SUPREME COURT OF QUEENSLAND

CITATION:	*Birch v Birch* [2020] QCA 31
PARTIES:	**SYLVIA BETTY BIRCH by her litigation guardian GEOFFREY MICHAEL BIRCH** (appellant) **v** **DOUGLAS NORMAN BIRCH** (respondent)
FILE NO/S:	Appeal No 13832 of 2018 SC No 8333 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2018] QSC 289 (Douglas J)
DELIVERED ON:	28 February 2020
DELIVERED AT:	Brisbane
HEARING DATE:	18 July 2019
JUDGES:	Fraser and McMurdo JJA and Bradley J
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	EQUITY – GENERAL PRINCIPLES – UNDUE INFLUENCE AND DURESS – PRESUMPTION OF UNDUE INFLUENCE FROM RELATIONSHIP OF PARTIES – OTHER PRESUMPTIONS OF UNDUE INFLUENCE – where the appellant claimed at first instance to have a transaction set aside on the basis of undue influence – where that transaction involved the appellant transferring to her respondent son a one-third interest in a property – where the respondent held from the appellant an enduring power of attorney at the time of transfer – where consequently there was a rebuttable presumption that the appellant was induced to make the transfer by the respondent's undue influence – where the primary judge dismissed the claim, finding that the presumption was rebutted because the appellant received independent legal advice about the transaction and properly understood the legal and financial consequences of that transaction – whether the appellant received proper and independent legal advice – whether the appellant properly understood the consequences of the transaction – whether the nature of the relationship between the parties was such that the degree of influence presumed could not have been high – whether the presumption of undue influence was rebutted

Powers of Attorney Act 1998 (Qld), s 87

Johnson v Buttress (1936) 56 CLR 113; [1936] HCA 41, cited
Michaletos v Stivactas [1992] ANZ ConvR 90, cited
Powell v Powell [1900] 1 Ch 243, cited
Yerkey v Jones (1939) 63 CLR 649; [1939] HCA 3, cited

COUNSEL: A J Greinke for the appellant
R M Treston QC, with G J Barr, for the respondent

SOLICITORS: Shine Lawyers for the appellant
Payne Butler Lang for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of McMurdo JA and the order proposed by his Honour.

[2] **McMURDO JA:** The appellant, who is known as Betty Birch, is the mother of the respondent, who is known as Doug Birch. She was born in 1929 and he was born, as her fifth child, in 1966.

[3] In August 2011, she transferred to him, as a gift, a one third interest in a grazing property called "Fairyland". She did so having obtained legal advice and with a full capacity to understand what she was doing. However, Doug held from her an enduring power of attorney at this time, with the consequence that pursuant to s 87 of the *Powers of Attorney Act* 1998 (Qld), there is a rebuttable presumption that she was induced to do this by his undue influence. He did not act as her attorney in this transaction: it was Betty herself who transferred the interest to him. But as is common ground, that does not matter to the operation of s 87 in imposing a presumption of undue influence.[1]

[4] Betty is now without legal capacity, and it was by a litigation guardian, Geoffrey Birch (another of her sons), that she brought this proceeding. She claimed to have the transaction set aside upon three bases, namely that it had resulted from the undue influence of Doug, from a breach of a fiduciary duty owed by him to her, and from unconscionable conduct by him. Originally, there were other defendants. They were Doug's wife, Juanita Birch, and Birch Pastoral Pty Ltd, the trustee of the Birch Pastoral Trust which, whilst not having a proprietary interest in Fairyland, conducted the grazing business on that property. The claims against those other defendants were not pursued.

[5] After a four day trial, the trial judge dismissed the claim.[2] By this appeal, that judgment is challenged, but only in respect of the case of undue influence. By numerous grounds of appeal, it is contended that the trial judge erred in finding that Betty had received adequate and independent legal advice about the transaction, and that she had a proper understanding of the legal and financial consequences for her of the transaction.

[6] There was a counter-claim, which it would have been necessary for the trial judge to decide, had he upheld the claim against Doug. The counter-claim was based upon

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1 See *Smith v Glegg* [2005] 1 Qd R 561 at 570 [40]; [2004] QSC 443 at [40]; see also *Gillam v Gillam* [2017] FCCA 64 at [33]; *Birtwell v Sands* [2012] QSC 396 at [134]; *Pinter v Pinter* [2016] QSC 314 at [97]; *Borthistle v Kanaef* [2016] QSC 182 at [12]; *Kebbell v Reynolds* (2012) 10 ASTLR 287 at 290 [13]; [2012] QSC 88 at [13].

2 *Birch v Birch & Ors* [2018] QSC 289 ("the Primary Judgment").

an argument that Doug's parents, Betty and Jim Birch, made mutual wills intending, that on the death of the survivor of them, the whole of Fairyland would belong to him. On that basis, he sought equitable relief against the one-third share in Fairyland which, she claimed, should be restored to her. His Honour made findings which, had the claim against Doug succeeded, would have resulted in the counter-claim succeeding. In this Court, there is no challenge to his Honour's findings in that respect, but there is an issue between the parties as to what relief would be appropriate if the counter-claim has to be considered.

The background facts to the transaction

[7] Betty and Jim had six children, five sons born between 1952 and 1966, and a daughter born in 1969. At the time of the transaction, all six were alive, but the oldest, Colin Birch, is now deceased.

[8] Fairyland is a property of approximately 8,000 hectares, with two houses on it. After working there for years, Doug spent some time away before returning, in 1992, to live in the smaller house with his wife Juanita, and they stayed there until 2007.

