SUPREME COURT OF QUEENSLAND

CITATION:	*Smith v Glegg* [2004] QSC 443
PARTIES:	**DAPHNE EVELEEN SMITH** (plaintiff) v **MARLENE DAPHNE GLEGG** (defendant)
FILE NO/S:	S7134 of 2003
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 December 2004
DELIVERED AT:	Brisbane
HEARING DATE:	9, 10, 11, 12 November 2004
JUDGE:	McMurdo J
ORDER:	**1. Judgment for the plaintiff against the defendant in the sum of $234,718.77** **2. It be declared that the defendant's interest in 25 Pacific Drive, Banksia Beach, is charged with the payment of $119,529.77 of that sum**
CATCHWORDS:	EQUITY – UNDUE INFLUENCE AND DURESS – PRESUMPTION FROM RELATIONSHIP OF PARTIES – IN GENERAL – where at the relevant time plaintiff was an 85 year old widow – where defendant is her eldest daughter – where plaintiff was estranged from her two younger daughters – where plaintiff transferred her only substantial asset to the defendant's son for no consideration – whether transfer was the result of defendant's undue influence or breach of fiduciary duty – whether equitable compensation is an appropriate remedy EQUITY – REMEDIES AND PROCEDURE – GENERALLY – where defendant sold plaintiff's property – where defendant used part of proceeds of sale to purchase a second property – where second property later sold – where defendant used part of proceeds from that sale to purchase a third property – where funds traced – whether equitable charge on third property *First Home Owner Grant Act* 2000 (Qld), s 15, s 20

Powers of Attorney Act 1998 (Qld), s 66, s 87

Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447, cited
Johnson v Buttress (1936) 56 CLR 113, applied
Scott v Scott (1963) 109 CLR 649, applied
Symons v Williams (1875) 1 VLR (E) 199, cited
Warman International Ltd v Dwyer (1995) 182 CLR 544, applied

COUNSEL: A J Greinke for the plaintiff
P J O'Neill for the defendant

SOLICITORS: Walker Smith & Breen for the plaintiff
Files Stibbe & Associates for the defendant

[1] **McMURDO J:** The plaintiff is a widow who was born on 16 November 1914. The defendant is her eldest daughter. The principal issues in this case are whether the conveyance of the plaintiff's house to the ultimate benefit of the defendant was the result of the defendant's undue influence or breach of fiduciary duty.

[2] In September 2000, the plaintiff and the defendant went to a solicitor's office where the plaintiff, who was by then legally blind, executed a transfer of her house in favour of the defendant's adult son. No consideration was given for the transfer. A year later, the defendant, acting as her son's attorney, sold the house and applied its proceeds to her benefit. The plaintiff seeks compensation, both in equity and under the *Powers of Attorney Act* 1998 (Qld), and equitable relief by way of a constructive trust or a charge against another real property said to have been acquired in part with the proceeds of sale of the plaintiff's house.

The plaintiff and her family

[3] The plaintiff was married in 1941 and widowed in 1988. She has three daughters, the second daughter being Mrs Chase and the youngest being Mrs Krome. For many years before the transaction in question, the plaintiff had been at odds with the defendant, but on good terms with her other daughters. Dr Carter, a psychiatrist who assessed the plaintiff in February this year, described the plaintiff as a normal person without any psychiatric disability or severe personality disorder, but with characteristics within her personality of "manipulativeness and using power and, at times, playing one child off against the other, and using threats in relationship to wills". There is abundant evidence to support that description, including from Mrs Krome who was called in the plaintiff's case as well as from several witnesses called in the defendant's case. As at May 1997, the plaintiff was on close terms with Mrs Krome, who lived nearby and who visited her at least once a week. She then granted an enduring power of attorney to Mrs Krome. I find that the plaintiff initiated this, having heard from other people of her age of the benefits of doing so. Although she was then in her eighty-third year, she was still driving and going on outings for shopping and social events.

[4] But in about 1998, the defendant came into favour when, it appears, her sisters fell out with their mother. At some time, probably in 1998, the plaintiff and Mrs Chase became estranged over some issue concerning a washing machine. According to Mrs Krome's evidence, she and her mother fell out in about the middle of 1999 because the plaintiff resented the attention Mrs Krome was giving to her own daughter. In January of 1999, the plaintiff granted a new enduring power of attorney, this time in favour of the defendant. This was prepared and executed with the assistance of Mr Stanton of Smith and Stanton, solicitors, who was called in the defendant's case. According to his evidence, which I accept, it was granted voluntarily and in circumstances which would not suggest any invalidity of the instrument. In the plaintiff's affidavit, she complained of a certain clause which was obviously intended to provide a general authority to enter into a "conflict transaction" as that term is used in s 73 of the *Powers of Attorney Act*. The plaintiff's counsel rightly conceded that no inference could be drawn from the inclusion of this clause which was one routinely included by Smith and Stanton, and which they had also included in the power of attorney granted to Mrs Krome. That clause is relevant to the content of the defendant's fiduciary duty and is considered below.

