

DISTRICT COURT OF QUEENSLAND

CITATION: *Kavanagh v Londy & Ors* [2022] QDC 161

PARTIES: **MICHAEL ANTHONY KAVANAGH**
(plaintiff)
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: 32 of 2017

DIVISION: Civil

PROCEEDING: Trial

ORIGINATING COURT: District Court

DELIVERED ON: 25 July 2022

DELIVERED AT: Brisbane District Court

HEARING DATE: 10 February 2021 – 11 February 2021

JUDGE: Sheridan DCJ

ORDERS: **1. The plaintiff’s claim is dismissed.**
2. The parties are to file and serve draft orders by 15 August 2022.
3. If the parties are unable to agree the terms of the orders, they are to file and serve separate draft orders by 15 August 2022.
4. If the parties are unable to agree the orders, the defendants are to file and serve submissions by 22 August 2022 and the plaintiff is to file and serve submissions by 29 August 2022.

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – where there was a written agreement between the plaintiff and his second cousin – where the agreement provided that the second cousin would bequest a property to the plaintiff – where the second cousin now deceased left a will which left the property to the second defendant and not to the plaintiff - whether the agreement can be enforced

EQUITY – GENERAL PRINCIPLES – where there was a written agreement between the plaintiff and his second cousin – where agreement provided that the second cousin would bequest a property to the plaintiff – where the second cousin now deceased left a will which left the property to the second defendant and not to the plaintiff - whether agreement voidable for undue influence or unconscionable conduct

LEGISLATION: *Evidence Act 1977* (Qld), s 92

CASES: *Alford v Ebbage* (2003) 1 Qd R 343; [2002] QCA 194, followed
Bassett v Cameron [2021] NSWSC 207, cited
Barnes v Addy (1874) LR 9 Ch 244, cited
Bridgewater & Ors v Leahy & Ors (1998) 194 CLR 457; [1998] HCA 66, followed
Bull v R (2000) 201 CLR 443; [2000] HCA 24, followed
Callisher v Bischoffsheim (1870) LR 5 QB 449, followed
Commercial Bank of Australia Limited v Amadio & Anor (1983) 151 CLR 447; [1983] HCA 14, followed
Director of Public Prosecutions (Vic) v Le (2007) 232 CLR 562; [2007] HCA 52, followed
Eastwood v Kenyon (1840) 113 ER 482; (1840) 11 Ad & El 438, followed
Farah Constructions Pty Limited & Ors (2007) 230 CLR 89; [2007] HCA 22, cited
Giumelli & Anor v Giumelli (1999) 196 CLR 101; [1999] HCA 10, followed
Grubisic v Western Australia (2011) 41 WAR 524; [2011] WASCA 147, followed
Hughes v National Trustees Executors and Agency Co of Australasia Ltd (1978) 143 CLR 134; [1979] HCA 2, followed
Riches v Hogben [1985] 2 Qd R 292, followed
Johnson v Buttress (1936) 56 CLR 113; [1936] HCA 41, followed
R v Meakin (No 1) [2016] NSWSC 1006, followed
R v Von Einem (1985) 38 SASR 207, followed
Sheslow v Kostin (1997) 11 BPR 21,043, followed
Sidhu v Van Dyke (2014) 251 CLR 505; [2014] HCA 19, followed
Sorbello & Ors v Sorbello & Anor [2005] QSC 219, cited
Sugden v Lord St Leonards (1876) 1 PD 154, followed
Thorne v Kennedy (2017) 263 CLR 85; [2017] HCA 49, followed
Kakavas v Crown Melbourne Limited (2013) 250 CLR 392; [2013] HCA 25, followed
Kennedy & Hunt v Griffiths (2011) 5 ASTLR 345; [2011] QSC 369, cited
Lenehan v Queensland Trustees Limited [1965] Qd R 559, cited
Louth v Diprose (1992) 175 CLR 621; [1992] HCA 61,

followed

Miles v New Zealand Alford Estate Company (1886) 32 Ch D 266, followed

Morley v National Insurance Co [1967] VR 566, cited

Musumeci v Winadell Pty Ltd (1994) 34 NSWLR 723; [1994] NSW ConvR 55-716, followed

Union Fidelity Trustee Co of Australia Limited v Gibson [1971] VR 573, followed

Walton v R (1989) 166 CLR 283; [1989] HCA 9, cited

COUNSEL: N Shaw for the plaintiff
LJ Nevison for the defendants

SOLICITORS: CLO Lawyers for the plaintiff
Broadley Rees Hogan for the defendants

Introduction

- [1] In his claim in these proceedings, Michael Kavanagh seeks to enforce part of an agreement made on 11 February 2012 with his second cousin, Mary Kavanagh.
- [2] For the purposes of simplicity and without any disrespect, I will refer to the plaintiff and the deceased by their christian names; as I will the deceased's cousin, Stephen Kavanagh, her niece, Anne Londy, and her sisters, Frances Cecelia Kavanagh (Celie) and Kathleen Roach (nee Kavanagh) (Kathy).
- [3] By the agreement Mary agreed to bequeath to Michael a property known as Emerald View.¹ The agreement included a gift by Mary to Michael of \$250,000, which Michael then utilized to purchase Thagoona House, another property owned by Mary. Thagoona House was sold to Michael for \$200,000.
- [4] Michael held a belief that Mary's father had behaved improperly towards his grandfather and that as a result Mary had been unjustly enriched and he had been held out of assets to which he would have otherwise had an entitlement. He says the agreement was intended by him to correct that.
- [5] Mary was born on 10 January 1916 at Ipswich; making her 96 at the time of the agreement. Mary is now deceased. Mary had never married and had no children.
- [6] Mary made a will in 1972, which is of no importance. From 2008 onwards, following the death of her two sisters, Mary made a significant number of wills through her solicitor, Mr Pender; the first of which was made on 3 April 2008. Further wills were made on 6 June 2008, 9 October 2009, 18 March 2010, 24 April 2013, 9 May 2013 and her final will on 16 August 2013.
- [7] It was around the time of the death of her sisters in 2008 that Michael resumed regular contact with Mary. From the will of 3 April 2008, Michael became a

¹ The real property description of Emerald View is Lot 265 on Crown Plan CHS 147 title reference 10244050 and Lot 2 on Registered Plan 101143 title reference 135664048.

beneficiary under the will and was appointed as an executor. He was a beneficiary in all but the last will and appointed as executor in all but the last two wills. The last two wills were executed after the agreement.

- [8] In Mary's final will, the first defendants were appointed as executors of her estate. Under that will, Michael did not receive any part of the estate. In particular, Mary did not bequeath Emerald View to Michael, but instead to her cousin, the second defendant.
- [9] The defendants challenge the validity and enforceability of the agreement on a number of bases.

Terms of the Agreement

- [10] The agreement stated as follows:

“Agreement between Mary Hilary Kavanagh of 5 Kavanagh Road Thagoona, via Rosewood, Queensland, and Michael Anthony Kavanagh of 73 McMahon's Road, Sladevale, via Warwick, Queensland, 4370.