[9] In January 2004, Jim and Betty made wills, under which, in each case, their one half interest in Fairyland was to be left to their spouse for a life interest, and upon the death of the spouse, to Doug on condition that he paid each of his siblings an amount of $15,000. At the same time, Betty and Jim wrote a letter, addressed to their children, in which they expressed their intention that the wills were to be construed together as one document.

[10] In September 2004, a property called "Rosevale" was purchased, for a price of $751,000. It was purchased by Doug and Juanita as to a 75 per cent interest, and Betty and Jim as to a 25 per cent interest. It appears that Betty and Jim contributed no more than 25 per cent of the price.[3] Both properties were worked by Doug and Juanita. In 2006, Betty and Jim transferred their interest in Rosevale to Doug and Juanita as a gift, and Doug and Juanita lived at Rosevale from October 2007.

[11] By a contract made in November 2007, Betty and Jim purchased a house in Eidsvold as their new residence, and moved there in 2008.

[12] In January 2008, the Birch Pastoral Trust was constituted. This was a discretionary trust of which Birch Pastoral Pty Ltd was the trustee. It became the owners of the livestock and the machinery which was used in the grazing business which it conducted on Fairyland and Rosevale.

[13] In February 2008, Betty and Jim transferred a one-third share in Fairyland to Doug, as a gift.

[14] In November 2008, Betty and Jim made new wills, by which they dealt with Fairyland in the same way as they had in their 2004 wills, with one exception. Upon the death of the survivor, Doug was to pay to each of his siblings not a stated dollar amount, but an amount calculated as 6.66 per cent of the then value of

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[3] Betty and Jim contributed 25 per cent of the value of the land, being 25 per cent of $671,000 or $167,750. Doug and Juanita contributed 75 per cent of the value of the land, being $503,250, plus $80,000 for equipment and similar property.

Fairyland. Consequently, Doug then would pay to his siblings, in aggregate, one-third of the then value of Fairyland.

[15] When they executed these wills, Betty and Jim signed a letter, to be read by their children after they had both died. They there wrote:

> "You will be reading this letter 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.
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> 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 the members of the family with cash, plus what they get from our other assets.
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> 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 by the improved valuation of the assets."

[16] In May 2009, Betty executed an enduring power of attorney, appointing Jim and Doug as her attorneys.

[17] In late 2009, Jim became hospitalised and remained there until he died in June 2011. The executors under Jim's will were Betty, and her brother-in-law, Bill Birch. Shortly after Jim's death, copies of his 2008 will, and the letter which I have just set out, were provided to Doug and his siblings.

[18] Doug testified that towards the end of July 2011, he went with his mother to the offices of JA Carroll & Son, who were the solicitors acting in the administration of Jim's estate. The principal of that firm was Mr Paul Laurentiussen, who had taken over the practice in 2009. Doug recalled meeting him on this visit to the firm's office, and, with his mother, hearing from him an explanation of the operation of Jim's will.

[19] Doug testified that he was then unhappy with the terms of his father's will, because it seemed to him that he had been left nothing under it. That was the case, in that his father's one-third interest in Fairyland was to pass to Doug only after his mother died, at which point he was to pay to his siblings an amount representing the value of that one-third share. Doug said that his mother was also upset, in that she was to receive only a life interest in that one third share, which, Mr Laurentiussen said, had a limited value. Doug said that it was at this meeting that the idea of a transfer of Betty's own one-third share to him was raised. He said that it was his mother who did so, asking Mr Laurentiussen whether she could do this, to which Mr Laurentiussen said: "you can do what you like". Doug's evidence was that when he and his mother left the solicitor's office, he said to her that she would need to get legal advice and that he should do so too.

[20] On 19 August 2011, Betty went back to JA Carroll & Son, in order to obtain that advice. Doug said he was not with her on this occasion, and Mr Laurentiussen said the same. She saw Mr Laurentiussen, and a law clerk, Mr Slade. The conference was recorded as lasting one and three quarter hours, but no file note of the conference was available by the time of the trial. The judge accepted the evidence of Mr Laurentiussen of the advice which he then gave.

[21] The only evidence as to what happened at this meeting came from Mr Laurentiussen. Before the meeting, he understood from Mr Slade that Betty was coming for advice about what to do with her share in Fairyland. He described her appearance on the day as "frail, small", and that she was moving "relatively slowly".[4] He said that Betty was still upset from the loss of her husband, but otherwise, she was "quite alert" and "quite receptive to what was being said and appeared to understand what was being said."[5] He recalled explaining to her that she had three options. One was to convert her and Doug's tenancies in common to a joint tenancy. The second option was to transfer her share to Doug. The third option was to leave things as they were.[6]

[22] Mr Laurentiussen said that Betty "wanted to ensure that Doug ended up with the one-third share of the property." When asked whether Betty said why she wanted to do that, he said that "[s]he had some concerns about other family members."[7] She said that other family members might be upset at her decision under her will, to leave her one-third to Doug.[8]

[23] As to the option of converting the tenancies in common to a joint tenancy, he advised Betty that "it would actually keep the property out of the estate."[9] As to the option of leaving things as they were, he said that he explained to her that the benefit was that there would be no legal fees, but that the detriment was that her one-third share of the property would form part of her estate and therefore susceptible to a contest after her death.[10] He said that he would have "discussed that by gifting it … now, that … again keeps it out of the estate".[11] He told her that, as long as she understood what she was doing, she was free to deal with her one-third share as she saw fit.[12]

[24] He said that one of the things which would have been discussed, this being his practice in like circumstances, was that he was not providing commercial advice to her, such as advice on taxation issues or Centrelink entitlements.[13]

[25] By the end of the meeting, Mr Laurentiussen said, he was satisfied that he had instructions from Betty to proceed with an *inter vivos* transfer.[14]