[5] In July 1999, the plaintiff and the defendant again went to Smith and Stanton, when the plaintiff made a new will by which she would leave her house, which was her only substantial asset, to the defendant alone. For many years the plaintiff had kept a daily diary, and her entry for that day (6 July), records that "Marlene (the defendant) came with me to bank and solicitors and I altered my will". The defendant called Ms Barnes, the solicitor from Smith and Stanton who prepared the will and witnessed its execution. According to her evidence, which I accept, the plaintiff demonstrated a testamentary capacity and was adamant that her other daughters should not share in the house. Ms Barnes made a diary note of this attendance which included the following:

> "I questioned Mrs Smith as to why she was leaving her estate in such a fashion. I pointed out to her that the 2 daughters Helen and Frances could very well consider questioning the Will if it was proven that the Will failed to make adequate provision for them. She was distressed that they might have such an action or that they would bring such an action. She said she excluded the daughters to the extent that she did because they had caused her significant grief and sorrow. They had virtually cut her out of their lives and treated her as if she didn't exist. She found this very difficult to cope with, she has had difficulty sleeping as well as eating as a result of this trauma.
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> The daughter Helen has not had anything to do with Mrs Smith for approximately 12 months. She has ignored her. As to Frances, she has had nothing to do with her since approximately October last year. She believes Frances fell out with her because she spoke out against her granddaughter Sandra. However, she failed to understand why these daughters have disowned her as they have. With Frances, she said that she has never been able to get on with her husband and she feels he might have some say in the way she has been excluded."

And she had this clause inserted in the will:

> "I have purposely failed to provide further for my daughters Helen Camilla Chase and Frances Marion Krome because of the grief and suffering they have caused me by the way in which they have treated me throughout the latter period of my life."

[6] At least by the middle of 1999 then, the plaintiff had become completely estranged from her second and third daughters and she had become close to the defendant. By this time also, the plaintiff's eyesight was deteriorating and she was requiring more domestic assistance, some of which was being provided regularly by the defendant although she lived at Bribie Island and the plaintiff lived at Aspley. The plaintiff's animosity towards her other daughters was apparently matched by her praise for the defendant, whom she would describe as her "only" daughter. According to her general practitioner, by the time of the subject transaction in September 2000 she was legally blind. She was unable to read and could sign her name only with her hand being directed to the relevant point on the page. It is admitted on the pleadings that by this time she suffered from depression and placed her trust and confidence in the defendant.

[7] Further, I find by September 2000 the plaintiff had become wholly reliant on the defendant for domestic assistance, company, transport to shops and medical appointments, and the management of her financial and personal affairs. She had no regular contact with any other relatives and apparently no friends.

The transaction in question

[8] On 7 September 2000, the defendant and her husband, Alan Glegg, drove the plaintiff to the offices of Smith and Stanton, where the plaintiff and the defendant saw Ms Susan Taylor. She was a law clerk and a recent law graduate. She had worked for many years in solicitors' offices as a legal secretary. She no longer works at Smith and Stanton or in the legal profession.

[9] The defendant says that it was the plaintiff who made the appointment for this visit. Her evidence and that of Mr Glegg is that the plaintiff had left a message on their answering machine as to the appointed day and time. I do not accept that evidence. For several reasons it is unlikely that it was the plaintiff who arranged this meeting. One is that by this time the plaintiff was unable to read, and there is nothing to indicate that she had the solicitors' telephone number in her memory. Another is that for this transaction, the solicitors believed that they had been engaged not by the plaintiff, but by the defendant's son, Matthew Stone, to whom the house was transferred. Mr Stone was not at this meeting and had no contact with the solicitors. The solicitors believed that he was giving instructions through his mother, the defendant. It is unlikely that they had this understanding if it was the plaintiff who had arranged this meeting, especially as the plaintiff had been their client on previous matters.

[10] At the meeting, the plaintiff signed three documents, each of which was prepared by Ms Taylor and none of which, of course, the plaintiff was able to read. One was a Deed of Gift, in which the plaintiff was named as the "grantor" and Matthew Stone was named as the "donee". It recited that the grantor intended to convey her house to him by way of gift, and it then provided as follows:

> "In consideration of her natural love and affection for the donee, the grantor conveys to the donee absolutely the grantor's right, title and interest in all that freehold property described in the Schedule to this Deed to hold the same unto and to the use of the donee in fee simple."

[11] The second document was in the standard form of contract for the sale of the house. The plaintiff was the seller and Mr Stone was the buyer. Against "seller's solicitor" was typed "self", but against "buyer's solicitor" was typed "Smith and Stanton". Ms Taylor, who was called in the defendant's case, said that this correctly represented the solicitor's retainer as she understood it. It is consistent with the fact that the solicitors addressed their bill for this transaction to Mr Stone, and not to the plaintiff or to the defendant. This contract document specified a purchase price of $150,000. Against "builder's inspection date" the words "7 days from the date hereof" were inserted, and against "settlement date" was inserted 28 September 2000. The contract was dated 8 September 2000, being the day after this meeting.

[12] The third document was a registrable transfer of the house to Mr Stone. The consideration was stated to be "monetary" and in the amount of $150,000. By the terms of the transfer, the plaintiff as transferor declared the correctness of certain information on the attached form, which was relevant to stamp duty and other matters. Included in that information was that there had been a written agreement made between the parties, and that it was dated 8 September (although the plaintiff executed this transfer on 7 September). And under "details of sale price" the amount of $150,000 was inserted against the word "cash".

