

SUPREME COURT OF QUEENSLAND

CITATION: *Fletcher v Queensland Nursing Council* [2009] QCA 364

PARTIES: **QUEENSLAND NURSING COUNCIL**
(respondent/applicant)
v
GLENNYS LAUREL FLETCHER
(appellant/respondent)

FILE NO/S: Appeal No 6533 of 2009
DC No 3074 of 2008

DIVISION: Court of Appeal

PROCEEDING: Application for leave s 118 DCA (Civil)

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 27 November 2009

DELIVERED AT: Brisbane

HEARING DATE: 27 October 2009

JUDGES: Chief Justice and Muir and Chesterman JJA
Separate reasons for judgment of each member of the Court, the Chief Justice and Chesterman JA concurring as to the orders made, Muir JA dissenting in part

ORDERS: **1. Leave to appeal granted.**
2. Appeal allowed.
3. Set aside the orders of the District Court made on 25 May 2009 and instead order that the appeal to that court be dismissed.
4. The respondent should pay the applicant's costs of the appeal to the District Court and the application for leave to appeal and the appeal to this Court.

CATCHWORDS: PROFESSIONS AND TRADES – HEALTH CARE PROFESSIONALS – NURSES – DISCIPLINARY PROCEEDINGS – where the applicant preferred a charge against the respondent of unsatisfactory professional conduct to the Nursing Tribunal under s 104A of the *Nursing Act* 1992 (Qld) – where the respondent was found to have acted in a manner that was professionally unsatisfactory by the Tribunal and that the respondent be deregistered for two years along with other orders – where the findings and orders of the Tribunal were appealed to the District Court pursuant to s 137 of the *Nursing Act* – where the appeal was allowed by the District Court – where the applicant appeals the decision of the District Court under s 118 of the *District*

Court of Queensland Act 1967 (Qld) – whether the learned District Court Judge erred in allowing the appeal – whether the charge against the respondent which involved an ‘abuse of position of trust and influence’ required an element of intent

District Court of Queensland Act 1967 (Qld), s 118
Nursing Act 1992 (Qld), s 6, s 84, s 96, s 104, s 104A, s 105, s 116, s 137

Bhattacharya v General Medical Council [1967] 2 AC 259, considered

Coleman v Kinbacher & Anor (Qld Police) [\[2003\] QCA 575](#), applied

Fletcher v Queensland Nursing Council [2009] QDC 129, cited

Graham v Queensland Nursing Council [\[2009\] QCA 280](#), distinguished

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

Louth v Diprose (1992) 175 CLR 621; [1992] HCA 61, considered

Medical Board of Qld v Thurling [\[2003\] QCA 518](#), considered

Parfitt v Lawless (1872) LR 2 Probate & Divorce 462, cited

Union Bank of Australia Ltd v Whitelaw [1906] VLR 711, cited

Wingrove v Wingrove (1885) 11 PD 81, considered

Winter v Crichton (1991) 23 NSWLR 116, cited

COUNSEL: P Davis SC, with S J Gallagher, for the applicant
 J J Allen, with K E Forrester, for the respondent

SOLICITORS: Rodgers Barnes & Green Lawyers for the applicant
 Roberts & Kane Solicitors for the respondent

- [1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of Chesterman JA. I agree with the orders proposed by His Honour, and with his reasons.
- [2] I wish to highlight my own rejection of the learned District Court Judge’s criticism of the questioning, by the Chairperson of the Tribunal, of the respondent. The questioning appears to have been relevant and otherwise reasonable. The Judge’s approach did not in my respectful view sufficiently acknowledge the Tribunal’s strong rejection of the credibility of the respondent’s evidence.
- [3] **MUIR JA: Introduction**
 The applicant, Queensland Nursing Council, applies for leave under s 118 of the *District Court of Queensland Act 1967 (Qld)* to appeal against a decision of the District Court allowing an appeal under s 137 of the *Nursing Act 1992 (Qld)* ("the Act") from orders made by the Nursing Tribunal on the hearing of a charge brought by the applicant against the respondent pursuant to s 104 of the Act.

The amended notice of charge

[4] The amended notice of charge before the Tribunal provided:

" ...

AMENDED NOTICE OF CHARGE

NOTICE IS HEREBY GIVEN pursuant to the provisions of the *Nursing Act 1992* that the Queensland Nursing Council has preferred the following charges against you pursuant to section 104(1) of the *Nursing Act 1992* on the ground that you have behaved in a way that constitutes unsatisfactory professional conduct contrary to section 104A(1) of the *Nursing Act 1992*.

Particulars:

You abused your position of influence and trust in respect of James Robert Paidley (now deceased) ('the deceased') arising from a nurse/patient (therapeutic) relationship formed in the period up to 22 May 2004 in that:

1. You over involved yourself in the deceased's affairs in the period from his admission to the Ipswich General Hospital on 23 May 2004 until his death on 3 July 2005 to such an extent that there was a foreseeable risk that the deceased could become unduly influenced by you in that you:

- a) Regularly visited the deceased at Ipswich Hospice Care at 37 Chermiside Road, Eastern Heights in the period from 16 June 2004 to 29 December 2004;
- b) Regularly visited the deceased at Karinya Village Nursing Home at 26 Samuel Street, Laidley in the period from 29 December 2004 to 14 January 2005;
- c) Accepted the deceased's enduring power of attorney on both financial and personal/health matters on or about 4 January 2005;
- d) Regularly attended the deceased's principal place of residence at 16 Yates Street, Rosewood to check mail, feed the deceased's cat and ensure the house was secure; and/or
- e) Regularly visited the deceased at Glenwood Hostel at 49 Main Street, Lowood in the period from 14 January 2005 until his death on 3 July 2005 and had involvement in formulation of the deceased's care plan.

in circumstances where you had failed to take appropriate steps to make it clear to the deceased that the therapeutic relationship had come to an end subsequent to his admission to the Ipswich General Hospital on 23 May 2004.

2. You failed to take positive steps to ensure clarity in your relationship with the deceased by not informing the family of the deceased (particularly Wayne Paidley) or your colleagues that your relationship with the deceased had changed from that of paid carer or nurse to that of an unpaid friend or confidante.

3. You failed to adequately involve, or reasonably attempt to adequately involve, the family of the deceased (particularly Wayne Paidley) in decisions or discussions about the deceased's ongoing care requirements.

4. You failed to take positive steps to ensure a greater distance between yourself and the deceased when he was making decisions about his Will in circumstances where it must have been within your contemplation that you may gain a significant entitlement under the deceased's Will.

5. You failed to relinquish the entitlements gifted to you under the terms of the deceased's will dated 23 September 2004.

6. You sought to influence the deceased at various times in the period from 23 May 2004 until the deceased's death on 3 July 2005 to benefit you under his will.

By engaging in the conduct alleged, the unsatisfactory professional conduct amounts to any one or more of the following within the meaning of section 104A(3) of the *Nursing Act 1992*; namely:

- A. Professional conduct that is of a lesser standard than that which might reasonably be expected of you by the public or your professional peers; or
- B. Professional conduct that demonstrates incompetence, or a lack of adequate knowledge, skill, judgment or care, in nursing practice; or
- C. Infamous conduct in a professional respect; or
- D. Misconduct in a professional respect; or
- E. Conduct discreditable to the nursing profession; or
- F. Fraudulent or dishonest behaviour in nursing practice.

NOTICE IS HEREBY GIVEN that the charge has been referred to the **Nursing Tribunal** for hearing and determination.
..."