[26] Mr Laurentiussen said that he saw Betty again on 26 August 2011, when she came to the office for the execution of the transfer documents. He thought that Doug

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4 AR 1162-1163.
5 AR 1163.
6 AR 1164.
7 AR 1165.
8 Ibid.
9 AR 1166.
10 Ibid.
11 Ibid.
12 Ibid.
13 AR 1167.
14 AR 1168.

must have been with her on that occasion, because he witnessed Doug's signatures on some documents on that date. The transfer document itself shows Mr Laurentiussen's signature as the solicitor for the transferee. His evidence was that this did not indicate that his client was Doug, but that instead this was then a "standard practice" in "a small town".[15] Just why he would sign for the transferee, if the transferee was then at his office, was not explained, and his evidence on this point was probably incorrect. Doug gave evidence that he went to Mr Laurentiussen's office on that day, and signed some documents, but not when Betty was there.

[27] A curious fact is that Mr Laurentiussen's tax invoice for this transaction was addressed to Doug, not to Betty. Mr Laurentiussen said that this was "an old habit" from his predecessor's days in the practice, which was that when he did a "family transfer", he would send the bill to the transferee, irrespective of who was the client.[16]

[28] In cross-examination, he agreed that neither Betty nor Doug brought to his attention that there had been an earlier gift of one-third of the property to Doug.[17] He was challenged on his evidence that Doug was not the client, or a client, notwithstanding that it was to Doug that the invoice had been addressed. He continued to say that Doug had not been his client in this transaction.

[29] The trial judge found Mr Laurentiussen to be a careful, reliable and honest witness, saying that there was no reason to disbelieve him.[18]

[30] On 23 August 2011, Doug sought legal advice from the firm Payne Butler Lang about a possible transfer to him of his mother's interest. He said that it was only in the few days after then that he became aware that his mother had decided to transfer that interest, and he then went to JA Carroll & Son's office on 26 August 2011 to sign some documents for that purpose.

After the transfer

[31] The transfer was registered on 18 November 2011. From that point, Doug was the owner of two thirds of Fairyland, the remaining one-third being held by Betty as a life interest.

[32] There was evidence from Bill Birch, Betty's brother-in-law and her co-executor of Jim's estate. Betty did not tell him that she intended to transfer her own one-third interest to Doug, before she did so. She told him later in 2011, saying that she had gone to JA Carroll & Son, to whose offices she had been driven by a friend, and signed the necessary documents.

[33] In late 2012, Betty and Bill Birch went to a solicitor in Bundaberg, Mr Parker, where she made a new will. She gave her Eidsvold house to her daughter, her shares in Birch Pastoral Company to Doug and Juanita, and effectively the rest of her estate to her six children in equal shares.

[34] Shortly thereafter, Betty wrote a letter to her children which said:

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15 AR 1170.
16 AR 1172.
17 AR 1180.
18 Primary Judgment [52].

"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.

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"

[35] In 2013, Betty moved from Eidsvold to Toowoomba, where she lived with her son Colin before moving to an aged care facility in that city. Her son Geoffrey also lived in the Toowoomba area. In April 2013, advice was sought from Wonderley & Hall, solicitors in Toowoomba, for the benefit of Betty, in relation to the Birch Pastoral Trust and the transfer of assets. Wonderley & Hall wrote a letter to Betty, dated 24 April 2013, which was relevantly as follows:

"We refer to the above matter and our recent conversations with you.

…

We confirm your instructions that it was your understanding that the cattle that were owned by yourself and your late husband were transferred to the Trust not long after the Trust was established in January of 2008. Your understanding was that this was to seek to obtain some taxation benefits for yourself and your late husband.

We confirm our advices to you that now that those cattle are located within the Trust, that now you no longer have ownership of those cattle and you do not have control of the Trust.

> The reason you do not have control of the Trust is that the Trustee of the Trust namely Birch Pastoral Pty Ltd has as its Directors not only yourself but also Douglas and Juanita and therefore from a Directors meeting perspective, you have a one third vote.
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> Further, the shareholding is held two shares by you and one by each of Douglas and Juanita and therefore from a shareholders perspective, you have a 50% voting right.
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> Further, the Appointors of the Trust being those parties that are able to hire and fire the Trustee is once again Douglas and Juanita and yourself and therefore you again only have a one third vote with respect to such matters.
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> …
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> We also confirm our discussions with you that it does show on the Historical Title Search that at one point in time you did own a one third share of Fairyland and we also confirm your advices that you did transfer that one third share to Douglas.
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> It therefore appears from our discussions and from the paperwork that voluntarily you have divested yourself of all of your cattle and your interest in Fairyland and therefore you are now in the position as we have discussed where you have no assets or income yourself and are reliant upon Douglas for whatever funds that you do receive. …"

[36] On 6 May 2013, Betty revoked the enduring power of attorney which had appointed Doug and Jim as her attorneys. She then executed a new enduring power of attorney, appointing Colin and Geoffrey as her attorneys.

[37] The claim was commenced by Betty on 6 September 2013, originally naming Doug as the sole defendant. A year later, Juanita was joined as the second defendant, and Birch Pastoral Pty Ltd as trustee for Birch Pastoral Trust as the third defendant, and relief was sought against them in relation to the operation of, and distribution of funds from, the Trust.

[38] On 31 July 2015, a judge ordered that Betty have leave to proceed by a litigation guardian. On 4 October 2017, a judge sanctioned the settlement of that part of the claim which related to the Trust, leaving the proceeding, as it had begun, as a claim for relief of the transfer of her interest in Fairyland.