[13] The contract and transfer were irreconcilable with the Deed of Gift. As I will discuss, no one intended or believed that the house would be sold by the plaintiff, or that any consideration would be given for the transfer. The contract and transfer were stamped, but the Deed of Gift was not. The transfer was promptly registered. The house had been the plaintiff's only substantial asset.

The defendant sells the house

[14] The defendant had been appointed an attorney for Mr Stone under a Power of Attorney made in June 2000, about three months prior to the transaction in question. Twelve months after that transaction, the defendant, acting purportedly as her son's attorney, sold the house to an arms-length purchaser for $180,000. The house had been vacant for most of that year. After a few short periods of temporary residence at a retirement home on Bribie Island, the plaintiff took up permanent residence there in March 2001. The defendant applied the entire proceeds of the sale to her own benefit. Mr Stone never lived in this house or received anything from it. For

most of the year in which he was its registered owner, he lived overseas. Nor has he ever made any claim to the house or its proceeds of sale.

The dispute arises

[15] For another year or so after this sale, the defendant continued to manage the plaintiff's affairs. The plaintiff's income was a pension, which was applied mostly in payment of rental to the retirement home, with the remainder given to the plaintiff for small expenditures. Then on 16 November 2002, the plaintiff's 88th birthday, she received some flowers from Mrs Krome. That led quickly to a reconciliation with Mrs Chase and Mrs Krome, and a corresponding falling out with the defendant. Solicitors instructed on the plaintiff's behalf demanded that the defendant hand over the plaintiff's bank passbook. The defendant's authority as the plaintiff's attorney was revoked. The plaintiff made a new will. And after some further time, she commenced these proceedings.

The relevant transaction – what was intended?

[16] The plaintiff, the defendant and Ms Taylor each has a different version of what was the intended effect of the transaction. There is no version from Mr Stone.

[17] The plaintiff's version is that she thought she was transferring the house, not to Mr Stone, but to the defendant. She understood that there was no consideration. The idea was to have it appear that she had no property when she was to take up permanent residence in the retirement home. She says that the defendant made her understand that if the plaintiff still owned her house, she would have to pay a large bond to the home, whereas if apparently without property, she would pay only a rental funded from her pension. And she says that the defendant assured her that after she had settled into the retirement home, the house would be re-transferred to her, or it would be sold and she would have its proceeds. All of this was discussed before the visit to the solicitors when she signed the documents.

[18] The defendant's version is that the plaintiff wished to unconditionally give the house to her, and had for some time been insisting that she accept the gift. The plaintiff had been saying that she was concerned that her other daughters would challenge her will, and that she thought it better to transfer the house during her life time. As to why it was being transferred to Mr Stone, the defendant says that, as she had explained to the plaintiff, the defendant thought that her marriage could end shortly, and the defendant was concerned that she would have to bring the house into account in any property dispute in the Family Court. The defendant wanted to have it appear that she was not the owner, and so her idea was to have Mr Stone hold it on her behalf, to which the plaintiff readily agreed.

[19] Ms Taylor said that she thought that this was an unconditional gift, but to Mr Stone and not to the defendant. She says that had she been instructed that Mr Stone was to be a trustee for the defendant, she would have advised that the trust be appropriately recorded. She believed that the client was Mr Stone and accordingly the solicitors'

bill was addressed to him. (As it happened, the defendant caused it to be paid with the plaintiff's money). Her evidence is that she believed that the contract was a necessary document, but "for stamping purposes". There is a more likely explanation for the contract which is that it was to be used to obtain a first home owner's grant.

The first home owner's grant

[20] Only a few months prior to this transaction, the *First Home Owner Grant Act* 2000 (Qld) came into force.[1] The eligibility criteria for a grant included a residence requirement (s 15). An applicant was required to occupy the home as the applicant's principal place of residence for a continuous period of at least six months, starting within one year of the completion of the applicant's purchase. The amount of a grant was to be the amount of the consideration for the purchase or $7,000, whichever was the lesser (s 20).

[21] Smith and Stanton prepared and lodged an application in the name of Mr Stone for a grant in relation to his acquisition of this house. The application was successful, and $7,000 was paid to a bank account in his name. From there, the defendant, acting as his attorney, transferred it to an IBD in his name, before transferring it to an IBD in her name. The defendant says that she ultimately re-transferred it to his account, but that is unsupported by any other evidence and I am not satisfied that she did so. I do however accept her evidence that she caused to be repaid to the State the amount of the grant, together with at least as much again for interest and penalties, although only after this case was commenced.

[22] The defendant explained that the grant had to be repaid because, as it happened, Mr Stone did not satisfy the residence requirement. As I have mentioned, at no time did he live in this house. He was overseas from 10 October 2000 until September 2001, when he returned to Australia for a couple of weeks. Her evidence is that he did intend to live in the house but as things eventuated, he remained overseas. Prior to his departure he had lived on the Sunshine Coast. I do not accept that he ever intended to live in this house, or that the defendant believed that he would.

[23] The contract, on its face, is signed by "M Stone" as the buyer. The same signature appears on the declaration for stamp duty purposes, as it also appears on the application for the grant. In each case the signature is dated 8 September 2000, which is the day after the plaintiff signed the Deed of Gift, contract and the transfer.