The Tribunal's approach and findings

[5] In its reasons, delivered by its Chairman, the Tribunal: noted the notice of charge and a statement of agreed facts; discussed the evidence; made some findings of fact and made findings on the credibility of witnesses. The respondent was found "not honest, or reliable". The reasons then addressed separately each of sub-particulars 1 to 6, made further findings of fact in relation to each sub-particular, and found whether the respondent had engaged in unsatisfactory professional conduct as alleged in the sub-particular.

[6] The finding in respect of sub-particular 1 was:
"The Tribunal is satisfied the Respondent engaged in unsatisfactory professional conduct as alleged in Charge 1 of the Amended Notice of Charge."

- [7] A similar formula was used for the findings against the respondent in respect of sub-particulars (described in the reasons as charges) 2, 4 and 5. What was described as charges 3 and 6 were dismissed.

The reasons of the learned District Court Judge

- [8] The learned District Court Judge concluded that the allegation in the particulars that the respondent abused her position of influence and trust was an essential element of the charge. He found also that there was no finding that the respondent did abuse her position of influence and trust and that the evidence was insufficient to support such a finding. His Honour embraced the submission of counsel for the respondent that the allegation of abuse of a position of influence and trust could be sustained only if the respondent engaged in the alleged conduct with the intention of gaining some benefit for herself.
- [9] The relevant findings of the Judge are contained in paragraphs [15], [16], [18] and [19] of his reasons.¹ In paragraph [15] of his reasons the Judge quoted the following paragraph from the respondent's outline of argument:

"...

11. The Reasons of the Tribunal refer to the relevant part of the Amended Notice of Charge as providing particulars of the alleged unsatisfactory professional conduct. The Reasons do not contain any stated finding that Ms Fletcher did abuse her position of influence and trust. The lack of such a finding is consistent with the lack of evidence to establish an abuse of position by Ms Fletcher. The relevant definition of 'abuse' in the Concise Oxford English Dictionary (10th edition, revised) is 'use to bad effect or for a bad purpose', with the relevant definition of 'use' in the same dictionary being 'take, hold, or deploy as a means of accomplishing or achieving something'. An allegation that someone has used or abused their position carries with it the notion of intent or purpose on the part of that person. For the same reasons that the evidence was insufficient for the Tribunal to be satisfied that Charge (or particular) 6 was proved, the evidence is such that the Court would not be satisfied that such an allegation is made out on the evidence. **Such an allegation was an essential element of the charge brought against Ms Fletcher and failure to establish such matter means that the charge should be dismissed.**

12. In the absence of any evidence establishing to the requisite standard that Ms Fletcher engaged in a course of conduct with the intention of gaining some benefit for herself, it is submitted that the evidence is insufficient to base a finding of guilt of a charge of unsatisfactory professional conduct."

- [10] His Honour then said, "In my opinion, that argument is correct." He concluded that it was not possible to imply a finding that the respondent did abuse her position of influence and trust. He noted that the respondent's case before the Tribunal was that there was one charge of behaving in a way that constituted unsatisfactory professional conduct which was particularised "as being one where the nurse abused

¹ *Fletcher v Queensland Nursing Council* [2009] QDC 129.

her position of trust in respect of a patient ...". After discussing the case presented by the applicant at first instance his Honour said:²

"In my opinion, the disciplinary proceeding was conducted on the basis that the Council set out to establish against Mrs Fletcher that she abused her position of influence and trust; it failed to persuade the Tribunal to find there was such abuse, notwithstanding that particular acts or omissions said to contribute to a conclusion there was abuse may have been made out. The charge of abuse should have been dismissed. On the Board's approach of identifying multiple charges, all of them ought to have been dismissed, not 3 and 6 only."

The submissions of the parties at first instance

- [11] The submissions on behalf of the applicant at first instance were made on the basis that there was one charge to which six sub-particulars had been provided. The written outline of submissions made no reference to the introductory words of the particulars and addressed only the sub-particulars. The respondent's outline of argument at first instance acknowledged that:

"1. The Respondent is charged pursuant to section 104(1) of the *Nursing Act 1992* on the ground 'that you have behaved in a way that constitutes unsatisfactory professional conduct contrary to section 104A of the *Nursing Act 1992*'."

- [12] It then referred to "The particulars of the charge" and proceeded to address each sub-particular. The written submissions did not refer to the introductory words of the particulars until after discussing each of the six sub-particulars. The submissions on liability then concluded:

"8.3 In disciplinary proceeding the (sic) before the Tribunal, the Queensland Nursing Council must prove the elements of the charge to the 'reasonable satisfaction of the Tribunal'. It is submitted that the conduct of the respondent clearly evidences a demonstrable lack of knowledge regarding appropriate boundaries, particularly within the community setting and a lack of knowledge of the professional and ethical duty to recognise and avoid potential and/or actual conflict of interest however it did not constitute *unsatisfactory professional conduct* within the meaning of section 104 A (3) of the *Nursing Act 1992* (Qld).

8.4 **It is submitted that the respondent did not abuse her position of influence and trust in respect of James Robert Paidley** (now deceased) arising out of the nurse/patient (therapeutic) relationship formed in the period up to 22 May 2004 but rather appears to have had little or no understanding of the distinction between 'caring for' and 'caring about' Mr Paidley. It is submitted that there was no intention on the part of the respondent to abuse but rather an ignorance of the potential conflicts that arise in situations were (sic) boundaries of practice are not established and maintained." (citations omitted) (emphasis added)

² *Fletcher v Queensland Nursing Council* [2009] QDC 129 at [19].

Submissions of counsel for the applicant

- [13] The applicant's counsel's submissions were to the following effect. Section 116 of the Act provides that "If, on the hearing of a charge against a person, the tribunal decides a ground for disciplinary action against the person is established, it may do any 1 or more of the following ...". It is not necessary that each factual allegation said to comprise the "charge" be found by the Tribunal. Section 104 requires the finding of one of the "grounds" identified in s 104A and s 104 requires notice to be given of factual allegations said to support the "ground"; here "unsatisfactory professional conduct". Provided that the Tribunal finds as proved sufficient particulars to establish the "ground", then the "charge" is proved. The Court, on appeal, should have asked "whether the Tribunal's conclusion that the finding of *"unsatisfactory professional conduct"* was rightly made upon the primary factual findings that were made".
- [14] The Judge erred in finding that "abuse" connoted some positive intentional conduct and that the conduct of the respondent did not fall below identified boundaries for nursing practice.
- [15] The charge did not allege any intentional conduct in the sense of conduct calculated to achieve a specific aim. The allegation of abuse of the position of influence and trust meant that the respondent "didn't act properly in her position of influence and trust". That this is so may be seen from sub-particulars 1, 2 and 4.
- [16] The Tribunal is a specialist one. It held that the proven conduct constituted "unsatisfactory professional conduct" and there was no valid reason to interfere with the Tribunal's conclusion.

Submissions of counsel for the respondent

- [17] The Judge was correct in finding that both parties before the Tribunal proceeded on the basis that proof of the allegation of abuse of position of influence and trust was a necessary part of proof of the charge of unsatisfactory professional conduct. A finding of proof of the charge of unsatisfactory professional conduct in the absence of a finding of proof of the allegation of abuse of position of influence and trust was contrary to fundamental principles of justice, or unfair in a material respect. The Judge was correct in upholding the appeal on that basis alone. Notwithstanding that the appeal was from a specialist Tribunal, the Judge correctly accepted the submission that the inferences to be drawn from the facts as found by the Tribunal and the ultimate conclusion as to whether or not the charge was proved, remain matters to be determined by the District Court on appeal by way of re-hearing.

Was there error on the part of the Tribunal?

