DISTRICT COURT OF QUEENSLAND

CITATION:	*Kavanagh v Londy & Ors* [2020] QDC 56
PARTIES:	**MICHAEL ANTHONY KAVANAGH** (applicant) **v** **ANNE LYNETTE LONDY and GERARD PHILIP PENDER as the Executors and Trustees of the Will of Mary Hilary Kavanagh (deceased)** (first defendant) **and** **JOHN DENNIS BYRNE** (second defendant)
FILE NO/S:	Toowoomba Registry 32/2017
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	Toowoomba District Court
DELIVERED ON:	16 April 2020
DELIVERED AT:	Brisbane
HEARING DATE:	26 February 2020
JUDGE:	Reid DCJ
ORDER:	**Application for summary judgment or strike out various paragraphs of the third further amended defence is dismissed**
CATCHWORDS:	COURT PRACTICE AND PROCEDURE – QUEENSLAND CIVIL PROCEDURE – SUMMARY JUDGMENT – STRIKE OUT – where the applicant applies for summary judgment on the equitable defences under r.292(2) (Qld)– where in the alternative the applicant seeks to strike out the relevant parts of the defence under r.171 (Qld) – whether any undue influence of the applicant continued beyond the date of agreement and up to the death of other contracting party – whether inference to be drawn from notes of her solicitor's consultations is that she may have remained under the applicant's influence – application for summary judgment refused – whether defence has adequately articulated the equitable defences – application to strike out refused

Uniform Civil Procedure Rules 1999 (Qld) rr 171, 292
Deputy Commissioner of Taxation v Salcedo [2005] 2 Qd R 232
Farmers' Co-Operative Executors and Trustees v Perks (1989) 52 SASR 399
Fisher v Brooker (2009) 1 WLR 1764
Gillespie & Ors v Gillespie [2013] QCA 126
Hewitt v Gardner [2009] NSWSC 1107
Londy v Kavanagah [2018] 1 Qd R 646
Rahme v Benjamin & Khoury Pty Ltd [2019] NSWCA 211
Royalene Pty Ltd v Register of Titles & Anor [2007] QSC 059

COUNSEL: N J Shaw for the applicants
L J Nevison for the defendant

SOLICITORS: CLO Lawyers for the applicants
Broadley Rees Hogan for the defendant

[1] The applicant applies for summary judgment on the equitable defences raised in the third further amended defence and counter claim (3rd FAD) or, in the alternative, orders striking out those parts of the 3rd FAD. The application is opposed. These matters are pleaded in the same form, but for some minor and presently irrelevant differences, in an earlier pleading filed on 7 June 2019.

Background

[2] The applicant's grandfather, Matthew Kavanagh died in 1924. His brother, Stephen Kavanagh, died in 1960. Mary Kavanagh (the deceased) was Stephen's daughter. She was, up to her own death on 14 September 2006, the owner of a property, "Emerald View". She had, until 5 July 2012 also owned a property, "Thagoona House". On that date she sold it to the applicant for $200,000. She had earlier given him $250,000 which he then utilised to purchase "Thagoona House" from her. That gift was part of a written agreement reached between them.

[3] The applicant holds a belief that the deceased's father behaved improperly towards his grandfather and that as a result she was unjustly enriched, and he correspondingly held out of assets to which he would otherwise have had an entitlement. I really know nothing of that grievance other than a view of it set out in the written agreement of 11 February 2012. That document was signed by the applicant and by the deceased after it had been prepared by the applicant. I shall refer to the document shortly.

[4] Before doing so it is helpful in an understanding of the relationship between the applicant and the deceased to say something of her, and of her various wills. The history of the matter is largely set out in a judgment of Boddice J in *Londy v Kavanagh*.[1]

[5] The deceased was 100 when she died. She had never married and had no children. She had two sisters both of whom predeceased her. After their death Boddice J says that the applicant resumed regular contact with her. She made a will in May 1972 which is presently of no importance, and then from 2008 made a significant number of wills through her solicitor, a Mr Pender. She made wills on 3.4.2008, 6.5.2008, 9.10.2009, 18.3.2010, 24.4.2013, 9.5.2013 and then her final will on 16.8.2013.