[24] It was not Mr Stone but the defendant who signed in each case as "M Stone". At one point of her evidence, she said that that was somehow explained by her previous surname having been Stone and her first name being Marlene, so that before she had become Marlene Glegg, she had been accustomed to signing as "M Stone". At another point, she said that she was signing for and on behalf of Mr Stone, because although he had not left Australia by then, he was working in some remote place. At one point she thought that he must have been in North Queensland

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1 On 1 July 2000

and, at a subsequent point, she thought that he was perhaps in Gove in the Northern Territory. She did not explain why she considered the matter so urgent that she could not have the documents sent to him for signature, or she could not await his return to the Sunshine Coast. Nor did she explain why she took the documents from the meeting with Ms Taylor and the plaintiff on 7 September, rather than signing them at that meeting if she thought she could as Mr Stone's attorney. The witness to the Stone signatures was Ms Pool, who is a daughter of the defendant.

[25] She did not sign the transfer as or for Mr Stone. It was signed apparently on his behalf by a member of the firm of Smith and Stanton. According to the prescribed form of transfer, had someone other than the transferee's solicitor signed on the transferee's behalf, that signature would have required a witness who was a qualified person such as a legal practitioner, a justice of the peace or a commissioner for declarations. The solicitor's signature on the transfer is dated 26 September 2000. It is likely that the defendant did not sign the transfer, as she signed the other documents, because she was conscious from the form of the transfer itself, if not also from other sources, that a qualified person would have to witness the signature.

[26] Ultimately then there is no documentary evidence which would indicate that Mr Stone knew that he was acquiring his grandmother's house. He was not called as a witness and there is no document containing his version of events which is in evidence.

[27] Possibly Mr Stone knew and approved of this transaction and the defendant thought that it was in order for her to sign for him as she did, including by making in his name the statutory declarations to be submitted to the Office of State Revenue, but I am unpersuaded of those matters notwithstanding the evidence of the defendant and her husband that Mr Stone knew and approved of the transaction. But whether or not Mr Stone did knew of the transaction, in my view it is more probable than not that she had no basis for a belief that he would satisfy the residency requirement for the grant.

[28] Of course there was a further reason why Mr Stone was ineligible for the grant. It was that no consideration was given for his acquisition. The contract of sale and transfer falsely represented that there was consideration, and it was only by that misrepresentation that the grant was obtained. Plainly the defendant knew that no consideration had been or would be given.

[29] The defendant's evidence is that Mr Stone was always to be the beneficiary of the grant although it can be traced through to a bank deposit in her name. It was within her power to provide, as she did not, some documentary evidence to support her assertion that she repaid to Mr Stone this $7,000, which was a relevant answer to the plaintiff's claim that she account for the benefit of that sum.

[30] According to the defendant's evidence, it was Ms Taylor who suggested that there be an application for the grant, and that the contract be prepared and signed for this purpose. According to the plaintiff's version, the plaintiff knew nothing of the

application for the grant, consistently with her evidence that she did not know that the documents she was signing were in Mr Stone's favour. Ms Taylor said she has a "vague recollection" of some discussion with the plaintiff and the defendant about the grant. No doubt she discussed it with the defendant, but I conclude that she did not discuss it with the plaintiff. Had it been explained to the plaintiff that this transaction would also yield $7,000 for Mr Stone, to whom she was not close and who was about to go overseas for an extended time, then as I see the plaintiff's personality, she at least would have inquired why he should receive that windfall. And Ms Taylor could not have given a proper explanation to the plaintiff of the grant, because no lawyer could have explained how Mr Stone was entitled to it. Whether it was Ms Taylor or the defendant who thought to apply for the grant in Mr Stone's name, it is that application which explains why the contract was signed, and why the transfer was in terms of its being pursuant to that contract. In either case, the defendant's involvement in the application for the grant is telling against her credibility. And the fact, as I find, that the plaintiff did not know of the application for the grant, whether or not it was to be enjoyed by the defendant or Mr Stone, is relevant to whether there was undue influence and a breach of fiduciary duty.

The plaintiff's claims

[31] There are three grounds upon which the plaintiff's case is argued. The first is that the defendant owed to the plaintiff a fiduciary duty, which she breached by obtaining a profit in conflict with her duty to protect the plaintiff's interests. The second is that as the plaintiff's attorney, the defendant was obliged to exercise power honestly and with reasonable diligence to protect the plaintiff's interests, and that having failed to do so, she should be obliged, pursuant to s 66 of the *Powers of Attorney Act*, to compensate the plaintiff for any resultant loss. Thirdly, the plaintiff argues that the transaction was procured by undue influence, which is to be presumed for two reasons. The first reason is said to be the operation of s 87 of the Act, and the second is the relationship, as I have described it, of the almost total dependency by the plaintiff upon the defendant.

Section 66

[32] It is convenient to mention first the case upon s 66 which provides:

> **"66 Act honestly and with reasonable diligence**
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> (1) An attorney must exercise power honestly and with reasonable diligence to protect the principal's interests.
>
> Maximum penalty--200 penalty units.
>
> (2) In addition to any other liability the attorney may incur, the court may order the attorney to compensate the principal for a loss caused by the attorney's failure to comply with subsection (1)."

