities referred to in *Quek v Beggs* (1990) 5 BPR 97,405 at 4-5.

<sup>47</sup> *Huguenin v Baseley* (1807) 14 Ves Jr 273; 33 ER 526 referred to in *Whereat v Duff* [1972] 2 NSWLR 147, 167-168.

<sup>48</sup> *Powell v Powell* [1900] 1 Ch 243, 247.

<sup>49</sup> *In re Coomber* [1911] 1 Ch 723, 730.

<sup>50</sup> *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127 where the gift constituted practically the whole of the donor’s property, a fact unknown to the lawyer who provided the independent advice.

- [106] The plaintiff relied on the evidence of Professor Byrne about Betty Birch's state at the end of November 2014 and into early 2015 when he dated his report on 27 January 2015. It appeared that that report may have been needed to address the issue whether a litigation guardian should be appointed. I do not regard it as reliable evidence of her state of mind in August 2011. In fact it was not pleaded against the defendant that his mother lacked capacity in August 2011. The reliable contemporary evidence establishes that she had capacity to make a decision such as this one at that stage. The decision is also consistent with her wills made in 2004 and 2008 which were prepared on the basis that Doug Birch would inherit the whole of Fairyland in due course.
- [107] The available evidence also suggests that Betty Birch was, in August 2011, still capable, engaged in normal social activities and, although frail, was in relatively good health. Mr Laurentiussen was used to dealing with clients like her and described her as quite alert and receptive to what was being said. She appeared to understand what was being said to her.<sup>51</sup>
- [108] The plaintiff also submitted that I should find that Doug Birch induced the transfer by placing pressure on Betty Birch. I do not accept that. The statement by Betty, not the subject of cross-examination because of her current state, is not reliable enough from my point of view to allow me to conclude that Doug Birch had her in tears on the way home by asserting that his father had not left him any money. Nor does her statement support the conclusion that he applied pressure to her. That view is inconsistent with her presentation to Mr Laurentiussen and also inconsistent with the form of the letter prepared by her in consultation with Chris Parker in November 2012 based on the handwritten document which Sherilyn Birch observed her to write.<sup>52</sup> I do not accept the assertions by Stan Birch and Geoff Birch as reliable evidence of Betty Birch's state of mind in August 2011.
- [109] It is also relevant that the life interest that Betty Birch held in one-third of Fairyland was not one that, of itself, provided her with any secure income. That income came from the trust company, something which barring the events that have occurred, was likely to have continued into the future. The fact that the income stopped being paid to her from about August 2013 does not throw light on her state of mind in August 2011 or, necessarily, on the alleged improvidence of the transfer at that time. My conclusion on the evidence I accept is that her later expressions of regret in respect of the transfer came after influence, particularly from Geoff Birch, Colin Birch and Stan Birch, from the earlier part of 2013 onwards.
- [110] I am encouraged in those conclusions by the failure of the plaintiff to waive privilege in Chris Parker's evidence in circumstances where it is clear that he was a separate source of independent advice provided to Betty Birch closer in time to the August 2011 transaction. Nor do I accept that Doug Birch told his mother during the period before the transfer that he would use it to pay out the other children. Betty Birch's statement says nothing of that and it is denied by Doug Birch whose evidence I accept.
- [111] The defendant, through his counsel, also relied upon the fact that the transfer amounted merely to an acceleration of the interest that he would have obtained on Betty Birch's death.

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<sup>51</sup> T 3-45/15-16.

<sup>52</sup> Ex 1, pp 218-221.

The transfer was broadly consistent with that long term goal which also reflected the earlier wills in 2004 and 2008, the letter of instruction to the children of 15 January 2004 and other documents indicating that it was the parents' intention to leave Fairyland to Doug Birch over a long period. That was also reflected in Bill Birch's evidence and Sherilyn Birch's evidence.