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1 [2018] 1 Qd R 646.

From the will of 3 April 2008, all but the last named the applicant as a beneficiary. He was also named as an executor in all but the last two wills. Each of the 2013 wills were made after the contract of February 2012. At all relevant times Mr Pender was the deceased's solicitor. He was very experienced, I was told. This is consistent with observations of Boddice J in his judgment.

[6] The benefit the applicant was to receive under the various wills varied.

[7] In paragraph 6 of the statement of claim (SOC), which is admitted in the 3rd FAD, it is alleged that under the will of 6 May 2008 "Emerald View" was left to the applicant and he was given an option to purchase "Thagoona House".

[8] In paragraph 7 of the SOC, also admitted in the 3rd FAD, it is said that the will of 9 October 2009 left "Emerald View" to the second defendant, but left "Thagoona House" to the applicant. In paragraph 8 of the SOC, also admitted in the 3rd FAD, it is said the 18 March 2010 will reinstated position in the May 2008 will, at least with respect to "Emerald View" and "Thagoona House".

[9] On 11 February 2012 the applicant and the deceased executed a written agreement. The terms of it are set out in [9] of the SOC and are not in dispute. The document provided:

(i) the applicant was to be paid $250,000 by the deceased;

(ii) that sum was said to be "in full settlement of all monies … owed to (the applicant)." The contract recites:

> "The debt referred to, relates principally to the disposal by Stephen Joseph Kavanagh of a half share of a farming property, previously occupied by Patrick Joseph O'Brien, of Crossdale via Esk, which, on the Instruction of Hugh

> Kavanagh (Senior), his Uncle, who financed that original Property, was to be bequeathed in equal shares to Stephen Joseph Kavanagh and Matthew Owen Kavanagh, sons of the aforementioned Hugh Kavanagh (Senior)."[2]

(iii) the applicant agreed to purchase "Thagoona House" for $200,000;

(iv) the deceased was said in the agreement to "honour the previous Agreement" to leave "Emerald View" to the applicant;

(v) the applicant agreed "not to contest or otherwise attempt to gain ownership" of another property, "Byrnes", also own by the deceased;

(vi) the applicant agreed "that any other unresolved issues" between his father's family and the family of the deceased's father, Stephen Kavanagh "shall be wholly and totally settled" under the terms of the agreement and the deceased "shall be totally absolved from any implication of responsibility for any of the aforementioned grievances";

(vii) the parties agreed "the terms and conditions of this Agreement shall remain private and confidential and, where possible, not be disclosed or become public knowledge".

[10] The contents of para [9] of the SOC are denied in [2] of the 3rd FAD, and the agreement is said to be:

(a) "avoidable and is avoided", for the reasons more particularly set out in [27] and [28] of the 3rd FAD;

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[2] As I have said, Stephen Joseph Kavanagh was the deceased's father and Matthew Owen Kavanagh was the applicant's grandfather. What gave rise to the applicant's complaint about Matthew Kavanagh's conduct is not specified other than in general terms in the agreement.

(b) "void or otherwise unenforceable" for the reasons set out in [30] of that pleading.

[11] [30] of the 3rd FAD alleges various legal matters which are not relevant for present purposes.

[12] [27] and [28] of the 3rd FAD allege that the February 2012 agreement was procured by undue influence and/or unconscionable conduct. They are the focus of the present application for summary judgment, or, alternatively, strikeout. The allegations in [27] and [28] are made on the basis of the facts alleged in paras [3] to [26] of the pleading.