I, Michael Anthony Kavanagh, Sole executor of the Estate of Hugh Leo Kavanagh, hereby agree to accept the sum of \$250,000, (Two hundred and fifty thousand Dollars), in full settlement of all monies and accumulated Interest, owed to me, only son of the abovementioned Hugh Leo Kavanagh, of Sladevale, via Warwick, formerly of Milora, via Munbilla, Welwyn Crescent, Coorparoo, Townsville, and Lowood, only son of the late Matthew Owen Kavanagh of Lowood, subject to the conditions listed below.

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).

Other items and events referred to in this agreement include:-

- (1) The transfer, registration and use of the cattle brand OB8, by Frances Cecelia Kavanagh, and the Individual Partners and the Partnership of “The Estate of S.J. Kavanagh”, who benefited from this action, and the subsequent refusal to return the said brands on several occasions, when requested by Hugh Leo Kavanagh, the lawful Registered owner of those Brands.
- (2) The disposal of any assets of the Estate of Mary Flynn which may have been due to Hugh Leo Kavanagh, as his share of the abovementioned Estate.
- (3) The Disposal by Stephen Joseph Kavanagh, or his Heirs and Successors, of any share of any other Land, Cattle, Shares, Dividends or other items or assets which may have been due to Hugh Leo Kavanagh, or his Heirs and Successors.

This agreement is subject to the following conditions:-

- (a) Mary Hilary Kavanagh shall pay to Michael Anthony Kavanagh, the amount of \$250,000. (Two hundred and fifty thousand Dollars), in settlement of all the above.
- (b) Michael Anthony Kavanagh shall Purchase from Mary Hilary Kavanagh, the House and Land situated on the corner of Kavanagh and McGeary Roads, known as 1 Kavanagh Road Thagoona, formerly owned and occupied by the late Margaret and Bill O'Connell, for the sum of \$200,000. (Two hundred thousand dollars). This Property has an area in the vicinity of two thousand square metres.
- (c) Mary Hilary Kavanagh honours the previous Agreement, to bequest the House, Land and Contents of the House known as "Emerald View" to Michael Anthony Kavanagh, or his Heirs and Successors. This Property is within the boundaries of Kavanagh Road to the north, McGeary Road to the west, Turnbull Road to the south, and the Property owned by the Turnbull Family to the east. This property has an area in the vicinity of 27 ha.
- (d) Michael Anthony Kavanagh agrees not to contest or otherwise attempt to gain ownership of the Property, owned by Mary Hilary Kavanagh, known as "Byrnes", situated south of Turnbull Road. This property has an area in the vicinity of 57 ha.
- (e) I, Michael Anthony Kavanagh, agree, without reservation, that any other unresolved issues between the family of the late Hugh Leo Kavanagh, and the family of the late Stephen Kavanagh both in Money and Kind shall be wholly and totally settled under the terms of this agreement, and that Mary Hilary Kavanagh shall be totally absolved from any implication of responsibility for any of the aforementioned grievances.
- (f) I agree that the terms and conditions of this Agreement shall remain private and confidential, and, where possible, not be disclosed or become public knowledge".

[11] Particulars were requested and answered about various elements of the agreement.

[12] The first particular related to the allegation in the first two paragraphs that the acceptance of the sum of \$250,000 was in respect of a settlement of monies owed to Michael arising from the disposal of a half share of a farming property by Mary's father, Stephen Joseph Kavanagh. The particulars allege that Stephen Joseph Kavanagh was supposed to only get a half share in the property owned by his father (Hugh Kavanagh Snr), Mary's grandfather, but in or about 1954 he acquired the whole property and then sold the property to a third party. Michael alleges in the particulars that the debt referred to in this part of the agreement was a debt for a half share of the proceeds of this sale from the heirs of the estate of Mary's father, Stephen Joseph Kavanagh, namely his four daughters; the last survivor of which was Mary.

[13] No documentary evidence was led which showed that Stephen Joseph Kavanagh was only entitled to a half share. Michael was only born in 1945, making him nine at the date of the alleged transfer of the property in 1954.

[14] As to paragraph numbered (1) in the agreement, the particulars refer to a transfer and registration of a cattle brand which was transferred to Hugh Leo Kavanagh

(Michael's father) as part of the administration of the estate of Mathew Owen Kavanagh (Michael's grandfather) into the name of Celie (one of the daughters of Stephen Joseph Kavanagh and Mary's sister). That transfer is alleged to have occurred on 19 November 1935 and it is alleged by Michael that the memorandum of transfer contained the forged signature of his father. From that date until his death in 1960, it is alleged that the brand was used by Stephen Joseph Kavanagh to operate a cattle business. The use by Celie (and the partnership of which she was a part) was alleged in the particulars to have taken place between 12 July 1960 and 6 December 1983; with Mary as the last survivor of the partnership. The inference from the particulars is that the brand should not have been transferred to Celie in 1935 but should have passed in the administration of Michael's grandfather's estate to Michael's father and then to Michael. This will was not put into evidence.

- [15] As to paragraph numbered (2), the particulars refer to Mary Flynn, an aunt of Stephen Joseph Kavanagh and Matthew Owen Kavanagh, who died on 13 September 1910 with probate of her will being granted on 6 December 1910. It is said that Stephen Joseph Kavanagh and Matthew Owen Kavanagh were both beneficiaries under the will of Mary Flynn. The particulars allege that Kathy and Celie (two of Mary's sisters) were appointed trustees of Mary Flynn's estate in 1959. It is alleged that they paid the estate funds to themselves and that Michael's father was not paid any money from the estate. The inference from the particulars is that the estate was not administered according to the terms of the will and that Mary, as the last survivor, ultimately benefitted from that.
- [16] As to paragraph numbered (3), the particulars allege that Stephen Joseph Kavanagh took possession of 200 head of cattle in 1924 and received dividends which belonged to the estate of Michael's grandfather which may have been due to Michael's father (and hence Michael, as his heir).

Course of Evidence

- [17] Evidence was led from Michael to explain, from his point of view, the past events which are referred to in the agreement. This evidence was admitted solely on the basis that it went to his belief at the time or shortly before the agreement. He was also cross-examined on these matters with a view to it being shown that he had no basis for his claims. Notwithstanding the absence of any documentary or first-hand proof of them, Michael was steadfast and persistent in his claim that he and his father had been wronged. All this reinforced in my mind the probability that he behaved in a similar way in his dealings with Mary.
- [18] Most of the admissible evidence from Michael concerned his dealings with Mary from about 2008. Michael expressed himself forcefully in giving this evidence and denied any suggestion that he had influenced Mary unduly or improperly in relation to the agreement or her wills. Unfortunately, such was the manner of his giving evidence, that in the end I found his protestations unconvincing and rather tended to reinforce the opposite of his denials.
- [19] Apart from Michael, oral evidence was given by Mary's solicitor, Mr Pender, about his dealings and conversations with Mary in relation to her various wills and the agreement and by a cousin, Stephen, as to various communications he had with both Michael and Mary.