- [112] The advice provided by Mr Laurentiussen was also relied on. It seemed to me to have been effectively independent as it was Betty Birch who consulted him. Doug Birch sought his own separate advice about the transfer from another solicitor. It also seems probable to me that she saw Mr Laurentiussen independently on 19 August 2011 when he gave her the advice he described in his oral evidence. That extended over a period of one and three-quarter hours. He gave her three options and she was clear that she wanted Doug Birch to end up with her one-third share of the property.
- [113] I also regard it as more likely than not that Doug Birch attended him independently of her on 26 August 2011 partly because of the evidence indicating that he drove to Mr Laurentiussen's office independently of his mother but also in reliance on Doug Birch's evidence itself. I also believe Mr Laurentiussen's evidence that Doug Birch did not give him any instructions except in respect of permitting Mr Laurentiussen to witness the transfer documents on his behalf. In the circumstances, that does not seem to me to affect the transaction such as to justify setting it aside.
- [114] The advice that he gave both to Betty Birch and Doug Birch in the July 2011 meeting about the effect of Jim Birch's will, namely that Doug Birch was really getting nothing out of it because he had to pay out his siblings for the one-third of the property to be left to him by his father and that essentially all that Betty Birch was getting was a life interest, was correct. The defendant did not receive anything from his father's estate on his death. It has not been distributed and will not be distributed until Betty Birch's death when her life interest in Fairyland ceases. It was her own one-third interest that he received earlier than he would have otherwise.
- [115] It was also submitted for the defendant that Betty Birch's statement, in the relevant passages which I have extracted earlier, was not inconsistent with Doug Birch's evidence about his discussion with Mr Laurentiussen in July 2011. Nor was the fact that he rendered a tax invoice to Doug Birch significant in the circumstances. It was a standard practice where such gifts between family members in rural areas were common. I would not conclude that Mr Laurentiussen was acting as Doug Birch's solicitor when he gave advice to Betty Birch about the transfer. It was significant that Doug Birch had sought his own advice from a different solicitor separately from his mother.
- [116] The issue that has concerned me most in this context is whether it has been demonstrated that Doug Birch ensured that his mother received appropriate financial advice about the consequences of the transaction if, as subsequently happened, he and she fell out. Mr Laurentiussen did not provide financial advice other than providing a contact with a person at Centrelink. Should she have been advised, for example, that, if she were worried about continuing to get an income from the trust, she should think about maintaining her ownership of her one-third interest with a view, for example, to charging an agistment fee in respect of the use by the trust of the land?

- [117] Dr Greinke also submitted that the plaintiff should have been advised, as other examples, to enter into a lease in respect of her interests in Fairyland or a reverse mortgage to provide an income stream and give her complete independence from Doug Birch. He submitted that because none of those alternatives were explored with her in respect of her financial position she had not received appropriate independent financial advice.<sup>53</sup>
- [118] Ms Treston QC's submission in respect of that was that I should infer, given her relationship with Doug Birch at the time and the consistency of the distributions that had been made to her since 2008, the probabilities were that she would not have acted on such advice. That seems likely to me also. As Mr Laurentiussen observed when he saw her, her mind was made up. Nor had there ever been a charge levied on the trust for agistment of its cattle on Fairyland. One would not expect it to have happened in respect of a family run property of this type. She also had a long-term intention to transfer her one-third of Fairyland to Doug Birch on her death in any event.
- [119] The defendant also contends that Betty Birch's one-third interest in Fairyland was not her only significant asset. She had a residential property in Eidsvold with significant equity in it. She had about \$10,000 standing to her credit in a bank account held with the National Australia Bank at the time of the transaction as well as the life interest in a one-third share of Fairyland. That one-third interest was always intended to remain in the family to be passed on to Doug Birch and was not realistically going to be sold during Betty Birch's lifetime so that it, in the defendant's submission, made no genuine difference to her day to day financial position. The income she received from the trust up until the financial year ended 30 June 2014 was significant.<sup>54</sup> The trust also continued to make payments for the mortgage on Betty Birch's house at Eidsvold well after she stopped living there.
- [120] It was also apparent that, as late as 24 April 2013, Betty Birch understood that the cattle had been transferred to the trust not long after the trust was established in January 2008.<sup>55</sup> It is reasonable to conclude that she knew that also at the time of the transfer in August 2011. As the defendant submitted, the later conduct of the proceedings may indicate that the preoccupation with the cattle was that of Geoff, Colin and Stan Birch rather than their mother.
- [121] Nor, the defendant submitted, did the transfer of Betty Birch's interest in Fairyland affect in any meaningful way the operation of the trust. Its operation was affected by Jim Birch's death because control then became, in effect, vested in Doug and Juanita Birch. It was correct, therefore, that there was no direct connection between the ownership of a one-third interest in Fairyland and the entitlement to income from the trust.
- [122] The defendant submitted, it seemed to me accurately, that, therefore, there was no basis to conclude on the evidence of the circumstances as they were up to the beginning of 2013 that

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<sup>53</sup> See the examples discussed in *Stivactas v Michaletos (No 2)* (1993) NSW ConvR 55-683; BC9301874 per Sheller JA at 11.

<sup>54</sup> See ex 15.

<sup>55</sup> Ex 1, pp 222-223.

the transfer would or would be likely to have any impact at all on the distributions that would be made from the trust.