Other evidence

[39] I have referred to the evidence of Doug and Mr Laurentiussen. Understandably there was no testimony from Betty. Her version of events was contained in a statement taken by a solicitor at Wonderley & Hall, and dated 13 May 2013. Much of that statement was ruled inadmissible. It does not appear to have been prepared as a statement to be tendered as the evidence of Betty. In fact, as I have said earlier, she and Jim moved to live in Eidsvold in 2008.

[40] In her statement, she said that she did not know much about the Trust, because she was not told anything about it. She said that she received $2,000 per month as an income from the Trust.

[41] Betty there recalled going to see Mr Laurentiussen, but did not describe any advice given by him about the transfer of her interest in Fairyland. The statement then contained the following evidence:

> "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'.
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> 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.
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> 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 I had known he would not be able to raise the money anyway I would not have given it to him.
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> 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."

[42] The trial judge did not accept that evidence. In particular, he did not accept that Doug had her in tears on the way home, when saying that his father had not left him any money. His Honour said that this statement was inconsistent with her presentation to Mr Laurentiussen and inconsistent with the letter prepared by her, in consultation with Mr Parker, in November 2012.[19]

[43] Evidence by Geoffrey Birch and Stan Birch (another of Betty's sons), as to Betty's state of mind in August 2011, was rejected by the trial judge.[20] Geoffrey testified that at some point, his mother had said that there had been some influence or pressure placed upon him by Doug, but he could not recall exactly when. Stan said that, in July 2011, his mother told him that she was thinking about transferring her one-third interest to Doug, which he advised her not to do. His evidence was that Betty seemed to be under the impression that, mistakenly, she thought that she would then be able to get a pension. He said that he advised her to look after her own interest and that she might not receive a pension, having given away so much property. He said that Betty then told him that Doug was pressuring her to make this transfer, claiming that he had received nothing in his father's will, so that she should address the situation by giving her one-third interest to him. That evidence was not accepted by the trial judge.

[44] Evidence was given by Betty's daughter, Sherilyn Birch. Her evidence was that she was told about the transfer a few days after it was done. Betty told her that she had arranged for a Blue Care worker to take her to see the solicitor. She explained that she had made the transfer because it would make things easier for Doug down the track to finalise Jim's final wishes. Sherilyn was with her mother when Betty and

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19 Primary Judgment [108].

20 Ibid.

Bill Birch saw the solicitors in Bundaberg in 2012. She was not present during the meeting with that solicitor, but she was aware that there was a hand written document, most of which had been written by her mother, which was converted into the typed document which I have set out above at [41]. The hand written document was in evidence. The trial judge said the credit of Sherilyn Birch was not challenged seriously in cross-examination, and that he found her to be a credible witness.[21]

[45] The Bundaberg solicitor, Mr Parker, was not called. Geoffrey Birch, as Betty's litigation guardian, refused to waive her privilege in respect of her communications with Mr Parker.

[46] An accountant, Mr Mortimer, gave evidence of the market value ($202,500) which had been attributed to cattle transferred by Jim to the Trust. Counsel for Betty said that there was other evidence from which it could be found that the amounts referred to by Mr Mortimer did not represent the market value of the cattle. His Honour declined to make that finding.[22]

[47] A report, dated 27 January 2015, written by a psychiatrist as to Betty's incapacity at that time, was tendered. As the trial judge noted, the report did not address Betty's abilities in August 2011.[23]

The findings and reasoning of the trial judge

[48] The trial judge found that Betty was, in August 2011, capable, engaged in normal social activities and, although frail, in relatively good health.[24] He held that Betty's statement was not reliable enough for him to conclude that Doug had had her in tears on the way home from the solicitor's office.[25] His Honour concluded that Betty's statement did not support the conclusion that Doug had applied pressure to her.[26] In his Honour's view, both the evidence of Mr Laurentiussen and the letter prepared by Betty, in consultation with Mr Parker in late 2012, were inconsistent with Doug having applied pressure to her.[27]

[49] The trial judge said that it was relevant that Betty's income came not from ownership of a share in Fairyland, but from the Trust, which was something which "barring the events that have occurred, was likely to have continued into the future."[28] His Honour said that the fact that this income stopped being paid to her, from about August 2013, did not indicate her state of mind in August 2011, or the alleged improvidence of the transfer at that time.[29] His Honour concluded that Betty's "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."[30]

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21 Primary Judgment [66], where an identical finding was made about the credit of Bill Birch.
22 Primary Judgment [93].
23 Primary Judgment [94].
24 Primary Judgment [107].
25 Primary Judgment [108].
26 Ibid.
27 Ibid.
28 Primary Judgment [109].
29 Ibid.
30 Ibid.

[50] The trial judge said that he was 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."[31]

[51] His Honour did not accept that Doug told his mother that he would use the transfer of the land in order to raise money to pay out the other children. His Honour noted that Betty's statement said nothing of that, and that it was denied by Doug, whose evidence he accepted.[32] The trial judge found that Mr Laurentiussen gave independent advice to Betty, and that Doug sought his own separate advice from another solicitor.[33] He noted that the extensive meeting with Mr Laurentiussen occurred on 19 August 2011, when Doug was not present.[34] Further, his Honour found, Doug attended on him, on 26 August 2011, at a time when Betty was not also there.[35] His Honour accepted Mr Laurentiussen's evidence that Doug did not give him any instructions, except to allow him to witness the transfer documents on Doug's behalf.[36] He said that the fact that Mr Laurentiussen rendered an invoice to Doug was insignificant in the circumstances.[37]

[52] The trial judge then considered a submission for Betty, repeated in this Court, that Doug had failed to prove that his mother received appropriate financial advice about the consequences of the transaction if, as later happened, he and she fell out. His Honour noted that Mr Laurentiussen did not provide financial advice. The trial judge reasoned as follows:

> "[116] … 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?
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> [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.
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> [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

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31 Primary Judgment [110].
32 Ibid.
33 Primary Judgment [112].
34 Ibid.
35 Primary Judgment [113].
36 Ibid.
37 Primary Judgment [115].