[13] These paragraphs, which the applicant also seeks to strike out and which the respondent's rely on to establish undue influence and/or unconscionable conduct, can be summarised as follows:

(i) the deceased being 96 in February 2012 (see [3] of the 3rd FAD);

(ii) the fact the applicant had complained to the deceased about her father's conduct and that of her sisters, Kathleen and Celie, generally as summarised in the written February 2012 agreement (see [5] of the 3rd FAD);

(iii) the applicant's attending, with the deceased, on her solicitor on 16 April 2008 in relation to her testamentary affairs and questioning whether the deceased had capacity to make a valid will (see [7] of the 3rd FAD);

(iv) the applicant attending on the deceased on 5 May 2008, being the date of, Celie's death, and whilst Kathleen was ill and living in a nursing home, requesting a copy of Celie's will and telling the deceased to change her will "to leave her property within the Kavanagh family (see [8] of the 3rd FAD);

(v) changing her will on 6 May 2008 and 9 October 2009, following discussion with the applicant about the historical claims as set out in the February 2012 agreement (see [9] and [10] of the 3rd FAD);

(vi) at some time thereafter the applicant became aware of the change to the deceased's will of 9 October 2009 and told her she "should" leave "Emerald View" to him and not leave the property to the second defendant as it would be passed to his step-children (see [11] of the 3rd FAD);

(vii) On 11 February 2010 the applicant phoned the deceased's solicitor to discuss her will and power of attorney. During that conversation he told Mr Pender:

- he was aware of the deceased's 2009 will, and his reduced inheritance under it, and was not happy about that change;
- he had considered contesting Celie's will, as he had not received the entitlement "he should have received";
- that over the previous 12 months the deceased had behaved irrationally and in a confused and inconsistent manner on numerous occasions (see [12] of the 3rd FAD);

(viii) prior to 18 March 2010 the applicant and the deceased again discussed the historical claims of the applicant and the deceased thereafter attended on Mr Pender, again altering her will. During her meeting with Mr Pender:-

- she told him she wanted to reinstate the gift to the applicant as set out in the will of May 2008;
- Mr Pender told her of his concerns she was being pressured to change her will and told her the applicant had told him that he might contest her will on the basis of capacity, if changes were not made (presumably to reinstate the May 2008 bequest to him);

- she told Mr Pender that if the property was left to the second defendant it might end up with his step-children (mirroring the applicant's comment earlier referred to);
- she made a will reinstating the bequest to the applicant in the May 2008 will (see [13] of the 3rd FAD).

(ix) on 18 April 2011 the applicant again spoke to the deceased's solicitor and discussed her changing her power of attorney in his favour, and her health. He told Mr Pender that the deceased was failing both physically and mentally (see [14] of the 3rd FAD);

(x) on 9 February 2012 the applicant and the deceased attended on her solicitor to discuss her testamentary affairs. On the following day the applicant spoke to the deceased about reaching an agreement between her and his father's estate to address what were described as "illegal dealings" by her family and the historical claims (see [16] and [17] of the 3rd FAD);

(xi) on 11 February 2012 the applicant gave to the deceased a copy of what became the February 2012 written agreement for her to sign, and took her to have her signature witnessed (see [18] of the 3rd FAD);

(xii) on 13 February the applicant told the deceased's solicitor that he wanted to buy "Thagoona House", for $200,000 which he said was its market value in accordance with a valuation he had obtained. He told Mr Pender of the written agreement and of the fact he was to use the $250,000 she was to give him, as compensation for the historical claims, in order to purchase the property. He told Mr Pender that he, Mr Pender, did not need to know of the full details of the historical claims. He also said that Mr Pender should not tell anyone of the February 2012 written agreement (see [19] of the 3rd FAD);

(xiii) on 31 May 2012 the applicant told Mr Pender he wanted to sign the contract to purchase "Thagoona House", "in case anything happens" to the deceased (see [20] of 3rd FAD);

(xiv) only on 6 May 2013 did the deceased tell Mr Pender of the February 2012 agreement, and of the payment of the $250,000 to the applicant. She also told Mr Pender:-

- she felt pressured and manipulated when she signed the 2012 agreement; and
- she did not believe many of the things in the written 2012 agreement were correct (see [21] of the 3rd FAD);