- [123] It is concerning, however that Betty Birch was not advised about her financial situation should she and her son fall out with each other. It does seem probable to me that she still would have proceeded with the transfer even had she received such advice. The consistency of her attitude to making the transfer up until early 2013 suggests that. Would she have done so only with further financial protections put in place had she been so advised? That is difficult to answer but my view is that she probably would have proceeded in any event as she did given her wish to facilitate Doug Birch's early receipt of her interest in the property.
- [124] In the circumstances, therefore, it is my view that the defendant has effectively rebutted the presumption of undue influence. He has satisfied me that his mother transferred her interest in Fairyland to him as an act of her own free will, properly advised.<sup>56</sup> In reaching that conclusion, I rely particularly on the evidence of Mr Laurentiussen but it also seems to me to be relevant that, after initial criticism from her other sons for her conduct, Betty Birch sought further independent legal advice from Chris Parker from Charltons Lawyers in Bundaberg, prepared a fresh will consistent with the view that she had already made an effective gift of Fairyland to Doug Birch and prepared a letter to be sent to her children giving the reasons why she gave her one-third share in Fairyland to Doug Birch. That letter demonstrated that she understood that her children had no legal entitlement to receive any money from their father's estate until her death but indicated that she was attempting to set in place whatever she could to facilitate the estate being finalised as soon as possible. She did not, however, say that her gift to Doug Birch was conditional on him borrowing money and paying out his siblings in any particular timeframe. The evidence of Bill Birch and Sherilyn Birch also supports this sequence of events. The evidence suggestive of pressure being applied to her by Doug Birch also appears to postdate early 2013 and is evidence that I have not accepted.
- [125] The plaintiff also submitted that I should infer that the defendant's failure to call Mr Slade, Mr Laurentiussen's conveyancing clerk, in respect of the opening of the file apparently for Doug Birch, should lead me more readily to conclude that Mr Laurentiussen was acting for Doug Birch as well as his mother in the transaction. The defendant's answer to that was that it was equally open to the plaintiff to call him and not incumbent on the defendant to do so. His evidence, as a non-lawyer, would not be relevant to the issue whether Betty Birch had received independent legal advice. In the circumstances I draw no inferences against either party from the failure to call that witness.

### ***Fiduciary duty***

- [126] Again, the principles relevant to this area of the law were not in doubt. It was submitted for the plaintiff that Doug Birch's acceptance of the gift from his mother was a conflict transaction

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<sup>56</sup> *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113, 133, discussed in *Stivactas v Michaletos (No 2)* (1993) NSW ConvR 55-683, 59,908.

given his position as her attorney. The question is whether Betty Birch provided her informed consent based on independent advice.<sup>57</sup>

- [127] For equivalent reasons to those I have discussed in respect of the issue of undue influence, I am satisfied that the plaintiff did provide her informed consent to the transaction. In fact it was, on my view of the evidence, a proposal that came from her. It was submitted for the plaintiff that Doug Birch had failed to disabuse Betty Birch of several matters where she may have been labouring under a misapprehension, particularly about the ownership of the commercial cattle. The submission was that he had not made proper disclosure as a fiduciary of information held by him.
- [128] The letter to which I previously referred from Wonderley & Hall of 24 April 2013, however, confirms Betty Birch's instructions to that firm that it was her understanding even in 2013 that the cattle that had been owned by her and her husband were transferred to the trust not long after the trust was established in January 2008. The other evidence also satisfies me that she knew that fact at the relevant time in 2011. Her husband had told her, in fact, that the cattle were transferred to the trust for tax purposes. She sets out her evidence in respect of that in her statement.<sup>58</sup> Doug Birch's evidence was that his mother knew the cattle were in the trust from very early on, "all the time".<sup>59</sup> The extrinsic evidence suggests that the cattle were the subject of an agreement that they be put into the trust by the time of the execution of the 2008 wills. It may well have been a mistake, therefore, to make the provision in those wills for the bequest of cattle to the other children.
- [129] Dr Greinke submitted that Betty Birch's knowledge of the transfer of the cattle into the trust was associated with a possible perception that it was done for tax purposes and that she may not have realised that she no longer had ownership of them until advised of that by Wonderley & Hall in April 2014.<sup>60</sup> It seems more likely to me, however, that she did already know that the cattle had been transferred.
- [130] It is true that she was, apparently, wanting to retrieve her share of the cattle out of the trust according to her statement.<sup>61</sup> She also said in that statement that she would like to get the cattle out of the trust because the will could not be "fixed up" until the other children received their share of the cattle. I am not persuaded, however, that she was unaware of that situation when she agreed to transfer her one-third interest in Fairyland to Doug Birch in August 2011. Nor would I conclude that she was unaware of the earlier gift of 25% of Rosevale and one-third of Fairyland by her and her husband to Doug Birch.
- [131] As the defendant also submits, for at least 16 months after she signed the transfer, with knowledge of having done so, Betty Birch continued to hold the opinion that the transfer was

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<sup>57</sup> *Maguire v Makaronis* (1997) 188 CLR 449.