- [18] That the applicant's case before the Tribunal was conducted consistently with there being one charge and six sub-particulars of charge may be accepted. So, too, may be the submission that the Tribunal considered that each sub-particular constituted a separate charge of unsatisfactory professional conduct and found the allegations made in each of the numbered paragraphs 1, 2, 4 and 5 proved. It is not correct, however, that, as counsel for the applicant contended, nothing turns on the manner in which the Tribunal approached its determination. The thrust of the argument advanced on behalf of the applicant was that as s 104 of the Act requires the finding of one of the "grounds" identified in s 104A and that notice be given of factual allegations said to support the "ground", provided the Tribunal finds as proved sufficient particulars to establish the "ground", then the "charge" is proved.

- [19] The difficulty with that contention was identified by the Judge. It ignores the fact that each of the sub-particulars are advanced in the Notice of Charge as instances or particulars of the allegation that the respondent "abused [her] position of influence and trust in respect of James Robert Paidley ... arising from a nurse/patient (therapeutic) relationship formed in the period up to 22 May 2004 ...". Absent a finding that the respondent abused her position of influence and trust, there is no finding that the factual basis of the charge which the respondent was called upon to meet has been proved. A perusal of the Tribunal's reasons reveals no basis for concluding that it addressed the question of abuse by the respondent of a position of influence and trust. The reasons make no mention of any such abuse and the question addressed in respect of each sub-particular was whether the allegations constituted unprofessional conduct.
- [20] I accept that the Tribunal did not need to find all of the sub-particulars made out in order to find the charge established. The applicant was required to prove only sufficient facts within the particulars to constitute the offence as alleged.³ Each of the sub-particulars are instances of the alleged abuse and the alleged abuse could not be made out unless at least some of the allegations in the sub-particulars were proven. But it does not follow that proof of the allegations in one or more sub-particulars established the alleged abuse.
- [21] There can be little doubt that, on the facts found by the Tribunal in respect of "charges" 1, 2, 4, and 5, the conclusion that the respondent abused her position of influence and trust was inescapable or virtually so. Nevertheless, the fact remains that the Tribunal did not address the correct issue and made no finding on it. It is also plain that the facts found by the Tribunal justified its findings that the respondent's conduct constituted unsatisfactory professional conduct. However, the way the charge was particularised, the only route to a finding of unsatisfactory professional conduct was by proof of abuse by the respondent of her position of influence and trust. In my respectful opinion the Tribunal's processes miscarried and the learned District Court Judge on appeal should have remitted the matter to the Tribunal for it to be decided according to law.
- [22] The Tribunal's breaking up the one charge into six and finding four of the six charges established is also less than satisfactory. Apart from anything else, it carried with it the risk that the sanctions imposed on the respondent were different than the sanctions which would have been imposed had it understood itself to be dealing with only one charge. However, there was no complaint about this aspect of the Tribunal's conduct in the notice of appeal.

The meaning of "abuse of a position of influence and trust"

- [23] I am unable to share the Judge's conclusion that the allegation of abuse of a position of influence and trust "carries with it the notion of intent or purpose on the part of" the accused. In my respectful opinion, in normal everyday speech, to "abuse" a position, whether it be one of trust or authority or otherwise, is to act or fail to act in a way which is inconsistent with the obligations and duties imposed by the holding of the position: to misuse the position. It may well be that questions of degree are involved in the determination of whether a particular act or omission constitutes an "abuse" but I am not persuaded that the words of the charge contemplate that offending conduct must be intentional.

³ *Coleman v Kinbacher & Anor (Old Police)* [2003] QCA 575 at [14].

- [24] The Judge's construction is inconsistent with the particulars. Each of the sub-particulars is an instance of the alleged abuse of the respondent's position of influence and trust. With the exception of sub-particular 6, none of the sub-particulars alleges the existence of an intention on the part of the respondent. The particulars must be read as a whole and with an understanding that the charge may be made out notwithstanding that not all of the matters alleged in all of the sub-particulars are established; provided, of course, that such proof also establishes an abuse of a position of influence and trust in respect of the deceased.
- [25] The primary judge also considered the applicant's case against the respondent on its merits, concluding that it "falls far short of one establishing abuse". As his Honour proceeded on the basis of an erroneous understanding of what was required in order to establish abuse, this finding is also affected by error.

The allegations in the sub-particulars and the meaning of "undue influence"

- [26] The Judge concluded that the words "unduly influenced" took their meaning from the doctrine of "undue influence" applicable to testamentary dispositions. In paragraph [26] of his reasons he discussed the doctrine of undue influence in relation to wills at some length. His Honour appears to have been of the understanding that an allegation of undue influence was also made in or was relevant to other sub-particulars. Although the allegations in the sub-particulars overlap to a certain extent there is no basis for importing into sub-particulars 2 to 6 inclusive a requirement of undue influence.
- [27] The Tribunal proceeded on the basis that "unduly influenced" took its meaning from the equitable doctrine of "undue influence". It was said by the Tribunal,⁴ citing *Union Bank of Australia Ltd v Whitelaw*:⁵
- "Undue influence involves an improper use of the ascendancy acquired by one person over another for the benefit of that person or someone else so that the acts of the person influenced are not, in the fullest sense of the word, free voluntary acts."
- [28] *Union Bank of Australia Ltd v Whitelaw* was not concerned with the doctrine of undue influence in relation to testamentary dispositions.
- [29] It is not possible to determine what the parties before the Tribunal understood the words to mean as there was no discussion in that regard in the written submissions or in oral addresses.
- [30] The following discussion by Brennan J in *Louth v Diprose*⁶ explores the difference between undue influence and unconscionable conduct:⁷
- "In *Commercial Bank of Australia Ltd v Amadio* ((1983) 151 CLR, at p 461), Mason J distinguished unconscionable conduct from undue influence in these terms:
- 'In the latter the will of the innocent party is not independent and voluntary because it is overborne. In the former the will of the innocent party, even if independent and voluntary, is the result of the

⁴ Reasons of the Nursing Tribunal dated 6 October 2008 at paragraph 19.

⁵ [1906] VLR 711 at 720.

⁶ (1992) 175 CLR 621 at 627.

⁷ Cited in *Burrawong Investments Pty Ltd v Lindsay & Anor* [2002] QSC 82 at [62].

disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position.’

Deane J (*ibid.*, at p 474.) identified the difference in the nature of the two jurisdictions:

‘Undue influence, like common law duress, looks to the quality of the consent or assent of the weaker party ... Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so.’

Although the two jurisdictions are distinct, they both depend upon the effect of influence (presumed or actual) improperly brought to bear by one party to a relationship on the mind of the other whereby the other disposes of his property."

- [31] In *Johnson v Buttress*,⁸ Dixon J (as he then was) explained the equitable doctrine of undue influence in the following terms:⁹

"The basis of the equitable jurisdiction to set aside an alienation of property on the ground of undue influence is the prevention of an unconscientious use of any special capacity or opportunity that may exist or arise of (sic) affecting the alienor's will or freedom of judgment in reference to such a matter. The source of power to practise such a domination may be found in no antecedent relation but in a particular situation, or in the deliberate contrivance of the party. If this be so, facts must be proved showing that the transaction was the outcome of such an actual influence over the mind of the alienor that it cannot be considered his free act. But the parties may antecedently stand in a relation that gives to one an authority or influence over the other from the abuse of which it is proper that he should be protected. When they stand in such a relation, the party in the position of influence cannot maintain his beneficial title to property of substantial value made over to him by the other as a gift, unless he satisfies the court that he 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. 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."

- [32] In transactions *inter vivos*, undue influence may be found to exist if the donee has obtained an advantage for himself or herself through the unconscionable use of a position of influence over the donor. In the case of testamentary dispositions though, as stated by Sir James Hannen P in *Wingrove v Wingrove*:¹⁰

"To be undue influence in the eye of the law there must be — to sum it up in a word — coercion. It must not be a case in which a person

⁸ (1936) 56 CLR 113 at 134.