- [20] The evidence of Mr Pender was largely based upon his recollection of the conversations with Mary, with his memory being refreshed by his typed diary notes. His evidence was that he made handwritten notes during the course of his conferences with Michael or Mary and that after the conference he would dictate his notes. He would usually dictate the notes immediately after the conference occurred but sometimes that was not possible and the notes were dictated later. The typed notes would bear the date of the conference and the date on which the notes were typed up by the staff, which depending on staff availability could be several days later.
- [21] When the notes of Mr Pender were sought to be tendered, objection was taken to their tender on the basis that they should not be received as to the truth of what was said at the attendance, but only that they were evidence of the attendances themselves and “*what passed at those attendances*”.
- [22] No objection was taken during the oral evidence of Mr Pender as to the relevant conversations or their contents; including the statements he says were made to him by Mary. However, during the submissions relating to the basis upon which the notes were to be admitted, a similar objection was made that, in effect, the oral statements made by Mary to Mr Pender were not to be treated as evidence of the facts stated. Although the objection was late and therefore the evidence could have been treated as admitted for all purposes,² I propose to treat the oral evidence on the same basis as the notes.
- [23] Under the rules of the common law, a statement made out of court is not generally admissible as truth of its contents. They may be admitted as proof of the fact that a conversation occurred. That would be relevant in this case as part of the evidence involving the change of Mary’s wills, and, in particular, the change in the will which had the effect of nullifying the term of the agreement relied upon by Michael.
- [24] Statements made out of court, however, are not only limited to proving that the conversations occurred. In *Hughes v National Trustees Executors and Agency Co of Australasia Ltd*,³ Gibbs J (with whom Mason and Aitken JJ agreed) held that a statement by a testatrix about her son’s conduct, which had been received by the trial judge as evidence explaining why she had not made provision for him in her will, was admissible as original evidence to prove the knowledge, motive or other state of mind of the testatrix should that be relevant. The decision was approved by a subsequent High Court in *Bull v R*.⁴ Indeed, in the later decision, the plurality approved a statement by Mellish LJ in 1876 that:
- “wherever it is material to prove the state of a person’s mind, or what was passing in it, and what were his intentions, there you may prove what he said, because that is the only means by which you can find out what his intentions were.”*⁵
- [25] It may be, as the plurality observed in *Bull v R*,⁶ that the current state of the law, especially as expressed in *Walton v R*,⁷ goes further, but it is unnecessary to deal

² *Bull v R* (2000) 201 CLR 443 at 465 [76].

³ (1978) 143 CLR 134 at 149.

⁴ (2000) 201 CLR 443 at 466 [79] and 479 [122].

⁵ *Sugden v Lord St Leonards* (1876) 1 PD 154 at 251.

⁶ (2000) 201 CLR 443 at 480 [125].

with the issue further given the limited use to which it was evidently proposed to make of this evidence; namely in support of the equitable defences of undue influence and unconscionable conduct.

- [26] I found Mr Pender to have been a careful and reliable witness, and accordingly will rely upon his oral recitation of events and conversations.
- [27] Stephen, a former government lawyer employed in New South Wales, gave his evidence of conversations. Prior to giving his evidence he had been forwarded copies of documents included in the trial bundle, including a copy of a handwritten note made by him following his conversation with Michael, the day after the agreement was signed. After giving his evidence of that conversation as he could now recall it, Stephen added to his evidence by reference to his handwritten note. No objection was taken during the course of his evidence to his retelling of conversations he had with Michael or Mary. Objection was only taken to the tender of his handwritten note, and the tender was not pursued. His oral evidence was uncontested in any event. He was a very careful witness and I similarly rely upon his evidence as to the events, including the events about which he was informed by Mary.
- [28] There was a letter from Mary and an affidavit sworn by her which was admitted into evidence under s 92 of the *Evidence Act 1977* (Qld). It is more convenient if I deal with the admission of that evidence during the course of discussing the evidence. It is sufficient to note that the letter and the affidavit were evidence in the case, and I propose to rely upon them, notwithstanding the limitations about them which were submitted on behalf of Michael.

Evidence of Events

- [29] Michael says that what he described as meaningful discussions about the historical events started with Mary when her sister, Celie, died in 2008. He says that Mary said to him that it was always the intention of her and her other sisters that they would keep Emerald View in the Kavanagh family. He says that Mary said to him that she had to make amends for what had happened in the past. He said that Mary said that she would have to be the one to do it because she was the last survivor. He says that as a result he was to get Emerald View under her will.
- [30] Michael gave evidence that this conversation occurred on 5 May 2008. It is unclear on what basis he decided that this was the date of the conversation, though I think it probable that he chose this date because this was the day before Mary signed the will gifting him Emerald View; a matter I will shortly come to.
- [31] Mr Pender gave evidence that on 26 March 2008, Michael had phoned him to make an appointment for him to see Mary and her sisters in hospital for the purpose of them making new wills.
- [32] By reference to Mary's earlier will executed in 1972, Mary had left everything to her sister, Celie, and had appointed her as her sole executrix.

⁷ (1989) 166 CLR 283.

- [33] Shortly after the phone call by Michael to Mr Pender, Mary executed a new will on 3 April 2008. In that will, her sister was removed as the sole executrix and trustee and Michael and another cousin, Colleen Fitzgerald, were appointed as executors and trustees. Her whole estate was left to her sisters, Kathy and Celie.
- [34] Mr Pender gave evidence of a meeting on 16 April 2008 with Michael, Mary and Mary's niece, Anne. Mr Pender gave evidence that there was a discussion "*in relation to a range of matters to do with Mary and her sisters*". There was discussion about the wills, properties owned and the wishes of Mary and the others. Mr Pender gave evidence that Michael raised an issue about the validity of Kathy's will and the assets that they each had and other issues including capital gains tax, insurance land tax, etc.
- [35] On 6 May 2008, Mary executed another will. Mr Pender confirmed that Mary attended at his office to sign the will and that Anne was present. That will was executed the day after Mary's sister, Celie, died. In that will, Mary appointed Michael as the sole executor and in his place, if he was to predecease her, Anne and her second cousin, John Byrne (the second defendant in these proceedings). In that will, the property, Emerald View, was left to Michael and Michael was granted an option to purchase the Thagoona House. Anne was left the Rosewood House and her second cousins, Colleen Fitzgerald and John Byrne, were left the Byrnes property. The residue of the estate was left in differing portions to Michael, Anne, Colleen Fitzgerald and John Byrne.
- [36] On 1 October 2009, Mary, in company with Anne, met with Mr Pender to discuss changing her will again. Mr Pender gave evidence that he expressed his concern, given Mary's age and increasing frailty, that changing her will could give rise to a suggestion that the will was not valid or that she did not have capacity or that she had been influenced by one person or another. Mr Pender said, however, that he was satisfied that she had capacity to give the instructions.
- [37] On 9 October 2009, Mr Pender and his secretary attended Mary at St Andrews Hospital and they witnessed Mary executing the new will. The will left Emerald View to John Byrne (and not to Michael) and left the Thagoona House to Michael (rather than an option to purchase the house, as provided for in her previous will).
- [38] Michael gave evidence that sometime later Mary told him about the change in her will. He says that he told her that he was not very happy about it "*but not in a heated way*". Michael said that Mary responded that she did not think he would like it, and Michael says that he outlined to Mary that "*we had some serious grievances*" and whilst she was leaving the property to him, they were all going to be forgotten. He says that he said to her, "*we've got to look at this again*". Michael said in evidence that he said whilst the will was written that he was getting Emerald View "*there were no problems*" and said "*this changes matters altogether*". Michael said that a short time later Mary conceded that she would return the will to the way it was before.
- [39] On 11 February 2010, Mr Pender said that Michael rang him and told him that he was not happy about the changes to Mary's will and that he would consider contesting Mary's sister, Celie's estate. Mr Pender said that Michael told him that there had been numerous occasions in the last twelve months, and in the recent will, where Mary "*was acting rash and confused and in an inconsistent manner*". Mr

Pender said he told Michael that he was not aware of any of those issues and that he was satisfied as to Mary's capacity. Although Michael said he did not think this conversation occurred, he accepted that he was concerned and had expressed to Mr Pender his concern about Mary's failing state sometime after he found out about the change in the will. I accept Mr Pender's recollection of events; which was aided by his diary note.