<sup>58</sup> See ex 1, p 53, para 68.

<sup>59</sup> T 2-89/45-47; see also ex 18, the advice from Accounting & You dated 8 September 2007.

<sup>60</sup> See ex 1, p 222.

<sup>61</sup> See ex 1, p 54 at para 73.

consistent with her intention and that of Jim Birch, particularly evidenced by her letter to her children in November 2012,<sup>62</sup> her request to Bill Birch to write to her children in late 2012,<sup>63</sup> and the absence of a complaint by Betty Birch during that period about the transfer. Therefore, I conclude that the plaintiff's case in respect of an alleged breach of fiduciary duty also fails.

***Unconscionable conduct***

- [132] The pleaded case as to unconscionable conduct relies on Betty Birch's age, the recent death of her husband of 60 years, the emotional distress she was under following his death, that she was physically ill, frail and feeble and that she was Doug Birch's mother. The defendant submitted that those issues did not seriously affect her ability to make a judgment about her own best interests at the time.
- [133] That she had a minor heart attack in 2003 and a major one in 2010 could have been significant but for the evidence that she was said to have made a full recovery from them. She suffered from diabetes but there was no evidence that it affected her ability to make judgments about her own best interests. Her mobility difficulties did not, on the evidence, appear to have affected her judgment. She received assistance from a Blue Care nursing service for about one hour per day on five days of the week but, again, that does not suggest an impairment of her ability to understand or make judgments.
- [134] In those circumstances, it is my view that the plaintiff has not established that there were special disadvantages suffered by her seriously affecting her ability to make a judgment as to her own best interests or that Doug Birch knew or ought to have known of those special disadvantages whether or not he actively sought to take advantage.<sup>64</sup>
- [135] In other words I do not accept that Doug Birch applied pressure to his mother and I do accept that it has been established that she had independent legal advice. Nor do I accept that she did not understand what the situation was in respect of ownership of the commercial cattle simply because a gift of them was proposed in her 2008 will. The later evidence indicates to my mind quite clearly that she knew and understood that the cattle had been transferred into the ownership of the trust well before August 2011.
- [136] Apparently she had not received financial advice about the effects of the transaction on her although she had received legal advice. Nonetheless, the practical effect of the transfer of her one-third share was merely to accelerate a disposition of that interest which was always intended and which would not have been likely to have had a practical effect on her income.
- [137] In the circumstances, therefore, I am satisfied that it has been shown that Doug Birch did not act unconscionably, having regard to the independent legal advice obtained by Betty Birch before she signed the transfer.

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<sup>62</sup> Ex 1, pp 218-221.

<sup>63</sup> T 3-79/34-36.

<sup>64</sup> *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

### **Mutual wills**

[138] The defendant relies on the execution of virtually identical wills by each of Betty Birch and Jim Birch in 2004 and 2008 to argue that those were mutual wills such that I should conclude that the parties agreed that the wills were irrevocable and would remain unaltered.

[139] The characteristics of a mutual will were set out in *Hussey v Bauer*:<sup>65</sup>

“[29] The characteristics of mutual wills and the means of proving their existence have been the subject of consideration in many courts. It is possible to draw from those authorities the following principles:

- (a) Mutual wills arise when two persons agree to make wills in particular terms and agree that those wills are irrevocable and that they will remain unaltered.
- (b) Substantially similar, even identical, wills are not mutual wills unless there is an agreement that they not be revoked.
- (c) The mere making of wills simultaneously and the similarity of their terms are not enough taken by themselves to establish the necessary agreement.
- (d) A will is, as a matter of probate law, revocable. But the revocation of a mutual will ordinarily results in the imposition of particular obligations:

‘It has long been established that a contract between persons to make corresponding wills gives rise to equitable obligations when one acts on the faith of such an agreement and dies leaving his will unrevoked so that the other takes property under its dispositions. It operates to impose upon the survivor an obligation regarded as specifically enforceable. It is true that he cannot be compelled to make and leave unrevoked a testamentary document and if he dies leaving a last will containing provisions inconsistent with his agreement it is nevertheless valid as a testamentary act. But the doctrines of equity attach the obligation to the property. The effect is, I think, that the survivor becomes a constructive trustee and the terms of the trust are those of the will which he undertook would be his last will.’”