(xv) in a letter of 30 May 2013 the deceased stated the applicant had blackmailed her into leaving "Emerald View" to him and had received "Thagoona House" for nothing, due to the $250,000 gift. Whilst it is pleaded that this letter was "addressed" to the applicant, I understand that it was not then delivered to him but placed with her will and read to him only after her death (see [22] of the 3rd FAD);

(xvi) on 8 July 2013 the applicant attended on the deceased's accountant to discuss her taxation affairs, without her authority to do so (see [23] of the 3rd FAD)

(xvii) the applicant knew the deceased did not have independent legal or financial advice in relation to the 2012 agreement, which agreement was prepared by him. He also arranged for its execution by the deceased, and to have her signature witnessed. He knew Mr Pender was her solicitor but did not offer to take her to see Mr Pender to get advice prior to signing it and did not suggest she contact Mr Pender (see [24] of the 3rd FAD);

(xviii) the applicant knew the deceased did not want family affairs to be discussed publicly (see [24(g)] of the 3rd FAD);

(xix) by reason of these matters the applicant knew the deceased was in a position of special disadvantage in relation to him and vulnerable to his influence (see [25] and [26] of the 3rd FAD).

[14] The defendants plead in [28] and [29] of the 3rd FAD that by reason of those matters, the February 2012 agreement was procured by undue influence and/or unconscionable conduct, and so voidable at the election of the deceased and, after her death, at the election of the first defendant. It is said she evinced an intention to avoid the agreement by making her will of 16 August 2013, under which the applicant received nothing and left "Emerald View" to the second defendant. Although the content of that last will was not communicated to the applicant, it is said the first defendant avoided the February 2012 agreement by filing and serving the further amended defence on 7 June 2019.

Applicant's Submissions

[15] The applicant's counsel submits that the applicant is entitled to summary judgment in relation to these equitable defences because the deceased had in fact affirmed the February 2012 agreement and lost her entitlement to avoid that agreement by actions she took in her lifetime.

[16] There is no dispute that if the defendants are able to establish undue influence or unconscionable conduct at the time of the February 2012 agreement being entered into, the contract was not void, but voidable at the election of the deceased or her representatives. The applicant's case is that, accepting that to be so, the right to rescind was lost by the deceased's subsequent conduct.

[17] It was submitted by the applicant's counsel that the right to resined was lost because:

(i) the defendant's pleaded case was that whilst undue influence or unconscionable conduct brought about the agreement, it is not pleaded that it continued until her death. (see T1-8 l, ll 13-15 and T1-10, ll 10-17);

(ii) it is not pleaded the deceased communicated any intention to avoid the contract to the applicant;

(iii) as a matter of law, the first defendant, after the deceased's death, could exercise any legal right the deceased had to avoid the contract at the time of her death and that, by filing and serving the further amended defence, the first defendant could, if such a right persisted, exercise such an election;

(iv) that whilst any delay between her death and the filing of the further amended defence was insufficient to justify the applicant succeeding in a summary judgment application (T1-9, ll 40-44) the right to do so was lost during the deceased's life time;

(v) the critical issue for the summary judgment application is that the deceased did not rescind promptly, and in fact affirmed the contract; (T1-10, l 43 to, T 1-11, l 4); and

(vi) the further amended reply and answer, at [27(b)], especially sub paras (i) and (iv), allege that the deceased on 28 May 2013 and 31 July 2013 told Mr Pender she did not wish to change her will to remove the bequest of "Emerald View" to the applicant, despite having been told, earlier, on 6 May 2013 that she could take court action in relation to the February 2012 agreement, and telling Mr Pender she had no intention of making a will inconsistent with the February 2012 agreement.

[18] The applicant's counsel submitted that if a party was going to assert undue influence beyond February 2012, when the contract was entered into, that should be specifically pleaded. (See T 1-11, ll 18-20). Counsel did however concede that on a summary judgment application, the respondents were not bound by the pleadings and that leave could be given to allow a further amendment to the 3rd FAD, or a rejoinder pleading could be filed. (T 111,ll, 17-30).