⁹ Cited in *Burrawong Investments Pty Ltd v Lindsay & Anor* [2002] QSC 82 at [63].

¹⁰ (1885) 11 PD 81 at 82 – 83.

has been induced by means such as I have suggested to you to come to a conclusion that he or she will make a will in a particular person's favour, because if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate in the sense of its being legal. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do, that it is undue influence.

The coercion may of course be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be, that the mere talking to him at that stage of illness and pressing something upon him may so fatigue the brain, that the sick person may be induced, for quietness' sake, to do anything. This would equally be coercion, though not actual violence.

These illustrations will sufficiently bring home to your minds that even very immoral considerations either on the part of the testator, or of some one else offering them, do not amount to undue influence unless the testator is in such a condition, that if he could speak his wishes to the last, he would say, 'this is not my wish, but I must do it'.

If therefore the act is shewn to be the result of the wish and will of the testator at the time, then, however it has been brought about — for we are not dealing with a case of fraud — though you may condemn the testator for having such a wish, though you may condemn any person who has endeavoured to persuade and has succeeded in persuading the testator to adopt that view — still it is not undue influence."

- [33] There can be no "undue influence" without "coercion": persuasion or inducement does not equate with coercion.¹¹ Coercion relevantly exists only when a person has been induced to do something which is not that person's will or wish.¹²
- [34] In my respectful opinion "unduly influenced" in sub-particular 1 does not take its meaning from the doctrine of "undue influence" applicable to testamentary dispositions. The charge is not concerned with the setting aside of a testamentary disposition: it alleges that the conduct of the respondent nurse constituted unsatisfactory professional conduct. Sub-particular 1 is plainly not concerned with actual undue influence: the conduct to which it relates is alleged to have given rise to "a foreseeable risk that the deceased could become unduly influenced" by the respondent.
- [35] Sub-particulars 2 and 3 contain no express reference to conduct in relation to a future will and there is no good reason why their scope should be so confined. Where the sub-particulars address conduct in respect of a will or a future will they

¹¹ *Parfitt v Lawless* (1872) LR 2 P & D 462 per Lord Penzance at 470; *Baudains v Richardson* [1906] AC 169 at 184 – 185 per Lord Macnaghten; *Winter v Crichton* (1991) 23 NSWLR 116 at 121.

¹² *Winter v Crichton* (1991) 23 NSWLR 116 at 121-122; *Wingrove v Wingrove* (1885) 11 PD 81 at 82 – 83; *In the Will of Wilson* (1897) 23 VLR 197 at 199; *In re Barnett* [1940] VLR 389 at 393 – 394.

do so expressly. Sub-particulars 4 and 6 make express allegations in relation to the deceased's will. Sub-particular 5 alleges a failure to relinquish an entitlement under a will. It would therefore require an unorthodox approach to construction to construe sub-particulars 1, 2 and 3 as relating only to conduct connected with the possibility of a future testamentary benefit to the respondent.

- [36] In any event I do not accept that the words "there was a foreseeable risk that the deceased could become unduly influenced by you" were intended to convey that there was a foreseeable risk that the respondent would do or omit to do acts by reason of "undue influence", as that concept is understood in equity, having been exerted over the deceased by the respondent.
- [37] The language of the particulars suggests that the words were intended to have a more colloquial meaning; namely that "there was a reasonable risk that the deceased could become influenced to make decisions in relation to his affairs as a result of the professionally inappropriate influence exerted over the deceased by the respondent by virtue of the matters stated in sub-particular 1".
- [38] Whatever the meaning of the words "unduly influenced" in the charge it was important that the Tribunal and the parties shared the same understanding of their meaning. Absent such consensus it was necessary for the parties to be aware of the lack of consensus and to have the opportunity to make submissions on the point.

Conclusion

- [39] For the reasons given above the proceedings before the Tribunal and the District Court miscarried and there has been no determination of the subject charge on its merits. That is an undesirable state of affairs having regard to the nature of the allegations made against the respondent and the role of the applicant and the Tribunal in the regulation of the nursing profession.
- [40] For the above reasons I would:
- (a) Grant leave to appeal;
 - (b) Allow the appeal;
 - (c) Order that the orders of the District Court made on 25 May 2009 be set aside;
 - (d) Order that the orders of the Tribunal made on 6 October 2008 be set aside and that the Tribunal determine the matter according to law; and
 - (e) Order that the respondent pay the applicant's costs of and incidental to its application for leave to appeal and of this appeal.
- [41] I would make no order concerning the costs of the appeal to the District Court. The difficulties that have arisen in this matter largely result from the way the charge was worded and the way it was presented to the Tribunal.
- [42] I agree with Chesterman JA and the Chief Justice that the condition imposed by the Tribunal was not beyond power.
- [43] Had I found, as did the majority, that the Tribunal's decision should stand, I would have found also that no error was shown to exist in respect of the sentence imposed.
- [44] **CHESTERMAN JA:** The respondent is a nurse registered under the *Nursing Act* 1992 ("the Act"). The applicant is the body corporate, established by s 6 of the Act,

charged with the regulation of nursing and the maintenance of professional standards. By s 104 of the Act the applicant may prefer a disciplinary charge against a nurse and refer it to the Tribunal, established by s 84 of the Act, if it reasonably believes there are grounds for taking disciplinary action. The Tribunal's functions include hearing any charge referred to it and making "findings about whether a ground for disciplinary action is established". If so satisfied it may take the action authorised by s 116. The Tribunal consists of a lawyer who is to be its chairman,¹³ 12 registered nurses and three representatives of "persons who use services provided by the nursing profession". When the Tribunal is called upon to determine a charge of professional misconduct it is constituted by the chairman and four other members three of whom must be registered nurses (s 96).

[45] By s 104A:

"(1) Each of the following is a ground for disciplinary action against a relevant person-

- (a) the relevant person has behaved in a way that constitutes unsatisfactory professional conduct;
..."

"unsatisfactory professional conduct, for a relevant person, includes the following-

- (a) professional conduct that is of a lesser standard than that which might reasonably be expected of the relevant person by the public or the relevant person's professional peers;
- (b) professional conduct that demonstrates incompetence, or a lack of adequate knowledge, skill, judgment or care, in nursing practice;
- (c) infamous conduct in a professional respect;
- (d) misconduct in a professional respect;
- (e) conduct discreditable to the nursing profession;
- (f) providing a person with health services of a kind that are excessive, unnecessary or not reasonably required for the person's wellbeing;
- (g) influencing, or attempting to influence, the conduct of another nurse, midwife or authorised person in a way that may compromise patient care;
- (h) fraudulent or dishonest behaviour in nursing practice."

[46] By an amended notice of charge dated 29 January 2008 the applicant gave the respondent notice pursuant to the Act that it had preferred:

"... the following charges against you pursuant to section 104(1) of the *Nursing Act 1992* on the ground that you have behaved in a way

¹³ The Act uses the term "chairperson", but as that word is both ugly and foolish I shall use "chairman" throughout.

that constitutes unsatisfactory professional conduct contrary to section 104A(1) of the *Nursing Act 1992*.