> 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.
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> …
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> [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."
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> (Footnotes omitted.)

[53] The trial judge appeared to accept the following submissions, which he recorded as made on Doug's behalf:

> "[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. The trust also continued to make payments for the mortgage on Betty Birch's house at Eidsvold well after she stopped living there."
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> (Footnotes omitted.)

[54] His Honour found that Betty knew, at the time of the transfer, that the cattle on the properties had been transferred to the Trust. He accepted a submission for Doug that "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."[38]

[55] His Honour accepted a submission for Doug that "there was no basis to conclude on the evidence of the circumstances as they were up to the beginning of 2013 that the transfer would or would be likely to have any impact at all on the distributions that would be made from the trust."[39]

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38 Primary Judgment [120].

39 Primary Judgment [122].

[56] His Honour declined to draw an inference, adverse to either party, from the fact that she or he did not call Mr Slade, Mr Laurentiussen's conveyancing clerk. He rejected the submission for Betty that it should be inferred that Mr Slade's evidence would not have assisted Doug's case.[40]

[57] His Honour expressed his conclusion, on the case of undue influence, as follows:

> "[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. 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."
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> (Footnote omitted.)

[58] It is unnecessary to discuss his Honour's reasons for rejecting the alternative claims made against Doug, because they are not pursued in this Court. But it is relevant to say something of his reasoning on the counter-claim. The principal question on the counter-claim was whether there were mutual wills, in the sense that Betty and Jim agreed that they would make wills in particular terms and those wills would be irrevocable and would remain unaltered.[41] His Honour found that there was such an agreement between Betty and Jim. There is no challenge to that factual finding and it has a significance not only for the counter-claim (were the appeal is to be allowed), but also as a relevant circumstance in the consideration of the undue influence claim.

The grounds of appeal

[59] The first ground contends that the primary judge erred in finding that Mr Laurentiussen had provided proper and independent legal advice of a kind intending to rebut the

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40 Primary Judgment [125].

41 His Honour set out the characteristics of a mutual will according to *Hussey v Bauer* [2011] QCA 91 at [29].

presumption of undue influence. Under this ground, it is argued that the advice was "seriously deficient", it did not meet the requirements for such an advice according to the authorities, in particular *Powell v Powell*[42] and *Michaletos v Stivactas*,[43] it was given without an understanding of material facts and, more generally, it was not of a kind "as would emancipate [Betty] from the presumed influence of [Doug]".

[60] The argument refers to the statement by Dixon J in *Johnson v Buttress*,[44] that the onus lies on the party in the position of influence to prove that:

> "[H]e took no advantage of the donor, but that the gift was the independent and well-understood act of a man in a position to exercise a free judgment based on information as full as that of the donee."

Dixon J there continued:[45]

> "This burden is imposed upon one of the parties to certain well-known relations as soon as it appears that the relation existed and that he has obtained a substantial benefit from the other. A solicitor must thus justify the receipt of such a benefit from his client, a physician from his patient, a parent from his child, a guardian from his ward, and a man from the woman he has engaged to marry. The facts which must be proved in order to satisfy the court that the donor was freed from influence are, perhaps, not always the same in these different relationships, for the influence which grows out of them varies in kind and degree. But while in these and perhaps one or two other relationships their very nature imports influence, the doctrine which throws upon the recipient the burden of justifying the transaction is confined to no fixed category. It rests upon a principle. It applies whenever one party occupies or assumes towards another a position naturally involving an ascendancy or influence over that other, or a dependence or trust on his part. 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 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."

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42 [1900] 1 Ch 243 ("*Powell*").
43 [1992] ANZ ConvR 90 ("*Stivactas*").
44 (1936) 56 CLR 113 at 134; [1936] HCA 41.
45 At 134-135.

[61] The argument concedes that independent legal advice is not required in all cases,[46] but contends that its absence is a relevant fact and is frequently "a very potent fact".[47]

[62] The requirements for independent advice, in this context, are said to be found in passages from *Powell* and *Stivactas*. In the former case, Farwell J said:[48]

> "[The duty of a solicitor] is to protect the donor against himself, and not merely against the personal influence of the donee, in the particular transaction … the solicitor does not discharge his duty by satisfying himself simply that the donor understands and wishes to carry out the particular transaction. He must also satisfy himself that the gift is one that it is right and proper for the donor to make under all the circumstances; and if he is not so satisfied, his duty is to advise his client not to go on with the transaction, and to refuse to act further for him if he persists."

In the latter case, Waddell CJ In Equity said:[49]

> "A person in the plaintiff's position at that time should have been asked what was the extent of her property and the question of her future care and maintenance should have been discussed and the adviser should have pointed out to her the possible disadvantages of divesting herself of her major assets and relying completely on the defendant."

[63] It is argued that Mr Laurentiussen did not consider the matters which are referred to in that passage from *Stivactas*. It is said that he was ignorant of, and made no attempt to investigate, several material matters, including her family history, Jim's intentions for Fairyland and Doug's existing ownership of an interest in the property. He was unaware of the transfer of a one-third interest in Fairyland, some years earlier, or the gift of an interest in Rosevale. He was unaware of Betty's financial position at that time and whether this could have been affected by the proposed transfer.