[19] Counsel accepted that if undue influence could be shown to have arguably persisted until the deceased's death, then the summary judgment application should fail. (T 1-11, l 33 to T 1-12, l 4).

[20] Counsel submitted however that there was simply no evidence of any influence continuing past the February 2012 date. He submitted that in fact the diary notes of the deceased's meetings with her solicitor were to the contrary effect.

[21] For reasons which I shall hereafter refer to, I do not accept that to be so.

Solicitor's Consultations

[22] Those diary notes comprise pages 64 to 70 of the exhibits to an affidavit of Alan Cumming, the applicant's solicitor.

[23] It is instructive to consider them in some detail. They relate to Mr Pender's consultations with the deceased on 6 May, 28 May and 31 July 2013.

[24] The record of the consultation of 6 May indicates, relevantly:

(i) they discussed the circumstances of the February 2012 agreement "in some detail";

(ii) the deceased had not obtained legal advice before signing that agreement;

(iii) she said she had felt pressured and manipulated into signing the agreement and the matters referred to in it were "largely … (the applicant's) view of matters" and she did not believe many of the matters "were fully true and correct";

(iv) the deceased believed she was elderly and frail and the applicant had "taken advantage" of her circumstances.

[25] Mr Pender advised he could, if the deceased wished, "take action to recover the $250,000" but the deceased said she did not wish to take any action. She was cautioned against further gifts or allowing the applicant to "force or manipulate or bully" her into any further agreement.

[26] The deceased also told Mr Pender at that meeting that the applicant had "made some comments to one of (her) neighbours about the past history of the families which annoyed (her) and frustrated (her) as did his attitude and tactics generally".

[27] She was advised by Mr Pender she was not going to be sued by the applicant for any of the matters referred to in the agreement, which was said to be long past and "irrelevant to (her) current circumstances". Mr Pender told her "there could be issues after your death" in relation to the applicant's control as executor or as to his entitlement to the contents of her home.

[28] Mr Pender raised issues concerning the applicant's suitability as an executor. The deceased said she did not wish to appoint another executor.

[29] The deceased indicated the matter had been worrying her for some months. Mr Pender told her that the applicant might use the agreement after her death as a means of contesting any wills she might make inconsistent with the February 2012

agreement. She said she understood that, but had no intention of making such a will.

[30] It is of some importance in my view to note that Mr Pender gave her no advice concerning the need to rescind the February 2012 agreement. He spoke to her only about the possibility of recovering the $250,000 already given to the applicant and about consequences, after her death, for any executors and beneficiaries. She would I conclude very probably not have understood the need to rescind the 2012 agreement.

[31] During the 28 May consultation, the deceased indicated she wanted to change her will, excluding the applicant as an executor and beneficiary.

[32] During that meeting the deceased indicated she did not want to give the applicant "Emerald View" but felt "obligated to do so and (was) concerned that at the risk of litigation after (her) death". She said the applicant "would do (so) if (she) did not leave him ("Emerald View") in the will.

[33] She was advised "not to concern (herself) with that as it was the concern of (her) executors and beneficiaries." Again no advice was given to her as to the need to promptly avoid the agreement by rescinding it.

[34] Ultimately she advised she did not then wish to change her will. I do not think it is logical to conclude that it means she was clear of the applicants influence, or at least that it was arguable she was not.

[35] She also indicated her concern that the applicant had enquired about her taxation matters with her accountant. She said the applicant had done so, in her view, as a way of "trying to remain involved in (her) affairs". She indicated to Mr Pender she

was considering selling her properties, including "Emerald View", and if she did this the applicant "would not receive anything" under her will.

[36] It is noted she was again not told of the need to rescind the written agreement and I would not infer the conversation support the fact that she did not or could not continue to be under his influence.