Particulars:

You abused your position of influence and trust in respect of James Robert Paidley (now deceased) ('the deceased') arising from a nurse/patient (therapeutic) relationship formed in the period up to 22 May 2004 in that:

1. You over involved yourself in the deceased's affairs in the period from his admission to the Ipswich General Hospital on 23 May 2004 until his death on 3 July 2005 to such an extent that there was a foreseeable risk that the deceased could become unduly influenced by you in that you:
 - a) Regularly visited the deceased at Ipswich Hospice Care at 37 Chermerside Road, Eastern Heights in the period from 16 June 2004 to 29 December 2004;
 - b) Regularly visited the deceased at Karinya Village Nursing Home at 26 Samuel Street, Laidley in the period from 29 December 2004 to 14 January 2005;
 - c) Accepted the deceased's enduring power of attorney on both financial and personal/health matters on or about 4 January 2005;
 - d) Regularly attended the deceased's principal place of residence at 16 Yates Street, Rosewood to check mail, feed the deceased's cat and ensure the house was secure; and/or
 - e) Regularly visited the deceased at Glenwood Hostel at 49 Main Street, Lowood in the period from 14 January 2005 until his death on 3 July 2005 and had involvement in formulation of the deceased's care plan.

in circumstances where you had failed to take appropriate steps to make it clear to the deceased that the therapeutic relationship had come to an end subsequent to his admission to the Ipswich General Hospital on 23 May 2004.

2. You failed to take positive steps to ensure clarity in your relationship with the deceased by not informing the family of the deceased (particularly Wayne Paidley) or your colleagues that your relationship with the deceased had changed from that of paid carer or nurse to that of an unpaid friend or confidante.
3. You failed to adequately involve, or reasonably attempt to adequately involve, the family of the deceased (particularly Wayne Paidley) in decisions or discussions about the deceased's ongoing care requirements.
4. You failed to take positive steps to ensure a greater distance between yourself and the deceased when he was making decisions about his Will in circumstances where it must have been within your

contemplation that you may gain a significant entitlement under the deceased's Will.

5. You failed to relinquish the entitlements gifted to you under the terms of the deceased's will dated 23 September 2004.
6. You sought to influence the deceased at various times in the period from 23 May 2004 until the deceased's death on 3 July 2005 to benefit you under his will.

By engaging in the conduct alleged, the unsatisfactory professional conduct amounts to any one or more of the following within the meaning of section 104A(3) of the *Nursing Act 1992*; namely:

- A. Professional conduct that is of a lesser standard than that which might reasonably be expected of you by the public or your professional peers; or
- B. Professional conduct that demonstrates incompetence, or a lack of adequate knowledge, skill, judgment or care, in nursing practice; or
- C. Infamous conduct in a professional respect; or
- D. Misconduct in a professional respect; or
- E. Conduct discreditable to the nursing profession; or
- F. Fraudulent or dishonest behaviour in nursing practice.”

[47] By s 105 of the Act when a charge is referred to the Tribunal for hearing and determination the chairman of the Tribunal must take all necessary steps to constitute a Tribunal for the hearing and give the person charged adequate written notice of the charge. By subs (6) the Tribunal must observe natural justice and proceed quickly and with as little formality and technicality as is consistent with a fair hearing. It is not bound by the rules of evidence and may inform itself in any manner it considers appropriate.

[48] The hearing and investigation of the charge before the Tribunal occupied four days, 15 to 18 September 2008. Evidence by way of affidavit was adduced by both applicant and respondent. Some deponents were cross-examined. As well the parties agreed upon some facts which were put into a statement given to the Tribunal. The agreed facts were:

- “1. The respondent was first registered as a nurse in Queensland under the provisions of the *Nursing Act 1992* on 27 March 1979 and has maintained continuous registration to date.
2. The respondent was born on 5 March 1959.
3. The respondent first met James Robert Paidley (‘the deceased’) at the deceased's house at 16 Yates Street, Rosewood in or about September 2002 when the respondent was assigned by her then employer, BlueCare, to provide community care for the deceased.
4. The deceased was born on 27 May 1930.

5. The respondent provided community care to the deceased every Monday to Friday from September 2002 to May 2004 except for periods of leave or when the deceased was hospitalised.
6. The respondent monitored the patient's diabetes, attended to wound care and did his grocery shopping in the period from September 2002 to May 2004.
7. The deceased was admitted to the Ipswich General Hospital on 23 May 2004.
8. On 4 June 2004 the patient was diagnosed with metastatic cancer and transferred to palliative care.
9. The deceased remained an inpatient at Ipswich General Hospital until 16 June 2004.
10. The respondent visited the deceased at the Ipswich General Hospital on several occasions.
11. The deceased was a resident at Ipswich Hospice Care at 37 Chermside Road, Eastern Heights from 16 June 2004 to 29 December 2004.
12. The respondent visited the deceased at Ipswich Hospice Care on at least 56 occasions.
13. On 23 September 2004 the deceased signed a will appointing the respondent as sole executor and leaving his entire estate to the respondent, save for a bequest of \$2,000 to his nephew Wayne Paidley.
14. The deceased was a resident of Karinya Village Nursing Home at 26 Samuel Street, Laidley from 29 December 2004 to 14 January 2005.
15. The respondent visited the deceased at Karinya Village Nursing Home.
16. The respondent accepted the deceased's enduring power of attorney for both financial and personal/health matters on 4 January 2005.
17. The respondent was a resident of Glenwood Hostel at 49 Main Street, Lowood from 14 January 2005 to 3 July 2005.
18. The respondent visited the deceased at Glenwood Hostel on 4 to 5 occasions each week in the period from 14 January 2005 to 3 July 2005.
19. Whilst the patient was a resident of the Glenwood Hostel:
 - a) The respondent was employed by BlueCare;
 - b) BlueCare was the owner/operator of the Glenwood Hostel;
 - c) The respondent was involved in formulating the care plan for the deceased.

20. The deceased died on 3 July 2005 at the Glenwood Hostel.
 21. In the period from 23 May 2004 to 3 July 2005, the respondent regularly attended the deceased's principal place of residence at 16 Yates Street, Rosewood to check mail, feed the deceased's cat and ensure the house was secure.
 22. The respondent did not relinquish her entitlement under the deceased's will (which included the property at 16 Yates Street, Rosewood) despite legal action by the patient's next-of-kin and a request by her then employer, BlueCare, to do so."
- [49] The Tribunal gave its decision on 6 October 2008. It found that the charge had been made out though not all of the particulars had been proved. It ordered that the respondent's registration be cancelled forthwith and that she be prohibited from reapplying for registration for a period of two years and then only after successfully completing a course in ethics, professional responsibility and accountability. The Tribunal further ordered that should the respondent be registered in the future then for two years thereafter she had to provide a copy of the Tribunal's order to any employer and authorise the employer to report to the applicant any "concern about the respondent's interactions with patients ...". The respondent was also prohibited from undertaking employment "in a community health nurse environment or in an aged care facility". The respondent was to pay the applicant's costs fixed in the sum of \$10,000.
- [50] The respondent appealed to the District Court against the Tribunal's orders pursuant to s 137 of the Act. On 25 May 2009 a District Court judge allowed the appeal, and ordered that the charge against the respondent be dismissed and that the applicant pay the respondent's costs of the appeal fixed at \$10,000.
- [51] The applicant seeks leave to appeal against the orders of the District Court pursuant to s 118 of the *District Court of Queensland Act 1967*.
- [52] The Tribunal thought it unnecessary to "set out in detail all of the evidence before it" because of the agreed facts. It nevertheless set out some "matters of significance":
- "13. In deciding whether the charges preferred in the Amended Notice of Charge had been proven to the requisite standard, the Tribunal has had the benefit of observing the witnesses give evidence. Whilst Mr Paidley's relatives were vague in various aspects of their evidence, each of them impressed the Tribunal as witnesses attempting to give evidence as honestly and accurately as possible. It was not surprising aspects of their evidence were vague, having regard to the infrequent contact they had with Mr Paidley, and the nature of the relationship between Mr Paidley and themselves.
 14. The Tribunal also had the benefit of observing the respondent give evidence. The respondent did not impress the Tribunal as a reliable or credible witness. Instead, the respondent presented as an unimpressive witness, who was being deliberately vague in her responses. In the Tribunal's opinion, the respondent was not honest, or reliable. The

Tribunal is not prepared to act on any of her evidence on contentious issues, except where it is corroborated by other evidence.