- [40] On 18 March 2010, Mr Pender said that he met again with Mary and Anne in relation to Mary's will and her wish to alter it. Mr Pender said that he advised Mary of his concerns that she was being influenced or pressured to make changes. When asked as to what made him be concerned, he said, *"I think that I was just generally getting more concerned about what pressures might be on her when she was starting to change her wills"*. Mr Pender said that he had no doubt about her capacity.
- [41] That day, Mary executed a new will. The change in that will was to leave Emerald View to Michael (rather than John Byrne) and to grant to Michael an option to purchase the Thagoona House, rather than give him the House (subject to the option being exercised within six months).
- [42] Michael gave evidence that sometime in 2010 there was an historic opening of a walkway, opposite where Mary resided at Thagoona, which had been named the Kavanagh walkway. He said that he was invited to give an address outlining the history of the Kavanagh family. He says that after his brief address Colleen Fitzgerald, Mary's second cousin, came up to him and said he had been wrong about Mary's father purchasing Emerald View off the O'Shea family. He said that Colleen *"hostilely contradicted"* him and that Colleen said that Mary's father's wife had inherited Emerald View from her parents. Michael said he responded, *"Well, that's not correct. I've got evidence that Steve bought it"*. Michael described the exchange as heated and said that Mary was *"very displeased"* that Colleen was suggesting that her father did not buy Emerald View. Michael said that he thought Colleen was trying to get hold of Emerald view and that she wanted the property to go back to the O'Shea family.
- [43] According to Michael, Mary subsequently said to him that they will have to do an agreement, *"because of things that had happened in the past"* and *"to make sure ... that you don't get cut out of everything"*. He said that Mary re-iterated that Emerald View had been in the Kavanagh family since 1922, that the Kavanagh family paid for it and that we want to keep it in the Kavanagh family.
- [44] He said that nothing was done about an agreement that day, but a week later Mary rang him up, and doing an agreement up was discussed. According to Michael, he said that they should get a solicitor, but that Mary said she did not want solicitors involved and specifically did not want to go near Mr Pender *"because the whole district would know about it before the end of the day and we want to keep this quiet"*. He said that he also suggested Mr Carruthers and that Mary said that was worse. He said, Mary said there were too many local people, who talk about things.
- [45] Michael said that in about 2011 he *"coincidentally"* came into contact with a solicitor he knew in Warwick, Mr Lyons, who he said he had used over the time. Michael said he told him about his dilemma and that the solicitor gave him oral

advice on what had to be in the agreement and how it had to be signed and witnessed.

- [46] Michael said he started writing notes but “*wasn’t pushing anything*” and that he “*just let it go*” but Mary asked again, “*How far have you got with the agreement?*” He says that he started to put it together properly in “*November or so in 2011*”.
- [47] All of this sounds contrived. Given the closeness and trust which Mary evidently placed in Mr Pender and the numerous times that she saw him to change her will, I do not accept that she would have been so disparaging of the likelihood that he would act inconsistently with his duty of confidence. There is nothing which corroborates the evidence of Michael that Mary accepted that there had been wrongs done in the past or that she wished to keep Emerald View in one particular side of the family. Given the terms of the will executed by Mary in March 2010, any agreement was superfluous. At that time, Mary did not need to execute an agreement to ensure that Michael was not “*cut out of everything*”. I do not accept at face value that the conversations alleged by Michael occurred.
- [48] On 10 December 2011, Michael wrote to a cousin of both he and Mary, Stephen (a government lawyer in Sydney) and his wife, Sue. The letter explained some of the events in the life of Michael. It included references to old documents that had been recovered by him, and enclosed a statement written by him “*regarding our grievances*”. In the letter, Michael told Stephen that Mary was showing signs of a “*steady deterioration, both in mind and body*” and was at times “*quite erratic*”.
- [49] In cross-examination, Michael accepted the statement could be described as “*a summary of research undertaken by you of the historic family claims*”. He said that he would have given exactly the same document to Mary. He said, “*There would have been, possibly, alterations made on a later date as different facts came in*”. The statement attached to the letter was a slightly different version of a document which, in giving evidence in chief, Michael said had been prepared as a result of Mary asking him to “*write down a list of all the things we had discussed about the grievances from the past*”. He said that as he “*discovered things*” he would add to “*the collection of notes*” and that he would give Mary “*a copy of whatever I newly discovered*”.
- [50] Michael said that he would have been discussing these things with Mary and her sisters for “*over some two decades*” but had first given Mary a list “*probably on about 2007 to 2009*”. The statement included allegations that family members may be liable for significant fines and criminal offences for the illegal transfer of the cattle brands. Michael accepted in cross-examination that it would have been “*pretty overwhelming for a 90-year-old lady being confronted with this sort of stuff*”.
- [51] Michael said that he first wrote an agreement out properly at Christmas time in 2011 and gave Mary a handwritten version on 8 January 2012. He says they discussed it and he suggested that she run it past Stephen.
- [52] Michael said that a week later Mary rang and said she had spoken to Stephen (and Sue). Michael gave evidence that Mary said that Stephen was “*happy about it*”.