The plaintiff's difficulty with this provision, as her counsel acknowledged in his address, is that the matters complained of did not involve the exercise of the defendant's powers under the power of attorney. She did not transfer the house on the plaintiff's behalf. In this transaction Smith and Stanton were not retained by the defendant on the plaintiff's behalf. Indeed, it is the absence of advice by any solicitor retained for the plaintiff which is an important element of the plaintiff's case of undue influence. The plaintiff cannot succeed under s 66.

The presumption of undue influence

[33] Section 87 of the *Powers of Attorney Act* 1998 provides as follows:

> "**87 Presumption of undue influence**
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> The fact that a transaction is between a principal and 1 or more of the following--
> (a) an attorney under an enduring power of attorney or advance health directive;
> (b) a relation, business associate or close friend of the attorney;
> gives rise to a presumption in the principal's favour that the principal was induced to enter the transaction by the attorney's undue influence."

[34] The relevant transaction was between the plaintiff as principal and the defendant who was her attorney or, another view, between the plaintiff and Mr Stone, a relation of the attorney.

[35] The issue then is whether s 87 is engaged, although the transaction was not effected by the exercise of the defendant's powers as the attorney. The defendant argues that for the same reason that s 66 does not apply to this case, s 87 is not engaged.

[36] The plaintiff submits that upon its proper interpretation, s 87 creates a presumption of undue influence from the fact of the relationship of principal and attorney, regardless of whether the transaction itself involved an exercise of the attorney's powers.

[37] The genesis of this Act is the Report on Substituted Decision Making published by the Queensland Law Reform Commission in 1997.[2] However, this particular provision was not within the Commission's recommendations and the Report does not assist with the present question.

[38] Each of the submissions accepts that the intent of s 87 where it is engaged, is to apply to a transaction the equitable doctrine of undue influence and the availability of relevant equitable remedies. The doctrine of undue influence operates according

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[2] QLRC Report 49, and see the Second Reading Speech, Hansard 8 October 1997 p 3684 and the Explanatory Notes to the Bill

to the nature and content of a relationship between the parties. Certain types of relationships are assumed to be ones in which there is such a level of trust and confidence and a likelihood of the exercise of authority by the one party over the other, that any substantial gift should be justified by the recipient.[3] Outside those types of relationships, the doctrine will operate where in a particular case there is proved a relationship which has the same ingredients of ascendency, power or domination by one party over the other.[4] The plaintiff's alternative argument submits this case to be an example. But whether a relationship of influence is presumed or proved, equity's concern with whether a gift has been unconscionably obtained comes from the fact that it was made between the parties to a relationship which has by its nature a substantial potential to affect what has been described as the quality of the consent or assent of one party.[5] Equitable intervention results where the relevant relationship is such as to make the will of the innocent party not independent and voluntary because it is overborne.[6] Where a relationship of influence exists, it can affect a transaction albeit one which occurs outside the particular context from which the relationship arises. For example, a solicitor is subject to the presumption not only in respect of dealings affecting matters in which the client has specifically engaged him,[7] but also in their other dealings.

[39] Absent s 87, a presumption of influence would not arise in the context of every transaction between a principal and an attorney, or between a principal and a relation, business associate or close friend of the attorney. Applying only the principles of equity, many of those transactions would not give rise to the presumption, because they would not fall within a recognised category of presumed influence or involve circumstances in which a relation of influence could be proved. The interpretation for which the plaintiff contends would undoubtedly impose the presumption in many cases where it would not otherwise arise. But that is the apparent purpose of s 87. Because of a perceived risk of undue influence in the context of principal and attorney, the evident intent is to provide strong protection against the risk of some misconduct by an attorney, by requiring the recipient in all cases to justify the transaction.

[40] On its face, s 87 is engaged simply from the fact that the transaction is one which is between a principal and an attorney or a related person as described in para (b). There is no expressed limitation in s 87 that the transaction must involve an exercise of the attorney's power. Indeed, by presuming that the principal was induced to enter the transaction by the attorney's influence, the section operates in a context where the principal does not enter the transaction simply by the attorney's doing so on his behalf. And it cannot be said that the apparent policy behind the section is one which requires such a limitation to be implied. In my view, s 87 is engaged where the transaction is between the principal and the attorney or another person within (b), whether or not the transaction was effected by the exercise of the powers under the enduring power of attorney.

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3 Meagher, Gummow and Lehane's *Equity Doctrines and Remedies* (4th ed) at [15-055]
4 Meagher, Gummow and Lehane at [15-105]
5 Meagher, Gummow and Lehane at [15-035]
6 *Commercial Bank of Australia Ltd v Amadio* (1982-83) 151 CLR 447, 461
7 Meagher, Gummow and Lehane at [15-065]

[41] The result is that at least by s 87, the plaintiff has a presumption in her favour that she was induced to enter this transaction by the defendant's undue influence. But in the circumstances of this case, and quite apart from s 87, the plaintiff has proved the necessary relation of influence. I refer to my findings at [6] and [7] above. The plaintiff was entirely dependent upon the defendant for domestic and health care, financial assistance and, it would seem, personal company. There was a very high level of dependence and trust in this relationship which makes the case for a presumption of influence a compelling one, and so much was all but conceded in the defendant's address.

Is the presumption of undue influence rebutted?