15. The Tribunal also had the benefit of evidence from Dr Winch and Dr McIntosh as to the professional responsibilities of a registered nurse in the respondent's position. The Tribunal found this evidence extremely helpful. In large measure, there was uniformity in the opinions expressed by these witnesses. In particular, there was uniformity as to risk of a power imbalance in such a relationship, particularly where, as here, the patient was first met as a patient, and as to the impropriety of a registered nurse, in the position of the respondent, accepting a benefit such as the benefit received by the respondent pursuant to the terms of Mr Paidley's Will."

- [53] The Tribunal described the particulars set out in the Notice as "charges". It found that "charge 1" had been made out. It was satisfied:

"... that the Respondent's failure to take appropriate steps to make it clear to Mr Paidley that the therapeutic relationship had come to an end subsequent to his admission to the hospital on 23 May 2004 constituted professional conduct that is of a lesser standard than that which might be expected of her by the public or her professional peers, and was conduct demonstrating a lack of adequate knowledge and judgement in nursing practice."

- [54] With respect to charge 2 the Tribunal found that there was:

"... no evidence any of the respondent's colleagues were aware (her) relationship with Mr Paidley had changed from that of paid carer or nurse to that of an unpaid friend or confidante in whom Mr Paidley had entrusted conduct of his day-to-day financial affairs, an enduring power of attorney, and executorship and beneficiary of his Will. ... the respondent took no steps to inform any colleague of those matters, or to inform Mr Paidley's family.

Such conduct is professional conduct that is of a lesser standard than that which might reasonably be expected of her by the public or her professional peers. It is also conduct demonstrating a lack of adequate knowledge and judgment in nursing practice."

Accordingly the Tribunal was satisfied that charge 2 had been proved.

- [55] Charge 3 was dismissed. Its gravamen was described as a failure to involve or attempt to involve Mr Paidley's family in discussions about his treatment. The Tribunal was not satisfied that the respondent had an obligation to involve Mr Paidley's family in such decisions.

- [56] The Tribunal found that charge 4 was made out and that:

"The respondent's failure to ensure a proper professional distance between herself and Mr Paidley was a breach of her professional obligations. ... this failure amounts to professional conduct that is of

a lesser standard ... and is also conduct demonstrating a lack of adequate knowledge and judgement in nursing practice.”

- [57] The Tribunal was also satisfied that charge 5 had been proved. It said:
 “the respondent’s failure to relinquish the entitlements gifted to her under Mr Paidley’s Will amounts to professional conduct that is of a lesser standard than that which might reasonably be expected of her by the public or her professional peers, and is also conduct demonstrating a lack of adequate knowledge and judgement in nursing practice. It was plainly inappropriate for the respondent to benefit in such circumstances. The Tribunal rejects the respondent’s contention she believed it was not possible for her to pass on the benefits contained under the Will.”
- [58] What was called “charge 6” was also dismissed. It alleged that the respondent had sought to influence Mr Paidley in order to benefit under his will. The Tribunal thought that there were:
 “... many aspects of the respondent’s conduct which give cause for grave concern that she did seek to influence Mr Paidley ... and there are concerning aspects of her conduct post Mr Paidley’s death which are inconsistent with the respondent’s evidence that she was ‘*stunned*’ to learn she was a beneficiary ...”.

Nevertheless there was insufficient evidence to establish the charge to the requisite standard.

- [59] The judge was critical of the Tribunal’s assessment of the respondent. His Honour noted the advantage which the Tribunal undoubtedly had in making its assessment, by reason of having seen and heard her testify, but nevertheless criticised *inter alia* its rejection of her protestation that she was “stunned” to discover she was the beneficiary under the will. His Honour thought that “a reading of the transcript leaves an unfavourable impression of (the respondent) as a witness” but nevertheless believed that she had been unfairly treated by the chairman, and had not been allowed to give a fair account of herself.
- [60] No criticism had been made in the appeal to the District Court of the mode of proceeding before the Tribunal, or of the manner in which the chairman conducted the hearing. It is not, I think, possible from the excerpts from the transcript of the respondent’s evidence, to which the judge referred, to conclude that the chairman’s questioning was aggressive, or hostile, or such as to prevent the respondent giving an acceptable account of her actions, if she had one.
- [61] It is not clear why the learned judge thought it necessary to criticise the chairman’s conduct of the proceedings, or to express sympathy for the respondent. His Honour however did so, and his concern for the respondent may have influenced his decision.
- [62] The Notice of Appeal to the District Court alleged error in the Tribunal’s finding that a charge of unsatisfactory professional conduct had been made out. The identified grounds of error were that:
- (a) The particulars of the charge alleged an abuse by the respondent of her position of influence and trust in respect of Mr Paidley arising from their therapeutic relationship;

- (b) The Tribunal failed to find whether or not there was an abuse of the position of influence or trust;
- (c) The evidence did not support a finding of such abuse;
- (d) The evidence did not support a finding that the respondent had behaved in an unprofessional manner.

[63] The submissions to the District Court focused on the particularisation of the charge that the respondent had abused her position. It was emphasised that:

“all of the paragraphs ... of the Amended Notice of Charge ... are prefaced by the general allegation that (the respondent) abused her position of influence and trust. Part of the particulars of any charge or charges of unsatisfactory professional conduct was the allegation of such abuse”.

The submission went on that the Tribunal’s reasons for judgment did not include:

“... any stated finding that (the respondent) did abuse her position of influence and trust. ... An allegation that someone has used or abused their position carries with it the notion of intent or purpose on the part of that person. For the same reasons that the evidence was insufficient for the Tribunal to be satisfied that Charge ... 6 was proved, the evidence is such that the Court would not be satisfied that such an allegation is made out on the evidence. Such an allegation was an essential element of the charge ... and failure to establish (it) means that the charge should be dismissed.”

[64] Reference was made to the definition of “abuse” in the Concise Oxford English Dictionary to support the argument that the words connote an intention or purpose. The submissions concluded:

“In the absence of any evidence establishing ... that (the respondent) engaged in a course of conduct with the intention of gaining some benefit for herself, ... the evidence is insufficient to base a finding of guilt on a charge of unsatisfactory professional conduct.”

[65] The judge accepted the argument and expressed his entire agreement with it. His Honour reasoned that the case against the respondent before the Tribunal was that she had engaged in a course of conduct intended to bring her a benefit from Mr Paidley, in his lifetime or by his will. That was the substance of what the Tribunal designated “charge 6”, which the applicant did not prove. That connotation, of an intentional course of conduct, was thought to underlie the entire complaint which should have been dismissed upon the applicant’s failure to prove such an intention.

[66] The respondent’s argument, which the judge accepted, in my opinion, is without substance and should have been rejected. It depends upon a misreading of the charge preferred against the respondent, and an erroneous understanding of what is meant by “abused”.

[67] To take the second point first, I would reject the contention that the word connotes some form of intentional conduct. It is clear that the word has many meanings and shades of meaning. The Concise Oxford Dictionary notwithstanding, the word does not carry with it any signification that the conduct designated abusive must have been intended to bring about a particular result. “Abused”, where it appears in the

Notice of Charge, is clearly a verb. According to the Macquarie Dictionary the word in that form means:

“1. to use wrongly or improperly; misuse ... 2 to do wrong to; act injuriously towards ... 5, wrong or improper use; misuse ...”

The Oxford Thesaurus suggests as synonyms for “abuse” as a verb:

“1 misuse, misemploy, ... misapply, exploit ...”