- [53] Stephen gave evidence that Mary did not speak to him about the agreement before it was entered. I accept that evidence without hesitation and am not inclined to accept Michael's evidence that Mary said something to the contrary.
- [54] Michael says that in early 2012 he had been staying with Mary for about four or five days and that on 10 February 2012 she asked him about when he was going to type out the agreement. He says that he typed it out that night and gave it to her the following morning.
- [55] Michael gave evidence that Mary said they had better get it signed and that he asked her who they were going to have witness it. He said in evidence that Mary suggested Stuart Ross of Bremer Valley Real Estate, Rosewood. Michael said that they went to his office and that he asked Mr Ross to come out to the car to witness the signature of Mary, rather than have her climb all the steps to the office. Michael said that he signed it and gave it to Mary and that she signed it and Mr Ross witnessed it with her in the car and him standing beside it.
- [56] On 13 February 2012, Michael sent a copy of the agreement by email to Stephen. Michael's evidence was that he subsequently telephoned Stephen and told him that he had met with Mary on the weekend, and he had arranged for her to sign the agreement. Michael said she signed it because she wanted to put things right between the families. He said that Stephen asked whether Mary had any legal advice and Michael stated that she had said that she did not want lawyers involved. Stephen gave evidence that Michael told him that Mary knew what she was doing and that the document was witnessed by a local real estate agent who could certify that she was competent and knew what she was doing.
- [57] On 15 February 2012, the sum of \$250,000 referred to in the agreement was transferred out of an account of Mary into an account of Michael. Michael signed a type-written receipt for the payment.
- [58] Michael subsequently paid \$200,000 out of that account to pay Mary for the Thagoona House; which he still owned at the time of the trial. Mr Pender gave evidence of Michael attending at his offices, confirming that Mary had signed the documents for the transfer of the house on 19 June 2012 and required the documents to be forwarded to Michael's solicitors.
- [59] On 24 April 2013, Mary attended Mr Pender in the company of Anne. In the conference, Mary gave instructions as to the terms of her will. Mr Pender gave evidence that he explained to Mary the powers of a trustee and some of the issues which had arisen in relation to Michael's claims about the family properties from many years ago, what Mary's obligations were or were not and her ability to gift amounts of money or property as she saw fit, prior to her death and he told her to keep a written record.
- [60] Mary executed a new will that day. The changes made by this will, relevantly, were to add Mr Pender as an executor and trustee to act with Michael and, consistent with the agreement, to remove the Thagoona House from the will. The will continued to leave Emerald View to Michael.
- [61] Sometime in May 2013, Stephen gave evidence that he received a phone call from Mary. Mary told him that she had done a very silly thing. Stephen said that Mary

was in a distressed state and explained that she had signed an agreement with Michael. Stephen said that he advised her to see Mr Pender.

[62] On 6 May 2013, Mary attended Mr Pender's office with Anne and at this conference told Mr Pender about the February 2012 agreement. He said it was something that she had negotiated with Michael directly and that she had not got legal advice before signing it. Mr Pender said that Mary told him "[s]he felt pressured and manipulated into signing it" and that "*she didn't know how many matters in the agreement were correct, but believed they were largely Michael's view of the matters*". She told Mr Pender that \$200,000 of the \$250,000 she had given to Michael was used to buy the Thagoona House. Mr Pender said that Mary had said she was happy to give Michael the brand, although she did not believe he had any entitlement to it. Mr Pender said that Mary had said to him that as she was becoming elderly and frail, she was concerned that Michael had taken advantage of her circumstances. Mr Pender advised that she could take action to recover the \$250,000 but he said that Mary told him she did not wish to do that. Mary told Mr Pender that Michael had made some comments to her neighbours about the past history of the family, which annoyed and frustrated her. She told Mr Pender that she was concerned about being sued by Michael personally. Mr Pender said he reassured Mary that was not going to happen, "*particularly when many of these issues related to things decades past*". He said that he advised Mary that there could be issues after her death in relation to Michael's control as an executor, specifically about the contents. Mary mentioned her concerns in relation to the contents and her wish to make sure the contents went to those who she thought were entitled to them. Mr Pender said he told Mary that she could change executors, if she wished. Mary told Mr Pender that she did not want to make any further changes to her will at that time.

[63] On 27 May 2013, Mary, again in the company of Anne, attended the office of Mr Pender and informed him that she had been considering the matter for many months and the changes to her will. Mr Pender said, "*She [Mary] was clear about those changes, the replacement of Michael with Anne Londy as an executor. Changes to various bequests. In particular, and that you [she] wished to give Michael no part of the residue*". Michael's share of the residue was to go to Anne. Mr Pender said he discussed with Mary issues relating to the will and the antiques and her concern that Michael might contest the will if he were left out. He said that he encouraged Mary to make whatever will she wished. He said that she had clearly considered matters. Again, he noted that Anne played no active role in the conference.

[64] Mr Pender said that he drafted an informal will and that Mary signed it that day.

[65] Mary attended again the next day, on 28 May 2013, and confirmed that she wished to change her will to exclude Michael as executor and not to give him any part of the residue. Mary told Mr Pender that she considered selling Emerald View and that "*[s]he didn't really want to give it him [Michael] the property at all but felt obligated to do so and very concerned about the risk of litigation and the significant costs and the upset that Michael would do if the property wasn't left to him*". Mr Pender said that he advised Mary that she should not concern herself with those things and that it was a matter for her executives and beneficiaries. He said that they would have to deal with any issues that flowed from her will. Mary told Mr Pender that there had been issues with Michael's behaviour and activities, but she

still wanted to give him something in the will. Mary told Mr Pender that she was concerned about a recent enquiry that Michael had made about her taxation affairs and said that she had told Mr Ward (her accountant) not to have any dealings with Michael about taxation affairs. He said that he pointed out to Mary that it could be alleged that Anne was influencing her as she was now getting a greater share of the estate. He said that Mary told him that Anne had not influenced her but said that she believed she had been “*influenced and manipulated and bullied by Michael*”.

- [66] That day Mary executed the new will. Consistent with her instructions, the will removed Michael as an executor and removed him as a residual beneficiary. By the will, Emerald View was still left to Michael.
- [67] Mr Pender produced a letter dated 30 May 2013 addressed to Michael from Mary. Mr Pender said his recollection was that the original came to his firm from either Mary or Anne and that it was held in safe custody and produced after the death of Mary. In giving evidence, Michael accepted that the letter was signed by Mary and that there was at least one notation on it which he also accepted was her handwriting. Michael said that the words used in the letter were not in the language Mary would have used, but, as he properly accepted, clearly Mary had adopted the words by signing the letter. In the letter, Mary accused Michael of making her life a misery over old family affairs. In the letter, Mary says to Michael that he had got what he wanted and really blackmailed her to get what she feels he should not have. Michael said that he saw the letter for the first time sometime after the death of Mary; he said he thought the letter was amongst documents he collected from Mr Ward. A copy of the letter was sent by Mary to Stephen under cover of a letter dated 24 July 2013. Stephen gave evidence that the letter was received by him sometime in late July 2013.
- [68] The letter was tendered under s 92 of the *Evidence Act*. Although in the end no objection was taken to the admissibility of the letter, it was submitted that it should be given no weight as it contained inadmissible opinion, assertion and swearing of the issue. There is ample authority for the view that a witness is entitled to state their impressions or opinions as to everyday matters.⁸ It was correct not to take the formal objection. For the same reasons as the letter was admissible, the contents of the letter are persuasive. They persuasively describe from the point of view of Mary her situation in relation to Michael; in effect that she felt pressured into giving him what he wanted.
- [69] On 31 July 2013, Mary attended Mr Pender with Anne, and stated that she was very angry at Michael’s recent activities and that she wished Mr Pender to write to Mr Ward. Mr Pender said that Mary was “*very angry at Michael’s recent activities*” and “*very angry at the way Michael had treated and manipulated her*”, that she strongly believed that he had no right or entitlement to the house and believed that she had been “*bullied and manipulated by him*”. Mr Pender said that Mary expressed the view that she did not want to leave ongoing problems for the executors nor an expensive legal action. Mr Pender said Mary discussed leaving the property to John Byrne rather than Michael. He said that he told her she might want to speak to John. Mr Pender said he advised Mary that Michael could contest her will on the basis of the agreement that had been signed for in exchange for those alleged family

⁸ *R v Von Einem* (1985) 38 SASR 207 at 210; *Grubisic v WA* (2011) 41 WAR 524 at 532-535 [41]-[48]; *R v Meakin (No 1)* [2016] NSWSC 1006.

obligations which Michael believed existed but which she did not. Mr Pender indicated that court action could be very expensive but indicated that the estate could afford a legal action if it occurred. Mr Pender said he was concerned that this had been worrying Mary for a long period of time and affecting her health. Mr Pender said that Mary indicated she would speak to Michael directly. Mary did not give instructions to change her will at that time.