[42] The issue then is whether the defendant has rebutted the presumption. The question here is not whether the plaintiff understood the effect of what she was doing. On her own evidence it is clear that she understood that she was transferring her house and for no consideration. Part of her evidence is that she was told things by the defendant which made her think that the property would be re-transferred or that she would ultimately have the benefit of it, notwithstanding its transfer. But she pleads no case to the effect that the house or its proceeds were subject to some trust or enforceable obligation in consequence of those statements. On her case as it is pleaded and argued, she did intend to unconditionally transfer the property.

[43] The defendant must show that this transaction "cannot be ascribed to the inequality between them which must arise from (her) stronger position" and that "the gift was the independent and well-understood act of a (woman) in a position to exercise a free judgment based on information as full as that of the donee": *Johnson v Buttress* (1936) 56 CLR 113, 134-5.

[44] To rebut the presumption, it is not necessary in every case for a donee to demonstrate that the donor received appropriate and independent advice, although that is often how the presumption is rebutted.[8] In this case, the plaintiff had no such advice.

[45] Smith and Stanton were not her solicitors in this transaction. Ms Taylor thought that their client was Mr Stone. The defendant and Ms Taylor each gave evidence that Ms Taylor explained to the plaintiff the effect of the documents which she was asked to sign. I reject that evidence. Ms Taylor said that in accordance with her usual practice, she would have "read the document to the person … and (made) sure that (she) understood the ramifications and consequences before signing". I do not see how she could have done so in this case, because the documents were so inconsistent with each other that no lawyer could have sensibly explained their combined effect. And Ms Taylor could not have explained how a transfer of the property to Mr Stone would put the property in the defendant's beneficial ownership, when Ms Taylor had no understanding that Mr Stone was to hold it for the defendant. Ms Taylor said that it was her usual practice to keep detailed diary notes of meetings such as this one. In this case however there is no such note, an

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8 Meagher, Gummow and Lehane at [15-140] and the cases there cited

absence which Ms Taylor said "astounds her". In truth, the plaintiff had no solicitor in this transaction, and nor did the solicitor on the other side of the transaction explain the legal effect of the documents to her.

[46] But more importantly still, the plaintiff had no independent advice as to whether it was in her interests to give away what was effectively the whole of her property.

[47] The evidence suggests two reasons which the plaintiff could have had for transferring her property. According to some witnesses, the plaintiff had been saying that she was concerned that her will would be contested and that the defendant would not inherit the house. The other possible reason was to avoid having to pay a bond on entry to the retirement home (with possibly a similar advantage from having no assets in relation to rental at the home and her pension).

[48] On that first matter, the defendant's evidence is that from not long after the plaintiff made the 1999 will, the plaintiff had been constantly suggesting that the house be transferred to her but that the defendant would always try to dissuade her. According to the defendant, the break through was when the plaintiff "decided she was doing it and she made an appointment (with Smith and Stanton)".[9] I have rejected already the evidence that it was the plaintiff who made the appointment with the solicitors, and I am unpersuaded that the defendant was such a reluctant recipient of her mother's property.

[49] I accept that from time to time the plaintiff could have made statements to the effect that she was concerned that her will would be challenged, and at the same time she could have said something to the effect that she was minded to transfer it during her lifetime. A number of witnesses called in the defendant's case have some recollections of statements at least to the effect that the plaintiff was concerned about the will. Some recalled the plaintiff's saying that she wanted to transfer the house. Evidence of that kind indicates that the plaintiff did intend to transfer it, but it does not exclude the prospect that the intention was the result of the defendant's influence. Statements of these kinds would be quite consistent with the plaintiff's personality, as many witnesses have described it in terms which accord with Dr Carter's assessment. But as Dr Carter commented, the act of giving away her property is a different matter, and it appears to be quite inconsistent with the plaintiff's personality. The plaintiff was given to using promises or threats about property in playing one daughter against another, but it seems to be out of character that she would put it out of her power to persist in that behaviour. Whilst it is likely that she made statements to the effect that she wanted to give away the house, I think it quite unlikely that she ultimately decided to do so without any significant influence from the defendant.

[50] This transaction coincided with her intention to move to the retirement home. She did not take up full time residence there until the following March, but before then there were periods of temporary residence, and upon everyone's account, in September 2000 a move to the retirement home was imminent. According to the

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plaintiff, her only reason for transferring the house was her belief that she could thereby avoid paying a substantial bond to the retirement home. I accept that she held that belief. I also accept that it was at least a substantial inducement for her decision to make this transfer. Whilst not denying that the plaintiff held that belief, the defendant denies that she influenced the plaintiff to come to it, or to act upon it to make the transfer. According to the defendant's evidence, the plaintiff had gained her understanding of the relevance of assets, or lack of them, to the requirement for a bond by talking to residents of the retirement home during her initial stays there. Quite probably she did have discussions of that kind. But I find that she had discussions about that matter with the defendant and the defendant's husband. In his evidence, Mr Glegg said that he had a particular understanding of the relevant rules for such bonds. He said he had a conversation with the plaintiff, at least after the transfer, in which:

> "She expressed her happiness that the house was gifted to (the defendant) and took the onus of the worry about whether she had undue assets and there was a – there was a requirement that – under government – a government statute that they have to pay so much of their assets to the government to get into – as a form of entry into these places … and I had had previous experience … so, I knew what was required and I knew what she was talking about. She was able to get rental assistance, retain her pension and not having the worry of having to cough up all this money to get into the retirement village."