[64] By the second ground of appeal, it is contended that the primary judge was wrong to find that Mr Laurentiussen was "independent of" Doug. It is submitted that his advice was not "free from any taint of the relationship": *In Re Coomber* [1911] 1 Ch 723 at 730. When Doug attended the meeting in July 2011, it was Jim's estate which was discussed, a matter in which Betty was not the only person interested in the advice. Further, Mr Laurentiussen signed the transfer, on its face, as the solicitor for Doug. It is argued, correctly, that Mr Laurentiussen conceded in cross-examination that he had made declarations in the transfer from information supplied by Doug and that he had Doug's authority to sign the transfer on his behalf. From these facts, it is submitted that Mr Laurentiussen was the "agent" of Doug, thereby owing him fiduciary duties, just as he owed Betty, and that there was a conflict between those duties. His lack of independence is said to have been evidenced also by his

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46 *Johnson v Buttress* (1936) 56 CLR 113 at 119 per Latham CJ.

47 Citing *Whereat v Duff* [1972] 2 NSWLR 147 at 169.

48 [1900] 1 Ch 243 at 247.

49 [1992] ANZ ConvR 90 at 95. This quote is incorrectly attributed in the appellant's submissions to Sheller JA, who in deciding an appeal from that matter quoted this passage: see *Stivactas v Michaletos (No 2)* (1993) NSW Conv 55-683.

sending the tax invoice for the work on the transfer to Doug. It is submitted that the judge should not have been satisfied with Mr Laurentiussen's explanation that this was a "standard practice".

[65] By ground 3, it is argued that the trial judge erred in finding that Betty had been properly advised and fully understood the consequences of her gift, when Betty had not received any financial advice. It is submitted that, absent any financial advice, his Honour could not have been satisfied that Betty fully understood the consequences of her gift, and that the presumption was rebutted.

[66] Ground 4 must be understood with the submission for Betty as to what advice she ought to have received. Advice might have been given that, if she was 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 to charging an agistment fee in respect of the use by the Trust of the land. His Honour raised that question, but found it unnecessary to answer it. It was submitted for Betty at the trial that (as other examples) she should have been advised, to enter into a lease in respect of her interests in Fairyland, or a reverse mortgage to provide an income stream.

[67] His Honour accepted the submissions for Doug that, given Betty's relationship with Doug at the time and the consistency of the distributions that had been made to her from the Trust since 2008, it was probable that she would not have acted on such advice. His Honour considered that this was confirmed by Mr Laurentiussen's observation that, when he saw her, her mind was made up.[50] By ground 4, it is contended that this reasoning was erroneous.

[68] That argument accepts that his Honour's finding, as to what Betty would have done if in receipt of such advice, was correct. But it is submitted that this was a significant indication of the effect of Doug's influence, so that rather than displacing the presumption, it confirmed it. The argument refers to the statement by Farwell J in *Powell* as follows:[51]

> "Further, it is not sufficient that the donor should have an independent adviser unless he acts on his advice. If this was not so, the same influence that produced the desire to make the settlement would produce the disregard of the advice to refrain from executing it, and so defeat the rule; but the stronger the influence the greater the need of protection."

[69] By ground 5, it is contended that the trial judge erred in finding that the solicitor, Mr Parker, had provided legal advice of a kind intending to rebut the presumption of undue influence. In paragraph [124] of the Primary Judgment, which I have set out above, his Honour expressed his reliance on the evidence that, after initial criticism from her other sons, Betty sought to have Mr Parker prepare a fresh will, consistent with the view that she had already made an effective gift of her interest in Fairyland to Doug, and she prepared a letter to be sent to her children providing the reasons why she had done so. There are several reasons, it is said, why his Honour was wrong to rely upon those facts. The first is that the interaction with Mr Parker occurred more than a year after the transfer occurred, so that it did not evidence the

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50 Primary Judgment [118].

51 [1900] 1 Ch 243 at 246.

absence of Doug's influence at the relevant time. The second is that there was no evidence that Mr Parker had given evidence of the kind which, in the submissions for Betty, should have been given. (Which is said to be unsurprising, as the transaction had already occurred.) The third is that there was no financial advice given to Betty even at that time. The fourth is that these facts are said to be simply evidence of Doug's ongoing influence. The fifth is that Betty's justification for the transaction, contained in her letter, is said to be counterintuitive, in that she justified her *inter vivos* transfer to Doug as necessary to enable Doug to purchase the interest under Jim's estate, when the other children had no entitlement to those monies until after her death. The sixth reason is said to be that the trial judge ought to have found that Betty was emancipated from Doug's influence, only after receiving independent advice from Wonderley & Hall in April 2013.

[70] By ground 6 of the appeal, it is contended that his Honour erred in finding that Betty understood, at the time of the transfer, that she had lost ownership of the cattle transferred to the Trust, when his Honour ought to have found that she did not fully understand the consequences of that transfer until receiving legal advice in 2013.[52] It is submitted that it was only on receipt of that advice that she discovered the true position with the cattle. That is said to be evidenced by the letter from Wonderley & Hall dated 24 April 2013. Reference is also made to her 2008 will, which included the cattle as part of her property, in revealing her misunderstanding.

[71] Ground 7 is that the trial judge ought to have found that Betty's transfer was "improvident". This was because, it is contended, her share of Fairyland was the only significant asset in her name; the house in Eidsvold had a "very modest equity". It is said that as a result of the transfer, Betty became dependent upon the goodwill of Doug and Juanita in making distributions from the Trust. This dependency was demonstrated when payments from the Trust were discontinued in 2013. (They were discontinued when she commenced this litigation.) Her poverty is contrasted with what is said to be the wealth of Doug and Juanita.