- [70] Mr Pender accepted that the references in the file note to words like “*manipulative*” and “*undue influence*” were probably his words; his summary of what Mary told him was occurring.
- [71] On 6 August 2013, Anne rang Mr Pender and told him that Mary wished to change her will, excluding Michael.
- [72] On 16 August 2013, Mary, in the company of Anne and John Byrne, attended Mr Pender. Mr Pender advised that the change in the will would require a detailed affidavit to be done which might well be used as evidence in later proceedings, particularly if Michael were excluded.
- [73] Mary signed the new will that day. Michael did not receive anything under the will. Emerald View was bequeathed to John Byrne; the second defendant.
- [74] An affidavit was subsequently prepared in Mr Pender’s office and sworn by Mary on 19 August 2013. The affidavit was tendered as an exhibit under s 92 of the *Evidence Act*. Although counsel for Michael submitted that the affidavit should be given no weight given the circumstances surrounding its making, Michael’s observations about its contents and that it contained opinion and swearing of the issue, it was not submitted that it was inadmissible. This is consistent with the authority as to the admissibility of statements as to opinion to which I was referred by counsel for Mary.⁹ It is also consistent with the authorities to which I have referred to earlier, and for similar reasons as regards the letter dated 30 May 2013, I propose to act upon it.
- [75] In the affidavit, Mary explained how the properties she owned were acquired through inheritance from members of the family. She also exhibited and briefly summarised the various wills that she made in her lifetime; including from as early as May 1972. She explained that her bequest to Michael in her will of 2008 followed his encouragement for her to leave properties within the family. She explained her change in the 2009 will to give the Emerald View property to John Byrne as stemming from her desire to return the properties to his bloodline. Mary explained that when Michael became aware of the change, Michael began harassing her to give him the property, arguing that if she gave the property to John Byrne it could pass to his stepchildren. In the affidavit, Mary said the change to her will in 2010 was to relieve the stress caused by Michael’s constant harassment.
- [76] In relation to the agreement, Mary swore that she was “*coerced*” into signing the agreement by Michael, who had consistently harassed her about his so-called rightful share and what he considered illegal dealings of her family, causing her great stress. She said that she signed it without receiving adequate legal advice and

⁹ *Lenehan v Queensland Trustees Limited* [1965] Qd R 559 at 566; *Morley v National Insurance Co* [1967] VR 566.

without her solicitor's knowledge. She said this was due to harassment by Michael to sign the agreement.

- [77] Mary explained that she left Michael as a beneficiary in the will she executed on 24 April 2013, even though it was not her wish, as she was aware that he would cause trouble if she removed him from the will. Mary said that at the time Michael was becoming more demanding and aggressive towards her and had attempted to become more involved in her affairs.
- [78] In the affidavit, Mary explained that her last will was drawn as she did not believe Michael had any right to make any claim upon her estate, and that the only reason she left him in previous wills was that she had been bullied and manipulated by him and that she did not wish to leave her executors and beneficiaries with trouble if Michael commenced court action.
- [79] In referring to the Thagoona House and the payment of \$250,000 to Michael of which \$200,000 was used by him to purchase the Thagoona House, Mary said that she believed that "*is more than what he is entitled*".
- [80] There are certainly conclusory statements in the affidavit, but that is not unusual in affidavits and it was reasonable in my view for a 95-year-old person to express themselves in those terms and for a solicitor, not knowing whether the affidavit would have to be used, to take the affidavit in that form. Leaving all that aside, I consider that it is appropriate that I rely upon it as truth of its contents. The contents are consistent with what Mr Pender said he was told by Mary, Michael's involvement with Mary's accountant, the changes in Mary's wills and my own view of the likely conduct of Michael.
- [81] Under cover of a letter from Mary's solicitor dated 23 August 2013, Michael was given a signed form of transfer of the brand. According to the letter, this was done on the basis that although Mary did not think Michael had any right to the brand or any claim on it, Mary had no further use of it and was prepared to dispose of it to him.
- [82] In that letter, Mr Pender also stated that Mary did not agree to the making of any amendments to her tax returns. The letter referred to Michael's attendance upon her accountants and a proposal by Michael for the amendment of her 2011 and 2012 returns. The letter clearly stated that Michael had "*no right, nor any authority or agency on Mary's behalf to represent her [Mary] in relation to any taxation or any other matter*". The letter further informed Michael that he had "*no right to access her home or any of her properties without her consent, nor to sign documents on her behalf*". The letter demanded that Michael cease his "*constant attempts to involve yourself in Mary's affairs*". The letter commented, "*It appears that some of your actions are amounting to harassment of Mary and more recently staff at the Cabanda Nursing Home*".
- [83] Michael responded to this letter by letter dated 17 December 2013. In the lengthy letter, Michael gave what he obviously thought was an innocent explanation for his attendance on Mr Ward and denied that he was harassing Mary.
- [84] Michael gave evidence that after the agreement was entered, Mary never said to him that she wanted to end the agreement. He said, "*On the contrary, the last time I*

spoke to her, which was 8 or 9 days before she died, she asked me if I still had my copy of the agreement” and he responded that he did and said, “If necessary, I’ll be using it”. Michael said that Mary responded, “Well, you’ve got to do what you’ve got to do”, or words to that effect. If said, bearing in mind that I have not found Michael’s evidence persuasive, both the inquiry and the answer, do not suggest that Mary did not want to end the agreement. They suggest that she felt that she had ended the agreement, she was tired of Michael and if he wanted to persist with what was not rightfully his that was his problem. It is also odd, in the context of what Michael says was a considered agreement by Mary and him, if the oral evidence is true, that Michael thought that he had to say that if necessary he would be using the agreement.

- [85] Mary died on 14 September 2016; with her last will being that signed on 16 August 2013 which left Emerald View to John Byrne.