[51] I have difficulties in accepting some parts of Mr Glegg's evidence. For example, he suggested that he knew that the house was being transferred not to the defendant but to Mr Stone, and that he understood at the time, from conversations with his wife, that this was from her concern about the state of their marriage. If she did have such a concern and was for that reason wanting her property to appear as that of her son, it seems to be unlikely that she would discuss all of that with her husband. Like many witnesses in the defendant's case who were close to the defendant, Mr Glegg seemed understandably keen to assist the defendant's case, and to relate his impression that the plaintiff was in all respects a strong character who had made up her own mind independently of any influence. But I do accept that Mr Glegg believed that he understood what could be done to avoid having to pay a substantial bond, and he impressed me as a man who would have been likely to have offered the plaintiff what he would have regarded as the benefit of his knowledge. I infer that Mr Glegg shared his professed knowledge and experience with the defendant and, at least through her, with the plaintiff.

[52] Even apart from Mr Glegg's role, it is clear that the defendant was making arrangements towards the plaintiff's move to the home. Inevitably, that required the defendant to understand the costs involved, and whether a bond would be required. Inevitably also, the defendant must have discussed those matters with the plaintiff. In my view it is more probable than not that the defendant said to the plaintiff things to the effect that the bond could be avoided by transferring the house to her.

[53] In her evidence, the defendant seemed to consider that it was entirely for her mother's good that the house was transferred. There is no reason to think that at the time of the transaction, the defendant referred to the ways in which the plaintiff could be worse off by the transfer. Having regard to the defendant's suggested marital problems, or the suggested difficulties within Mr Glegg's business, there was no certainty that the defendant would be able to provide for the plaintiff anything not provided by a pension, even after the defendant had the plaintiff's property. I infer that the defendant encouraged the plaintiff to transfer her house referring to at least one good reason for it (the bond) and saying effectively nothing of any disadvantage.

[54] In this case, therefore, the influence of the defendant is positively proved. Apart from what the plaintiff may have heard said by other residents of the retirement home, her information about the relevant terms and costs for entry to the retirement home must have come from the defendant's advice. She did not have, as she should have had, independent advice about that matter and whether it warranted a transaction by which the plaintiff gave away substantially all of her property.

[55] The defendant strenuously denies that she said words to the effect that the property would be retransferred once the plaintiff was settled into the retirement home. Whilst the defendant was not an impressive witness nor, in my view, was the plaintiff completely reliable. I am unpersuaded that the defendant said that she would retransfer the house. But as I have said, the plaintiff's pleaded case does not depend upon proof of such an assurance.

[56] The defendant's case that the plaintiff independently decided upon this transaction and initiated the steps to effect it is also inconsistent with the plaintiff's ignorance of some of what was involved in this transaction. I have found that she did not know of the grant application and nor could she have known that she had been asked to write her signature on a contract which was not intended to have any legal effect. I also accept her evidence that she did not know that she was transferring the house to Mr Stone. Had she known that, it is likely to have caused her concern because her intention was to have the property transferred to the defendant whom she was trusting to continue to see to her care. Ms Pool's evidence is that she discussed with the plaintiff that the property was to go to Mr Stone, but she could not recall the specifics. I do not accept that evidence which did not seem to come from any actual recollection.

[57] I conclude then that the defendant has failed to rebut the presumption of undue influence.

Fiduciary duty

[58] The statement of claim alleges that the defendant owed the plaintiff a fiduciary duty not to obtain a profit for herself or a related party in conflict with the interests of the plaintiff. By the Defence, the defendant admits that "the Defendant owed the Plaintiff fiduciary duties but the extent of those duties were identified and modified

by the contents of the Enduring Power of Attorney and in particular clause 3 thereof".

[59] Clause 3 provided as follows:

> "I expressly allow and authorise my attorney to enter into transactions on my behalf where my interests and duty could conflict with my attorney's interests and duty in relation to the transaction even though my attorney might derive a direct or indirect benefit therefrom."

[60] The transactions to which clause 3 applied were those entered into by "my attorney … on my behalf". By the terms of clause 3, the content of any fiduciary duty was affected only in that context. It was not in terms which affected a transaction such as this one. The effect of clause 3 was to widen the circumstances in which the attorney could enter into a transaction on the principal's behalf. It did not affect the content of any fiduciary duty in circumstances which do not involve such a transaction.

[61] Apart from her argument based upon clause 3, the defendant correctly concedes that she owed to the plaintiff fiduciary duties. The plaintiff was totally dependent upon her assistance, and specifically upon her exercise in good faith of her very extensive powers under the power of attorney. That required the defendant to avoid any dealing or transaction by which her own interest could conflict with her duty to the plaintiff. A critical part of her responsibilities as an attorney was her management of the plaintiff's money and property. If the defendant was to be free to accept a gift of the plaintiff's only substantial asset, then her interest in maximising the value of what she would receive would conflict with her duty to manage and apply the plaintiff's property only for the support, health and comfort of the plaintiff, even if that involved some substantial expenditure. The existence of such a conflict between duty and interest was not challenged in the defendant's case.