[72] Ground 8 is expressed, not as a distinct ground, but as a contention that for the reasons advanced within the other grounds of appeal, his Honour erred in concluding that the presumption of undue influence had been rebutted. But in the appellant's submissions, some other points were advanced by reference to this ground. It is said that there were other matters of concern which tended against the rebuttal of the presumption, one of which was that Betty had offered different and inconsistent reasons for giving away her interest in Fairyland. She had told Mr Laurentiussen that she was concerned about other family members being upset at her decision to leave her one-third interest to Doug. It is said that this explanation was inconsistent with other explanations, such as that Jim's will was unfair, or that she was assisting Doug to pay out the other children. Further, it is submitted that Betty's secrecy, in keeping from the children both the first and second transfers to Doug, was suggestive of Doug's undue influence.[53]

[73] The remaining ground of appeal concerns the counter-claim. Of course, no order was made on the counter-claim, but it is said that whilst the judge was not incorrect in finding that there were mutual wills, Betty's obligation was a "floating obligation" which would take effect only upon her death, a matter which is relevant

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52 The notice of appeal refers to legal advice from Wonderley & Hall in April 2014, but this appears to be an intended reference to the advice given in April 2013.

53 Citing *Stivactas v Michaletos (No 2)* (1993) NSW Conv 55-683 at 59-903.

to the relief which would be granted to Doug. As to the terms of that relief, with the agreement of the Court, the parties provided further submissions. Counsel for Betty provided a draft order with his submissions, which would provide for, amongst other things, a declaration that Betty be permitted to sell her interest in Fairyland (the interest which should be restored to her according to the claim), on condition that Doug be given a first right of refusal, the proceeds obtained from such a sale be held on trust to be used for her care and welfare and the discharge of her properly incurred debts, that she be otherwise restrained from giving away any part of those proceeds and that on her death, the balance of such proceeds be distributed as to one half to Doug, and as to the other half to her other children (in equal shares).[54]

Consideration of the appellant's arguments

[74] By s 87 of the *Powers of Attorney Act* 1998, there is a rebuttable presumption of undue influence in a transaction between a principal and an attorney under an enduring power of attorney. It is presumed that the principal entered into the transaction, under the influence of the attorney, in that it is presumed that, to adopt the words of Dixon J in *Johnson v Buttress*, there is a position "involving an ascendancy or influence over that other, or a dependence or trust on his part."[55]

[75] Consequently, there is a presumed inequality between the parties, from which there is a presumed influence of one party over the other in a transaction between them. But the operation of this rule must have regard to the particular nature of that relationship between the parties, in assessing what is required to rebut the presumption. In *Johnson v Buttress*, Dixon J said:[56]

> "This burden is imposed upon one of the parties to certain well-known relations as soon it appears that the relation existed and that he has obtained a substantial benefit from the other. A solicitor must thus justify the receipt of such a benefit from his client, a physician from his patient, a parent from his child, a guardian from his ward, and a man from the woman he has engaged to marry. *The facts which must be proved in order to satisfy the court that the donor was freed from influence are, perhaps, not always the same in these different relationships, for the influence which grows out of them varies in kind and degree.*"
>
> (Emphasis added.)

[76] In the present case, there is a presumption of an influence. But Betty was of full capacity at the time of the transfer, and the degree of his influence, which s 87 requires to be presumed, could not have been high. Further, there was nothing about this transaction of which Doug had a knowledge which was not shared with Betty. She was just as able to decide whether it was in her interests to transfer this interest. The presumption had to be rebutted, but the burden of proof in this case was not as heavy as in many others, and care must be taken in the application of statements, in other cases, about different types of relationships of presumed influence.

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54 The proposed order would also provide that Doug pay to his siblings, for Jim's one-third share in Fairyland, a total of one-sixth, rather than one-third, of the value of Fairyland.

55 (1936) 56 CLR 113 at 135; [1936] HCA 41 cited above at [60].

56 (1936) 56 CLR 113 at 134; [1936] HCA 41.

[77] Further, although there was the relationship of principal and attorney, it is necessary to consider that there was another relationship between the parties, namely that of mother and son, in which a gift could be explained by motives of gratitude and affection. In *Yerkey v Jones*,[57] Dixon J observed, about the types of relationships to which the presumption of undue influence applies:

> "But in the relations comprised within the category to which the presumption of undue influence applies, there is another element besides the mere existence of an opportunity or obtaining ascendancy or confidence and of abusing it. It will be found that in none of those relations is it natural to expect the one party to give property to the other. That is to say, the character of the relation itself is never enough to explain the transaction and to account for it without suspicion of confidence abused."

The relationship of mother and son does not displace, as a matter of law, the presumption imposed by s 87. But it can be relevant, and in some cases critical, to a question of whether the presumption is rebutted in a particular case. In the present case, that relationship is of central importance.

[78] It is convenient to discuss first the submission that this was an improvident transaction for Betty. Betty's income, for the most part at least, came from distributions from the Trust. At least once Jim had died, the exercise of the trustee's discretion, as to the distribution of Trust income, was likely to have been controlled by Doug and Juanita. That did not mean, necessarily, that Betty's position was particularly precarious, because Betty and Doug appear to have had a close and harmonious relationship over many years. There was here no reason for Betty to think that Doug would not do the right thing by her, in the distribution of Trust income or otherwise. And she continued to receive that income, as I have noted, until she sued Doug. Whether Doug's reaction then was appropriate need not be considered. What presently matters is that, as at August 2011, she had every reason to anticipate that her income from the Trust would continue.

[79] It is not unlikely that Betty had an imperfect understanding of a discretionary trust, and, more particularly, what that meant for the ownership of and enjoyment of the income from the livestock. She may not have understood that the livestock was the property of the trustee. But that legal position is unlikely to have been a matter of concern to her. What she did understand was that the grazing business was usually profitable, and that she was receiving regular monthly payments from it.