- [68] Of the suggested meanings the most apposite as a substitute for “abused” would be “misused” or “used wrongly”. The substitution reveals that the verb does not express any particular purpose or course of action, but describes a condition of the conduct in question.
- [69] The judge was wrong therefore to conclude that the charge against the respondent should have failed because the applicant did not prove her conduct was intended to bring about some identifiable, and identified, result.
- [70] A further difficulty in the path of the argument that “abuse” connotes an intention to bring about a particular result is to identify from the Notice of Charge what the intention was. Counsel for the respondent had difficulty in articulating it. It is, of course, clear enough with respect to particular 6 which alleged an attempt to influence the deceased to gain a benefit. None of the other particulars are in that form. Particular 1 alleged that the respondent “over involved” herself in the deceased’s affairs so that there was a foreseeable risk that Mr Paidley might become unduly influenced by her. Conduct giving rise to a risk of a particular eventuality is, by definition, not conduct intended to bring about the eventuality. The mechanisms are distinct and different. Particulars 2, 3, 4 and 5 all alleged failures of various kinds by the respondent in her dealings with Mr Paidley. The allegations are that the respondent omitted to do something she ought to have done. Neglect in this sense is qualitatively different from conduct designed to bring about some result.
- [71] One cannot read the Notice of Charge, with the exception of particular 6, as alleging conduct pursued as a means of producing a result.
- [72] Dealing with the first point, there is a degree of confusion in the wording of the Notice of Charge and in the Tribunal’s analysis of it. The Notice advised the respondent that “the following charges” had been preferred against her on the ground that she had behaved in a way that constituted unsatisfactory professional conduct. Particulars of the charges were said to be that the respondent had “abused (her) position of influence and trust ...” in six identified circumstances, each described in some detail. The Tribunal found that four of those circumstances had been proved, but two had not.
- [73] It is possible to read the Notice of Charge as alleging one charge of unsatisfactory professional conduct of which six particulars were given, or as six particular instances of unsatisfactory unprofessional conduct. The Tribunal proceeded on the basis that there were six charges. A more natural reading of the Notice of Charge, despite the plural “charges”, is that it contained one allegation of unsatisfactory professional conduct arising out of the respondent’s professional relationship with Mr Paidley. The conduct was described as an abuse of position of trust and confidence, six particular instances of which were provided to substantiate the general allegation.

- [74] It does not, I think, matter which reading is correct. The Tribunal appears to have found four separate instances of unsatisfactory unprofessional conduct by reference to the six particulars given of the more general complaint that the respondent had abused her position of trust and influence. The better view of the Notice of Charge is that it contained one complaint of unsatisfactory professional conduct which was then particularised by the description of the six instances. On either approach, subject to the point next to be discussed, the Tribunal was satisfied that the respondent had behaved in a manner which constituted unsatisfactory professional conduct. The Tribunal did not expressly find an abuse of position, but its findings with respect to particulars 1, 2, 4 and 5, amply supported the determination that the respondent had committed unsatisfactory professional conduct.
- [75] The determination could be made notwithstanding that only four of the six particulars of misconduct were proved. I pointed out in *Coleman v Kinbacher* [2003] QCA 575, with the agreement of McMurdo P and Davies JA:
- “If the facts proved by the prosecution establish beyond reasonable doubt all the elements of an offence then a conviction must follow even though the Crown may have furnished particulars not all of which were made out. If the facts proved against the applicant were sufficient in law to constitute disorderly conduct, and they were within the description of the offence given by the particulars the applicant would have been rightly convicted. It would not matter that not all of the particularised actions were proved to have occurred.”
- [76] It is clear from the Tribunal’s findings with respect to those four particulars that the conduct proved against the respondent by the applicant amounted to unsatisfactory professional conduct. There were explicit findings to that effect.
- [77] The respondent’s argument to the District Court, which was accepted, was that to prove the charge against her the applicant had to prove not only the conduct particularised, and that it amounted to unsatisfactory professional conduct, but in addition it satisfied the description that she abused her position of trust and influence. The Tribunal did not refer to that aspect of the Notice of Charge and did not, in terms, find that there had been such abuse.
- [78] It is, I think, to misread the Notice of Charge to conclude that a finding of abuse of position was a separate element of the charge. The allegation brought against the respondent was that she had behaved unsatisfactorily in her professional conduct, contrary to s 104A(1) of the Act. The conduct was particularised as the abuse of her position of influence and trust *vis-à-vis* Mr Paidley. A description of the abuse of position was given by reference to the further particulars numbered 1 to 6. The plain structure of the charge was that the six instances alleged constituted the abuse of position. In other words, the abuse was not a separate particular of the charge but a designation of the conduct described by the particularised instances. According to the terms of the charge if the particulars were made out there had been an abuse of position. It was not necessary to find, in addition, a superadded criterion of abuse.
- [79] The Tribunal’s findings must be viewed with this understanding. Its express satisfaction that four of the particulars of misconduct had been established meant that abuse as alleged had also been proved. The express, consequential, finding that the charge of unsatisfactory professional conduct had been made out was sufficient

to allow the Tribunal to find that a ground for disciplinary action against the respondent had been established and empowered it to make the orders specified in s 116. It was not necessary for the Tribunal to find expressly that there had been an abuse of position of trust and influence. That followed inexorably from the mode in which the charge had been expressed and the Tribunal's satisfaction that four of the particulars which constituted the alleged abuse of position had been satisfied.

- [80] The respondent's complaint to the District Court about the Tribunal's finding was concerned with a point of substance, not of form. The complaint was not that the Tribunal had failed to find, as a question of formality, that the respondent had abused her position with respect to the late Mr Paidley. Rather it was that the Tribunal had not made the finding because it could not on the evidence find an intention to bring about the particular result. The dismissal of "charge 6" was relied upon. The judge accepted the argument. For the reasons I have given it should have been rejected.
- [81] His Honour thought that acceptance of the respondent's submissions might have resolved the appeal to the District Court on a "technical basis". His Honour therefore proceeded to consider the "merits" of the case which he concluded fell "far short of one establishing 'abuse'". His Honour's analysis of the "merits" of the appeal is with respect irrelevant and must be disregarded because it was predicated wrongly upon there being a need, if the charge of unsatisfactory professional conduct were to be proved, to establish conduct by the respondent intended by her to bring about the result that she benefited from Mr Paidley's estate. This emerged plainly from his Honour's finding that:
- "It would be totally wrong and unfair, applying the civil standard of proof, let alone the somewhat stricter *Briginshaw* standard, to draw the inference of a plan or anything intentional here."
- [82] One is then left with the Tribunal's findings that some of the particularised conduct alleged against the respondent had been proved and that that behaviour amounted to unsatisfactory professional conduct as defined by s 104A of the Act. The judge's reversal of those findings cannot stand based as it was upon a misunderstanding of the charge preferred against the respondent and an erroneous conception of what was needed to prove that the respondent had abused her position.
- [83] Nevertheless two comments are called for. The Tribunal's finding that what the respondent did amounted to unsatisfactory professional conduct was amply supported by the evidence. Both the applicant and the respondent called expert testimony on the point. They both agreed that the respondent had acted unprofessionally in her dealings with her patient. They differed only in this, Dr McIntosh who testified for the respondent, thought there was insufficient evidence that her lapse had been intentional.
- [84] Dr Winch who provided a report and gave evidence for the applicant said:
- "... (the respondent) has demonstrated unprofessional conduct in the assessment, planning and intervention of an acceptable level of domiciliary nursing care in the case of Mr James Paidley. This violated the boundary between professional nursing and personal conduct. ... It is apparent ... that Mr Wayne Paidley ... who did not live in the same town, visited his Uncle regularly although not as frequently as (the respondent). It is a clear and important role in

community and domiciliary nursing care to promote family well being and support of the carer This is particularly important when the Next of Kin is not residing with the patient. ... I do not see any evidence of this process in the patient's notes by (the respondent). ... it does not appear that (the respondent) has explored acceptable nursing interventions to promote the psycho-social well being of this patient as he becomes progressively isolated through his increasing lack of mobility during the time that she was employed as his primary nurse (the respondent) exhibited professional conduct which is of a lesser standard than that which might reasonably be expected by ... (her) peers. Instead of trying to ensure that the Next of Kin was involved in the patient's care it would appear that (the respondent) stepped into this role and began to perform acts that are not normally part of the duties of the registered nurse. It is my opinion that she crossed the boundary between what is deemed professional nursing care and what would be acknowledged as personal care ... as Mr Paidley's vulnerability progressively increased The documents ... I reviewed do not support that appropriate professional behaviour was followed ... Specifically:

4. In the final admission to Ipswich General Hospital a number of inappropriate requests were made to (the respondent) that indicated that the patient had misunderstood her role. Rather than gently correct this impression (the respondent) undertook these tasks This may have reinforced the patient's misunderstanding. ... there is no evidence that (the respondent) attempted to contact the Next of Kin There is no indication that (the respondent) referred the matter back to the social worker to deal with more appropriately."

[85] Dr McIntosh said:

"The events described ... demonstrate that (the respondent) did cross professional boundaries in relation to being over involved with the patient. ... There is no evidence that these crossings were of a malicious intent. ... It is clear however that (the respondent) did not put limits in place in term[s] of her relationship with the patient It is clear from the information provided that (the respondent) has demonstrated a lack of understanding about the complexities of professional boundaries especially in relation to over involvement with patients."

[86] The Tribunal is a specialist one. Its expressions of opinion that conduct does or does not amount to unsatisfactory professional conduct should be given considerable weight and not disturbed in the absence of demonstrated error in the process of reasoning, or fact finding, or the application of the statutory definition to the facts. This I understand to be the orthodox approach to appeals from specialist tribunals. See eg *Medical Board of Queensland v Thurling* [2003] QCA 518 at [12] and *Bhattacharya v General Medical Council* [1967] 2 AC 259 at 265 in which the Privy Council thought that an appellate court should be "slow to differ" from such a tribunal. I do not understand that *Graham v Queensland Nursing Council* [2010] 2 Qd R 157 is to any different effect.

[87] There was a separate challenge to the orders made by the Tribunal. Because the appeal to the District Court was allowed it was not necessary for the judge to deal with it and his Honour did not do so. If the applicant succeeds, as I think it should, the respondent complains of the fourth order made by the Tribunal. It was:

“Upon any subsequent re-registration, the respondent’s registration is to be subject:

- (a) to a condition for a period of two (2) years from the date of such re-registration requiring the respondent to provide a copy of these Orders and a written authority to her nursing employer within seven (7) days of commencing employment ... to report to (the applicant) if the employer holds a concern about the respondent’s interactions with patients, or if the employer is requested by (the applicant) to provide a report about those interactions;
- (b) to a condition prohibiting the respondent from undertaking employment in a community health nurse environment or in an aged care facility.”

[88] The respondent submits that the Tribunal had no power to make an order in those terms.

[89] Section 116 provides:

“(1) If, on the hearing of a charge against a person, the tribunal decides a ground for disciplinary action ... is established, it may do any 1 or more of the following –

- (a) take no action;
- (b) caution the person;
- (c) reprimand the person;
- (d) order the imposition of conditions (including limited registration or enrolment) under which the person may continue to practise as a registered nurse ... for a period (not longer than 2 years) determined by the tribunal;
- (e) order that the person’s registration ... be suspended for such period (not longer than 2 years) as the tribunal considers appropriate;
- (f) order the cancellation of the person’s registration ... and set conditions under which the person may re-apply for registration ...
- (g) ...
- (h) order the imposition of such other conditions as the tribunal considers appropriate, including, for example, conditions under which a person may reapply for registration or enrolment”.

[90] The respondent submitted that the power contained in s 116(1)(d) to impose conditions under which a person may continue to practise as a registered nurse is conferred only when the Tribunal decides not to suspend or cancel a registration but permits a nurse to continue in practice. The submission should be accepted. Section 116(1) identifies the Tribunal’s disciplinary powers in ascending order of

severity. The power to impose conditions is conferred with respect to sanctions less serious than suspension or cancellation of registration. It is a separate disciplinary power, not one to be exercised as an adjunct to suspension or cancellation. There was also the point that the conditions which may be imposed may not endure beyond two years. The condition imposed by order 4(b) is indefinite and cannot be supported by s 116(1)(d).

- [91] The only other source of power is s 116(1)(h) by which the Tribunal may impose “such other conditions as (it) considers appropriate ...”. The respondent submits that the ambit of that power is limited by the examples which follow, which are conditions attached to an application for re-registration following cancellation. It is submitted that the conditions found in order 4 apply to the respondent’s employment subsequent to a re-registration and not to the application for re-registration itself.
- [92] The applicant submits that s 116(1)(h) should be construed according to the natural meaning of the words and that the Tribunal may impose whatever conditions it considers appropriate. The example which follows is prefaced by the word “including”, indicating that the subject matter of conditions extends beyond applications for re-registration.
- [93] The matter is far from clear but I prefer the applicant’s construction. The powers conferred on the Tribunal by s 116 are to be exercised for the protection of the public, the proper disciplining of registered nurses and the regulation of their professional conduct. The subsection should not be construed more narrowly than its words, given their ordinary meaning, require. The power conferred by s 116(1)(h) is extremely wide allowing for the formulation of conditions in a wide variety of circumstances and to meet an equally wide variety of contingencies. There is nothing in the words themselves to limit the power to any particular set of circumstances such as an application for re-registration.
- [94] In my opinion order 4 was within the Tribunal’s competence.
- [95] The respondent also argued, more generally, that the sanctions imposed were excessive and that the District Court ought to have allowed the appeal at least to the extent of alleviating the severity of the disciplinary action.
- [96] In this regard it is worth noting the Tribunal’s finding:
 “... (the respondent’s) conduct in relation to Mr Paidley evidenced a total lack of professional responsibility on her part in relation to an elderly, lonely man. ... (he) was very vulnerable having regard to his domestic situation, his deterioration in health, and the recent diagnosis of a terminal illness. The respondent had a positive obligation to ensure there was a proper termination of the therapeutic relationship that existed between Mr Paidley and herself. She failed to discharge that professional responsibility. Instead, she engaged in a course of conduct ... and ... allowed Mr Paidley to depend more and more upon her to the point where she allowed herself to be listed as the first contact ... undertook control of his financial affairs, became his executor and major beneficiary of his estate, and refused to pass on the benefits ... notwithstanding an opportunity to do so without jeopardising her employment. Such conduct is totally unacceptable and deserving of condign punishment.”

- [97] This being the assessment of the specialist Tribunal charged with the responsibility of maintaining professional standards amongst nurses I would defer to its opinion and decline to come to any different opinion in the absence of some disclosed error in the process by which the Tribunal formed its opinion. None was suggested.
- [98] The applicant has succeeded in demonstrating an error by the judge in the disposal of the appeal to the District Court. The proceedings concern the fitness of the respondent to practise as a registered nurse. The Tribunal found serious deficiencies in her understanding of her professional role and a recalcitrance to reproof. It is in the public interest that there should be leave to appeal. I would give leave to appeal, allow the appeal, set aside the orders of the District Court made on 25 May 2009 and instead order that the appeal to that court be dismissed. The respondent should pay the applicant's costs of the appeal to the District Court and the application for leave to appeal and the appeal to this Court.