Defences

Standing

- [86] Counsel for the defendants submitted that Michael had no standing to pursue the claim as he was pursuing it in a representative capacity without the claim being appropriately endorsed or any evidence that he was the personal representative of his father’s estate in the form of a will or grant of probate.
- [87] There was some basis for the submission. The written agreement commenced with the proposition that it was made by “*Michael Anthony Kavanagh, Sole Executor of the Estate of Hugh Leo Kavanagh [his father]*”. During cross-examination, Michael answered in the affirmative that he purported to enter the agreement in his capacity as the executor of the estate of his father and denied that he purported to enter the agreement in his personal capacity.
- [88] Nevertheless, the agreement was signed by Michael without any endorsement that he was acting other than for himself and the operative parts of the agreement, with the exception of the reference in the opening paragraph, referred to him personally and not in any representative capacity. Even the opening paragraph, although it stated that Michael, as sole executor, agreed to accept the sum of \$250,000 in settlement of monies, used the expression that the moneys were “*owed to me, only son of the abovementioned Hugh Leo Kavanagh*”.
- [89] The term relied upon for the proceeding also was confined to one expressed to be an obligation owed solely to Michael. It relevantly provided:
- “Mary Hilary Kavanagh honours the previous Agreement, to bequest the House, Land and Contents of the House known as “Emerald View” to Michael Anthony Kavanagh, or his Heirs and successors”.*
- [90] Two of the other operative terms of the agreement were similarly worded. One involved a promise by Mary to pay the sum of \$250,000 to Michael, and the other involved a promise by Michael to purchase from Mary a property at Thagoona for \$200,000.

[91] Two further clauses involved promises by Michael. One was not to contest or otherwise attempt to gain a property owned by Mary, known as “*Byrnes*”, and the other was an agreement by Michael that any unresolved issues between the families were wholly and totally settled under the terms of this agreement.

[92] Clearly the agreement was one under which personal obligations were sought to be owed or sought to be enforced. The submission by the defendants as to standing fails.

Terms of the agreement

[93] Counsel for the defendants secondly submitted that, properly construed, the agreement did no more than recite that Mary had made a previous agreement. It was in effect submitted that there was no substantive obligation contained in the agreement.

[94] The agreement does not define “*the previous Agreement*” which Mary is said to honour, nor does the written agreement date or place any previous agreement between Michael and Mary or expand upon its terms. Particulars were neither sought nor given as to the meaning of the words.

[95] In his oral evidence in chief, Michael explained that the reference in this paragraph was to a verbal agreement made between him and Mary. In cross-examination, Michael said that on the day of the walkway opening, and two years prior to that, Mary had said to him that it was always the intention of the family to leave Emerald View or to keep Emerald View in the family. No objection or submission was made that this evidence was not admissible to explain the meaning of the words; though, as I have said, I did not find any of the evidence of Michael persuasive.

[96] In my view, none of this really matters. The text is logically a new promise, albeit stating that it is in the same terms as a previous agreement, that Mary will bequest Emerald View.

[97] The context fortifies this conclusion. This clause is in one of six clauses which are expressed in mandatory terms: the first two of which use the expressions “*shall pay*” and “*shall purchase*” and the last three of which specify that Michael “*agrees*” not to do or to do certain things. They are all expressed as “*conditions*” for Michael’s agreement to accept the settlement for the past wrongs referred to earlier in the agreement.

[98] The promise arguably is an additional one to the main promise; which is to settle the claim for the debt arising from the alleged historical wrongs by the payment of \$250,000. On the other hand, that settlement is said to be subject to another four other substantive conditions; one of which is the bequest of Emerald View. Understood as part of the settlement, construing the clause relating to Emerald View as having substantive effect is consistent with the purpose of the agreement.

[99] This defence fails.

Consideration for the Promise?

- [100] It was thirdly submitted on behalf of the defendants that there was no consideration for the promise and that the forbearance to sue which was relied upon, was not bona fide and was vexatious and frivolous.
- [101] In response, it was submitted on behalf of Michael that by the agreement Michael gave up his right to sue Mary for the wrongs referred to in the agreement and in his evidence. It was submitted, based on the decision in *Callisher v Bischoffsheim*,¹⁰ that if a person bona fide believes the person has a fair chance of success the person's forbearance to sue was good consideration.
- [102] It was also submitted on behalf of Michael, that apart from the historical claims, the agreement included an agreement to purchase the Thagoona property, an agreement not to contest the ownership of the Byrnes property, the giving of moral absolution to Mary for the various grievances and the giving of an undertaking as to confidentiality.
- [103] The effect of the three elements of the agreement relied upon in the submissions, namely those regarding the Thagoona property, the Byrnes property and the confidentiality clause, can be dealt with simply.
- [104] Although the agreement expresses in mandatory terms that Michael was obliged to purchase the Thagoona property, there is no evidence that Mary wished to sell it and it is clear that Michael considered that he was entitled to much of the property then owned by Mary. The effect of the payment of \$250,000 by Mary to Michael in cash essentially meant that there was a round-robin of transactions; with Mary getting no benefit from the transaction itself. Michael suffered no detriment either. There is also nothing moreover which shows that the purchase of the Thagoona property has any relationship with the promise to bequest the Emerald property.
- [105] As to the Byrnes property, in cross-examination Michael admitted that he did not have a claim on the Byrnes property. Michael said that the additional promise was put in the agreement at the request of Mary as she was concerned that there might be a dispute about the property between others. Michael denied that it was put in the agreement because Mary was concerned that he might attack her estate.
- [106] The confidentiality clause is not one that can be satisfactorily characterized as consideration for the promise to bequest the Emerald property. There is nothing to suggest that it had any value.
- [107] As to the alleged wrongs, it is not readily apparent that there was anything to pursue. On Michael's version the wrongs were done to his grandfather and father. The claims are based on transactions which occurred well before Michael was born and seem largely founded on things he had been told by his aunts and father when he was a young person. All of these people are deceased. It does not even appear as if the things he was told were based on any first-hand knowledge of the tellers. On their own, the documents, such as there are, do not enable any conclusion to be drawn that the claims are worthwhile.
- [108] It was submitted on behalf of Michael that his case was stronger than appeared. It was submitted that, if he had pursued his claims, Mary would have been forced by

¹⁰ (1870) LR 5 QB 449.

the pleading rules to make admissions consistent with those she and her sisters had made to Michael during the course of their conversations, or potentially may not have contested the claim at all. I am not persuaded that I should place any reliance upon what Michael says unless there is independent documentary or other proof. I certainly am not inclined to accept that Mary or her sisters made any admissions of misconduct by them or family members. Michael was overborne by his view of the world to such an extent that he had no capacity to listen to or for an objective statement by anyone. I reject the suggestion that Mary would not have contested any claim. The submission is quite inconsistent with her other conduct: her conversations with her solicitors, her change of wills and her affidavit.

- [109] It was submitted that, if the claim was not compromised, Michael would have made further investigations and sought more evidence, and that he does not need to prove his claims in this proceeding. Michael does not need to prove his claim in this proceeding, but he placed evidence before the Court about it and the worth of it was clearly in issue. As to the question of further evidence, Michael says he had been pursuing his claim since 1995. It is hard to see how it might have improved beyond that which he had in 2012, or at this trial.
- [110] It was also submitted on behalf of Michael that the case was not entirely hearsay and that reliance could be placed upon a handwriting expert's examination of a purported signature of Matthew Kavanagh on a copy of a memorandum of transfer of land dated 16 July 1915. The examiner, Mr Dale, says that in his view the habits and letter formations on the questioned signature are not within the range of those on the specimen signatures. On the other hand, as Mr Dale admits, the challenged signature was only on a copy (with all the limitations that this entails) and there were only three comparison signatures. These were also copies or reproductions of documents dated 1899, and two in 1908. How they might be authenticated is unclear. In any event, that the signature on the transfer was a forgery does not take a case said to be based on knowing receipt and knowing assistance¹¹ by his descendants very far.
- [111] Where a person bona fide believes that they have a fair chance of success in an action or a reasonable ground for suing, their forbearance to sue would constitute good consideration.¹² To put it another way, forbearance of a non-existing claim would not be forbearance at all.¹³ It is only if an intending litigant bona fide forebears a right to litigate a question of fact or law which is not frivolous or vexatious to litigate, that they give up something of value.¹⁴
- [112] In this case, Michael says he consulted a solicitor about the claims in 2002, 2003 or 2004, but the solicitor did not open a file. There is nothing to suggest that Michael sought or obtained serious legal advice or took any steps to pursue any claim. Michael says he had been discussing these matters with Mary and her sisters from the 1990s, but says he never threatened legal proceedings of any kind against Mary.