[80] The one-third share of Fairyland was then her principal asset. On any view of the evidence, it was worth far more than her equity in the Eidsvold house. Betty had no proprietary interest in the livestock. When her financial position is stated in such simple terms, this might be considered to have been an improvident transaction.

[81] However, there were other considerations. Most importantly, for some years (at least from when the 2004 wills were made), Betty and Jim had been intent on Doug inheriting their shares in Fairyland. According to the now unchallenged findings by the trial judge, Betty and Jim agreed that their wills would be irrevocable and would remain unaltered. Consequently, Betty was subject to equitable obligations in respect of her one-third share in Fairyland. She was obliged not to do anything which would affect the full value of that interest in Fairyland passing to Doug under

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57 (1939) 63 CLR 649 at 675; [1939] HCA 3.

her will. A reverse mortgage of that interest, if it could have been procured, would have breached that obligation. More generally, consistently with her agreement with Jim, she was not free to sell or otherwise dispose of that interest. Her one-third share, whilst being valuable as measured by one-third of the value of Fairyland, was not as valuable as it would have been if held by a party free from the obligations which were upon her as a result of the mutual wills. Betty would not have understood the operation of equitable principles upon her circumstances, but more generally, she must have felt an obligation to give effect to the intention which she and Jim had held for many years, which was that Doug would be the owner of Fairyland when they had died. In short, she would not have regarded this as her asset to deal with, as she pleased. When that is considered, this was far from a transaction which was clearly improvident.

[82] It is submitted that the transaction deprived Betty of a means of obtaining an income by, in effect, requiring some *quid pro quo* for the use of land in which she was a part owner. The argument is that it would have provided her with a more assured source of income, than by a discretionary distribution by the trustee. This argument cannot be accepted. There was no realistic possibility that Doug, already the owner of one-third of Fairyland, would have agreed to it. Absent Doug's agreement, Betty had no effective means of preventing the trustee company from using Fairyland for its grazing business, but without paying an agistment fee. And it is unrealistic to suppose that, without the consent and ongoing cooperation of Doug and Juanita, Betty could have arranged for cattle belonging to a third party to agist on Fairyland.

[83] As will appear from the above, most of the grounds of appeal challenge the trial judge's conclusion that Betty received appropriate legal advice. In my view, the advice which Betty did receive is not critical to the outcome in this case. This is because, if the presumption is not otherwise rebutted, the advice which Betty did receive would have been insufficient to make a difference. The main reason for this is that, as Mr Laurentiussen made clear to Betty, he was not her financial adviser and there could have been other considerations which were relevant to her decision. Nevertheless, the fact that Betty received the advice which was given by Mr Laurentiussen is relevant, in demonstrating that she had professional advice which provided her with a good reason for giving this property to Doug then, rather than under her will.

[84] However I do not accept all of the criticisms which are made of Mr Laurentiussen's advice. Mr Laurentiussen did not misstate the legal options which were open to Betty, or the possible legal consequences of them. The circumstances, which did exist and which would have been apparent to Mr Laurentiussen, were that Betty was of full capacity and had long intended that Doug should become the sole owner of Fairyland. There was an extensive consultation during which Betty, but also Doug, received his advice. As things would have appeared to Mr Laurentiussen, Betty was able to make her own decision about whether this transaction might affect her interests, although she may not have received from him all of the advice which would be relevant to that decision.

[85] Like the trial judge, I would accept that Mr Laurentiussen was an independent legal advisor. After he had advised Betty, and she had instructed him to effect the transfer, he did provide some service to Doug in effecting the transaction. But the advice which he gave to Betty, during the lengthy conference on 19 August 2011, was independent advice.

[86] By ground 4, it is contended that his Honour erred in reasoning that the presumption was displaced by the fact that, his Honour found, the advice which it is said that Betty should have received would not have persuaded her to act otherwise. It is submitted that this was a significant indication of the effect of Doug's influence, so that rather than displacing the presumption, it confirmed it. That submission cannot be accepted. The finding that Betty would have proceeded, notwithstanding the receipt of such advice, recognises that there were other circumstances which were influential, most importantly Betty's affection as a mother towards Doug and her gratitude for Doug's contributions over many years to the development and operation of the property.

[87] Unlike the trial judge, I would not see the fact of the advice given by Mr Parker to Betty, in 2012, as significant in the way in which independent advice at the time of the transaction would have been. What can be said, however, is that her instructions to Mr Parker show that this was not a transaction of which Betty repented until 2013. The appellant's argument then has to confront the trial judge's finding that in 2013, Betty came under the influence of some of Doug's siblings who, it fairly appears from the judgment, were not regarded by his Honour as independent advisers.

[88] In my conclusion, the trial judge was correct to find that the presumption of undue influence was rebutted. On the evidence which the trial judge accepted, it was demonstrated that Betty decided to make this gift, uninfluenced by her relationship with Doug as principal and attorney. She made this decision because she wished to avoid the risk that, if her interest was to pass to Doug under her will, that could be challenged by the actions of some of her other children. If she had a concern about Doug being able to borrow enough money to pay out his siblings, for what had been his father's one-third interest, that was a proper and rational concern. If there had been some challenge to the distribution of her estate, according to her will, that would have had a potential relevance for Doug's prospects of borrowing something of the order of $1 million to pay for what had been his father's share. For many years, she and Jim had meant to leave the whole of Fairyland to Doug, and they had made mutual wills to that effect. As I have discussed, this was not an improvident transaction when all the circumstances are considered.

Order

[89] I would order that the appeal be dismissed with costs.

[90] **BRADLEY J:** I agree with McMurdo JA.