[37] On 31 July she again saw Mr Pender. The diary note indicates that she was very angry at the applicant's recent actions, as she had stated in prior discussions. I do not take this to mean that there were any more recent actions by the applicant beyond those already referred to in the earlier conversations. There was discussion about whether Mr Pender should write to the applicant "setting out" the deceased's wishes and feelings towards him, but she indicated Mr Pender should not do so. There was again no suggestion that he then told her of any need to rescind the agreement. The deceased indicated that both she and Anne Londy, who is one of the executors and first defendants and who attended each of three individual meetings – would speak to the applicant directly.

[38] There is no evidence that either in fact did so.

[39] The deceased indicated she "strongly" believed the applicant "had no right or entitlement" to "Emerald View" and had no family association with it until recent years. She reiterated she had been "bullied and manipulated" by him and was very concerned that he might take court action to contest her will if she did not leave the property to him. She said she did not wish to leave any ongoing problems for her executors or beneficiaries and was concerned about expensive litigation. Again such matters are not in my view suggestive of a passing of his influence.

[40] Mr Pender again advised her of the possibility of the applicant contesting her will because of the February 2012 agreement. He advised her that the applicant's actions had been "manipulative and might amount to undue influence". The applicant said she thought the applicant "would strongly contest" any will. She said it was a great worry to her. Again this in my view runs contrary to the argument that his influence had passed and her right to rescind was lost.

[41] Mr Pender indicated the possible expense of litigation. He indicated his view was that she "should do what (she) wished and give "Emerald View" to whomever you wished and that … (the) executors or beneficiaries would deal with it whatever issues arose".

[42] She again said she did not at present wish to change the will. She did however in fact do so in August 2013.

[43] At no time was she told of the importance of rescinding, or of communicating that rescission to the applicant.

Consideration

[44] The principle that arises is whether in such circumstances I can be satisfied that the deceased lost her right to rescind prior to her death. In considering that issue, I am conscious of the test on a summary judgment application as set out in the words of r 292 and as explained in *Deputy Commissioner of Taxation v Salcedo*.[3]

[45] It is clear, as the applicant's counsel submits, that following her various consultations with her solicitor the deceased did not seek to rescind the agreement. It is said she received "express advice as to her rights and clearly and unequivocally elected not to pursue them" resulting in loss of any right to rescind.

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3 [2005] 2 Qd R 232.

[46] I do not accept, having regard to the appropriate test, a proper understanding of the applicant's conduct and of the issues discussed during her consultations with Mr Pender, I should come to that conclusion.

[47] At no time during the course of the solicitor's consultations was she told of the need to rescind the agreement. It is true she was told she could seek to recover the $250,000 given to the applicant and chose not to do so. But that is different to what she did with "Emerald View". At no time was she ever told the February 2012 agreement had any effect on "Emerald View" other than for her executors and beneficiaries, in the event that she changed her will. She was told if she changed her will, disinheriting the applicant, which she ultimately did, that was an issue for her executors and beneficiaries, not for her. I do not conclude her doing nothing to recover the $250,000 given to the applicant is an indication that she was free of his influence. She was old, quite probably frail and concerned about the applicant's likely reaction to anything she might do.

[48] Her reluctance to change her will at the time of those consultations, and doing so only on about 16 August 2013, does not indicate she could necessarily be said to be free of the applicant's influence and control of her. Indeed his actions, and hers, might be thought to strongly suggest to the contrary. She, at least arguably, appears to have been afraid of his anticipated strong reaction to her making a will inconsistent with the February 2012 agreement and of the consequences of that for her, and ultimately for her beneficiaries and executors also.

[49] I am unable to conclude, having regard to the test required by the words of r 292, that the deceased was necessarily free of the applicant's influence at any time prior to her death. I do not accept that the legal effect of the deceased's actions are clear in the way the applicant's counsel asserts. The fact she sought legal advice about

her testamentary affairs on numerous occasions, and was advised by her solicitors of her ability to bring an action to recover the $250,000 paid by her to the applicant, and chose not to do so, does not justify one in concluding that she was free of his influence. So too her deciding not to change her will on occasions prior to her ultimately doing so in August 2013 does not amount to an affirmation of the contract and is not indicative that she was free of his influence.