[140] Counsel for the defendant submitted that the test was met when one coupled the letter to the children signed with the 2004 will,<sup>66</sup> which evidenced their mutual intention that their wills be

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<sup>65</sup> [2011] QCA 91 at [29] (citations and emphasis omitted).

<sup>66</sup> Ex 1, p 131.

construed together so as to give effect to the intention that Doug Birch receive Fairyland for a specified sum payable to his siblings with the later will and the letter accompanying it.

- [141] The submission was that the parents' clear mutual intention was restated in the 2008 will where the valuation price was defined in such a way in cl 4(c)(iii) as to require each will to be read in conjunction with the other to limit the amount payable in this form:

“For the avoidance of doubt I DIRECT AND DECLARE that this Will is to be read in conjunction with the Will of my Spouse to the intent that should the valuation of ‘Fairyland’ be for example Three million dollars (\$3,000,000.00) then the said DOUGLAS NORMAN BIRCH would be required to pay the sum of One hundred and ninety nine thousand eight hundred dollars (\$199,800.00) to each of his siblings that is to say it is my intention that he not be required to pay One hundred and ninety nine thousand eight hundred dollars (\$199,800.00) under this my Will and a further similar amount under the Will of my Spouse.”

- [142] That led to the conclusion, it was submitted, that the wills were intended to be mutual such that, once the first of either Jim Birch or Betty Birch had died, cl 4(c)(iii) could not be given effect to and “read in conjunction with” the will of the spouse, unless both wills were to remain in force. That was said to be strengthened as a conclusion by the terms of the letter accompanying the will.<sup>67</sup> That was the letter that referred to Doug Birch carrying on with the ownership of Fairyland without too much of a debt load.
- [143] Evidence supportive of the making of such an agreement was also said to flow from the letter of November 2012 by Betty Birch to her children drafted in conjunction with Chris Parker.<sup>68</sup> In that letter Betty Birch referred to her promise to Jim Birch before he died that everything he wanted would be done according to his wishes and as fairly as possible in the context of Doug Birch buying Jim Birch's share of Fairyland so that the other siblings would receive their shares.
- [144] The plaintiff's submission was that, on the evidence, Jim Birch and Betty Birch repeatedly changed their wills and Betty Birch's new will in 2012 substantially departed from the 2008 will. I do not accept that they repeatedly changed their wills. When both were alive their wishes as expressed in their wills were consistent.
- [145] The claim was resisted particularly, however, on the basis that Doug Birch had engaged in undue influence, unconscionable conduct and breach of fiduciary duty and would therefore be disentitled from equitable relief. My factual findings and earlier legal conclusions dispose of those submissions. Had I decided that Doug Birch failed to ensure that his mother received appropriate financial advice I would not have concluded that disentitled him in equity to the declarations sought about the effects of the wills being mutual. He advised her to and knew she sought independent legal advice. He had on one occasion taken her to see the solicitor. He was not asked whether he understood that advice would not necessarily cover financial advice. Nor was he to know necessarily whether his mother had spoken to accountants at the time. He understood her to be capable of looking after herself as, indeed, she was at the time.

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<sup>67</sup> Ex 1, p 152.

<sup>68</sup> Ex 1, p 221.

- [146] It was also submitted that it would be inequitable to treat the wills as mutual given that the intentions regarding the 2008 wills were based on the false premise that the commercial cattle were available for Jim Birch to give to the other children. The fact that that gift fails was, however, on my findings a conclusion that that was known both to Jim Birch and Betty Birch at the time they executed those wills which was around the same time as they had entered into the trust deed. It is not inequitable of Doug Birch in those circumstances not to release the commercial cattle from the trust or to adjust the benefits as between himself and his siblings from the early gift of the property to him by his mother.
- [147] The latter submission does not seem to me to be relevant as the intent of this claim by the defendant is merely to seek declarations that the wills are mutual and that the plaintiff holds her one-third share in Fairyland on constructive trust subject to the terms of her 2008 will. Had I not decided that the plaintiff's claim based on undue influence, breach of fiduciary duty and unconscionability failed, therefore, I would have made declarations of the nature sought by the defendant in respect of the 2008 wills being mutual wills leading to the conclusion that the plaintiff should hold her share in Fairyland on trust subject to the terms of the 2008 wills.

### **Orders**

- [148] The plaintiff's claim is dismissed. Accordingly I make no orders in respect of the counterclaim. I shall hear the parties as to costs.