[62] Further to her argument in reliance on clause 3, the defendant's other submission was that if I could be satisfied, on the undue influence case, that the transfer was the result of a voluntary and independent decision such as to rebut the presumption, then I would also conclude that there was no breach of fiduciary duty. I do not accept that a determination either way of the undue influence claim determines this claim for breach of fiduciary duty. Even absent undue influence, I would hold that the defendant's acceptance of this gift was in breach of duty. But, as I have concluded that the presumption of undue influence has not been rebutted, and indeed that the defendant did induce this transaction, it follows that the defendant's only resistance to this part of the case is upon clause 3.

Remedies – Undue Influence

[63] The house cannot be restored to the plaintiff because it was sold to a third party in 2001. On the undue influence ground, the plaintiff seeks an order for equitable

compensation, quantified in the amount of that sale ($180,000) plus the costs charged to the plaintiff for the transfer to Mr Stone ($1,761.26).

[64] Equitable compensation is available to the victim of undue influence: *Mahoney v Purnell* [1996] 3 All ER 61 discussed in *Heydon* "Equitable compensation for Undue Influence" (1997) 113 LQR 8 and Meagher, Gummow and Lehane at [23-010]. The defendant makes no contrary submission. As was noted at 113 LQR at 9-10, the trial judge in *Mahoney v Purnell* concluded that the relationship in that case "may be described as fiduciary" and the case might be thought to leave open the question of whether absent a breach of fiduciary duty but given a transaction from undue influence, equitable compensation is available. But as the authors of Meagher, Gummow and Lehane say at [23-010] orders are now made for equitable compensation in a wide variety of cases of "equitable misbehaviour" and they give recent examples of cases not involving a breach of fiduciary duty. There is no reason in principle why a person who is a victim of undue influence but not also a breach of fiduciary duty, should be denied equitable compensation. Undue influence has been described as an instance of fraud.[10]

Remedies – breach of fiduciary duty

[65] As a fiduciary in breach of duty, the defendant profited in the amount which she received when she sold the house ($180,000). She is liable to account for that sum or to repay it as an equitable debt.[11] She also benefited by the use of the plaintiff's money used in the costs of the transfer for her benefit ($1,761.26).

[66] It is admitted on the pleadings that the defendant purchased a house at 9 Orara Avenue, Banksia Beach using $119,529.77 of the proceeds of her sale of what had been the plaintiff's house. It is not established what price she paid for Orara Avenue; nor is it established at what price she sold it. But it is proved that $165,838.15 of the proceeds of sale of Orara Avenue were used towards paying the purchase price of $240,000 for 25 Pacific Drive, Banksia Beach, which the defendant bought in October 2002 and still owns.

[67] Because the price paid by the defendant for Orara Avenue and the price received for it by the defendant are unknown, the plaintiff has not proved how much of the $165,838.15 represents proceeds of the sale of the plaintiff's house, so as to establish an entitlement to part of the beneficial ownership of 25 Pacific Drive.

[68] But as $119,529.77 of monies which the defendant should have restored to the plaintiff as the fruits of her breach of fiduciary duty, were used to acquire Orara Avenue, the plaintiff was entitled to an equitable charge over Orara Avenue, and in turn, its proceeds of sale, for that amount.[12] Accordingly, the plaintiff was entitled to a charge for $119,529.77 over that part of the proceeds of sale from Orara Avenue which were used for 25 Pacific Drive. In my conclusion, the plaintiff has

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10 *Symons v Williams* (1875) 1 VLR (E) 199 at 216 cited in Meagher, Gummow and Lehane at [15-005]

11 *Warman International Ltd v Dwyer* (1995) 182 CLR 544; Meagher, Gummow and Lehane at [5-245]

12 *Scott v Scott* (1963) 109 CLR 649

established that she is entitled to a charge in that sum of $119,529.77 against 25 Pacific Drive. That charge would secure in part the defendant's obligation to pay to the plaintiff the benefits she has received from the breach of fiduciary duty. These benefits are the sum of $180,000 as the value of the house in the hands of the defendant, and also the benefit of the plaintiff's funds used for the expenses of acquiring the plaintiff's house ($1,761.26).

[69] I reject the claim for payment of the sum of $7,000 (and interest thereon) received for the first home owner's grant. Because I accept that the defendant has repaid to the Office of State Revenue the amount of the grant with interest, together with a penalty, I find that ultimately the defendant has not benefited in this respect.

Conclusion

[70] The result is that the plaintiff has established an entitlement to payment of sums totalling $181,761.26. As she is entitled to be paid that amount as the defendant's benefits from her breach of fiduciary duty, her entitlement should be secured by imposing an equitable charge against 25 Pacific Drive, Banksia Beach, to the extent of $119,529.77.

[71] The plaintiff should have interest against the defendant on the sum of $1,761.26 from 7 September 2000, and on the sum of $180,000 from the date of the sale by the defendant, 17 September 2001. In each case the rate should be 9 per cent. The total interest is $52,957.51.

Orders

[72] The orders will be as follows:

1. Judgment for the plaintiff against the defendant in the sum of $234,718.77;
2. It be declared that the defendant's interest in 25 Pacific Drive, Banksia Beach, is charged with the payment of $119,529.77 of that sum.