[50] The applicant's counsel submitted that she was given legal advice in May and July of 2013 "in respect of the allegations that underpin the equitable defences" but "decided to take no action" (see para 6(c) of his written submissions). He submits that such a position is inconsistent with the proposition that the right to avoid the contract was not lost up to the time of the death.

[51] I do not accept that.

[52] The deceased was never told by Mr Pender of the need to avoid the contract. She was in fact advised the contract was a matter for her executors and beneficiaries. The advice concerning taking court action given to her on 6 May was confined to the recovery of the gift of $250,000. She was told she was not going to be sued for any of the matters referred to in the agreement. She was also told the applicant might use the agreement after her death to contest any changed will. That such a view was arguably her understanding is entirely consistent with the notation made on 29 May that she was concerned that the risk of litigation after her death. She was advised not to concern herself with that as it was a matter for her executors and beneficiaries. That advice was effectively repeated on 31 July. She indicated she had been bullied and manipulated by the applicant but was concerned if she did not leave him the property she would be leaving ongoing problems and expense for her

executors and beneficiaries. That is not inconsistent which his exercising ongoing influence over her.

[53] It is not disputed that if the deceased remained under the applicant's influence up until her death then any lapse of time the deceased in not taking action to avoid the contract has no legal consequences. This is consistent with observations of Duggan J to that effect in *Farmers' Co-Operative Executors and Trustees v Perks*.[4]

[54] I was referred also to *Rahme v Benjamin & Khoury Pty Ltd*[5] where at para [106] Macfarlan JA, with whom Bathurst CJ and McCallum JA agreed, said:

> "To ensure that consent is fully informed, independent advice must be 'meaningful' advice enabling the person advised to make an independent intelligent choice concerning the transaction… In Bester, Street J held that the advice of a solicitor was inadequate in circumstances where the solicitor 'read the document through' and 'invite [d] questions of the plaintiff but did not give the plaintiff 'advice as to whether or not she should sign the document."

[55] That is important here. Whilst the applicant relies on the deceased receiving legal advice, as I have said, at no time was she specifically advised of the need to rescind or that, if she did not do so, that might be seen as an affirmation of the February 2012 contract.

[56] In considering that question and the inference to be drawn from her conduct, I am very mindful of the deceased's age and of the effect on her of her express belief that the applicant would strongly contest any decision by her to resile from the agreement.

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4 (1989) 52 SASR 399 at 417.
5 [2019] NSWCA 211.

[57] In *Hewitt v Gardner*[6] Ward J spoke with approval of observations of Sir Anthony Mason in an article published in the Anglo American Law Review where the former Chief Justice said:

> "My understanding of undue influence… is that it denotes an ascendency by the stronger party over the weaker party such that the relevant transaction is not the true voluntary and independent act of the weaker party."

[58] Sir Anthony emphasised the impaired judgment of the weaker party as critical.

[59] In *Hewitt* [supra] Ward J said at para [71] of his judgment:

> "It matters not that the deceased being of sound mind may have intended to confer that benefit. The question is how the intention was produced."

[60] In this case it is at least open to an arbiter of fact to conclude that the deceased's agreement in February 2012 was bought about by the applicant's undue influence or his unconscionable conduct. As I have already said consideration of the diary notes of the solicitor's consultations at least leaves open the view that such influence was ongoing.

[61] In dealing with the question of delay and whether a person's rights arising from undue influence or unconscionable conduct were lost, Wilson J, with whom McMurdo P and White JA agreed, said in *Gillespie & Ors v Gillespie*[7]adopting what have been said by the privy council that the critical fact in considering whether delay was a bar to a claim for equitable relief was,

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6 [2009] NSWSC 1107.
7 [2013] QCA 126 at [79].

> "Whether [a party] has, by his inaction and standing by placed (another party) in a situation in which it would be inequitable and unreasonable 'to place him if the remedy were afterwards to be asserted'."

[62] Her Honour said, quoting from Meagher Gummow & Lehane's "Equity Doctrines and Remedies" that there are two kinds of laches –

(i) delay with acquiescence, where prejudice to others need not be shown; and

(ii) delay with prejudice to others.

[63] Her Honour noted this latter delay was more common and referred to the judgment of Lord Neuberger in *Fisher v Brooker*[8], where his Lordship said that some sort of detrimental reliance is usually an essential ingredient.

[64] In this case the applicant's counsel submitted that his client would suffer relevant detriment.

[65] In para [27(c)] of the reply, the applicant pleads, in response to the assertion in [29(d)] of the 3rd FAD that the contract was avoided by delivery of the further amended defence on 7 June 2019, that the defendants are estopped from doing so because of the deceased representing she intended to perform the agreement by carrying out its terms. This was presumably by giving him the $250,000 and then transferring her ownership of "Thagoona House" to him as required in the contract.

[66] In oral submissions the applicant's counsel submitted that although detriment was not an immutable requirement to be proven, it was proven here because the applicant had carried out the contractual requirements upon him, namely:

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8 (2009) 1 WLR 1764 at 1781.

(i) purchase of the "Thagoona House";

(ii) by keeping the matter confidential;

(iii) by not contesting the deceased's ownership of the property "Byrnes";

(iv) by accepting that the effect of the agreement was that any other unresolved issues between the families were wholly resolved, and the deceased was absolved from any responsibility for the historical grievances referred to in the agreement.

[67] A difficulty with such a submission, in my view, is that in considering issues of laches and acquiescence, being equitable defences to the claim of undue influence and unconscionable conduct, it is necessary to have regard to competing equities and the issue of whether the applicant has suffered relevant prejudice. This is, in my view, different from the approach one takes when looking at strict contractual matters. Any prejudice suffered by the applicant is relevant to the issue of his defences to these equitable claims, but this involves a consideration of the strength of competing equities.

[68] Ultimately whether any of those matters amounts to a sufficient detriment, in circumstances where the purchase price of the "Thagoona House" was at market value, and wholly paid for by the money given by the deceased to the applicant, is a moot point.

[69] I am not persuaded that in balancing the respective equities of the applicant and deceased in relation to such matters that it could be said the defendants do not have reasonable prospects of defending the matter at trial and that there is no need for a trial.

[70] In the circumstances I refuse the application for summary judgment.

Strike out

[71] I turn then to the application to strike out the relevant parts of the 3rd FAD.

[72] The applicant submits that the portions of the pleading dealing with the equitable defence should be struck out because of lack of specificity about the applicant's conduct. It was said the pleading is such that any evidence to the same effect could not cause a court to feel an actual persuasion of their occurrence because of the indefinite nature of the allegations.

[73] It is said there was nothing alleged which could give rise to conduct amounting to undue influence or unconscionable conduct and that the pleading is entirely conclusory in nature. I have earlier set out (13 hereof) the critical aspects of the pleading.

[74] A critical object of pleadings of course is to ensure the other party knows the nature of the case it is required to meet. The pleading, in my view, sufficiently outlines the overall factual matrix the defendant proposes to prove to enable the applicant to know the relevant case it must meet. In my view, if such matters were proved, it would be open to the arbiter of fact to conclude that there was undue influence and/or unconscionable conduct, that that influence continued until the time of the deceased's death, that the right to rescind was not lost, and that the contract was duly rescinded executors by the filing of the further amended defence.

[75] It cannot be said the defence raised is obviously untenable.[9]

[76] In the circumstances, the application to strike out the various paragraphs of the 3rd FAD is also refused.

[77] I will hear submissions as to cost.

[9] *Royalene Pty Ltd v Register of Titles & Anor* [2007] QSC 059 [6].