¹¹ *Barnes v Addy* (1874) LR 9 Ch 244 at 251-252; *Farah Constructions Pty Limited & Ors v Say-Dee Pty Limited* (2007) 230 CLR 89 at 140 [112].

¹² *Callisher v Bischoffsheim* (1870) LR 5 QB 449 at 452; *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723 at 737.

¹³ *Miles v New Zealand Alford Estate Company* (1886) 32 Ch D 266 at 291.

¹⁴ *Miles v New Zealand Alford Estate Company* (1886) 32 Ch D 266 at 291; *Alford v Ebbage* [2003] 1 Qd R 343 at 353.

It is true that in examination in chief, and in re-examination, when his mind was turned back to historical grievances, Michael said he did think he had a right to take action against Mary, but in cross-examination he accepted that his view that Mary was liable for the debt incurred by her father, Stephen Joseph Kavanagh, amounted in her hands to no more than a moral, not a legal, obligation.

- [113] That answer, in my view is more truthful than the answer given in examination in chief and in re-examination. It is difficult to accept, given his inaction over a long period and the speculative nature of his claims and their reliance on hearsay, that Michael bona fide gave up anything of value or even thought that he had done so.
- [114] Putting it the other way, Michael admitted in cross-examination that what Mary got in exchange for her payment of \$250,000 and her gift of Emerald View was peace of mind, and that what Michael gave her was a clear conscience. In the words of clause (e), Mary, by the agreement, was “*totally absolved*” from responsibility for any of the “*grievances*” mentioned in the agreement.
- [115] It would be surprising if the benefit of the absolution by Michael was recognized as something of value in the eyes of the law sufficient to enable the agreement to be enforced.¹⁵ After all, looking at the issue the other way, it is well accepted that a promise made out of a moral obligation is not enough to find a right of action.¹⁶
- [116] In any event, I am not persuaded that Mary accepted that Michael or his forbears had been wronged by the conduct of any of her siblings or forbears, or that she considered herself liable or felt guilty for any of the alleged deeds which were alleged against her forbears. There is no independent proof of any of these things and the contents of the letter of 30 May 2013, the comments of Mary to her solicitor, the contents of her affidavit and the change in her will shortly after the agreement tells against that case. I also consider it improbable that she felt the need for or felt as if she had received any absolution from Michael. Her conduct after the agreement is inconsistent with that view. As will become clear, in my view, it is more probable that the agreement was the product of her being overborne by the continual harassment of Michael.
- [117] In my view, Michael gave no consideration for the gift of the property, and he is not entitled to sue for it.

Estoppel

- [118] As an alternative, it was submitted on behalf of Michael that Mary was estopped from rescinding or avoiding the agreement by the fact that Michael carried out his obligation to purchase the Thagoona property and improving it and abiding by the other terms of the agreement presumably meaning that he refrained from further investigating and pursuing the claims referred to in the agreement and not contesting the ownership of the Byrnes property.

¹⁵ *Director of Public Prosecutions (Victoria) v Le* (2007) 232 CLR 562 at 576-577 [43] per Gummow and Hayne JJ and at 591 [108]-[109] per Kirby and Crennan JJ.

¹⁶ *Eastwood v Kenyon* (1840) 11 Ad & El 438; (1840) 113 ER 482; *Sheslow v Kostin* (1997) 11 BPR 21,043 at 21,049.

- [119] Presumably Michael also sought to advance a case that Mary was estopped from denying the enforceability of the agreement by reason of the same facts. Statements of testamentary intention are capable of serving as a basis for proprietary estoppel.¹⁷
- [120] Equitable estoppel will afford relief where there has been “*an assumption as to the future acquisition or ownership of property which had been induced by representations upon which there had been detrimental reliance by the plaintiff*”.¹⁸
- [121] As to the representation issue, it is clear from the terms of the agreement that Mary promised that she would bequeath the Emerald property. It is reasonable to proceed on the basis that, as a result of the representation contained in the document, that Michael assumed or expected that he would be bequeathed the Emerald property and also that Mary knew that by the terms of the document Michael expected that outcome.
- [122] It is necessary to deal with each of the alleged acts of reliance separately.
- [123] As to the first act relied upon, although the agreement expresses in mandatory terms that Michael was obliged to purchase the Thagoona House, as I have already observed there is no evidence that Mary wished to sell it and it is clear that Michael considered that much of her property was rightfully his anyway. The effect of the payment of \$250,000 by Mary to Michael in cash was essentially a round-robin of transactions for which Mary received no benefit and Michael suffered no detriment. There is, in any event, nothing which shows that the purchase of the Thagoona property has any relationship with the promise to bequest the Emerald property.
- [124] The position as regards the Byrnes property is similar: there is nothing showing that this promise had any relationship to the bequest of Emerald View. On Michael’s evidence he did not want it nor have any claim over it and suffered no detriment by his promise.
- [125] It is submitted that Michael did not pursue the historical claims because he had the promise of Emerald View. That is not readily apparent from the inactivity which Michael had displayed until that date; or since this dispute arose. Michael says he consulted a solicitor about the claims in 2002, 2003 or 2004, but the solicitor did not open a file. There is nothing showing that he had taken serious legal advice on any of the issues, let alone about possible causes of action or prospects.
- [126] It is also doubtful whether there was anything to pursue. As I have already commented, on Michael’s version the wrongs were done to his grandfather and father; wrongs which Michael said he was aware of since at least the age of four and wrongs which he had been discussing with Mary and her sisters since about the 1990s. The claims are based on transactions which occurred well before Michael was born and seem largely founded on things he had been told by his aunts and father when he was a very young person. All of these people are deceased. As already noted, it does not even appear as if the things he was told were based on any first-hand knowledge of the tellers. Further, on their own, any documents, such as they are, do not enable any positive conclusion to be drawn as to prospects.

¹⁷ *Bassett v Cameron* [2021] NSWSC 207 at [415].

¹⁸ *Giumelli & Anor v Giumelli* (1999) 196 CLR 101 at 112 [6]; *Sidhu v Van Dyke* (2014) 251 CLR 505 at 511 [2].

[127] As became clear during the course of the evidence, there was little or no evidentiary basis for the allegations recorded in the agreement or stated by Michael. Whether he believed that his father or grandfather or himself or his family had been wronged is not to the point. The question is whether the Court can find that he suffered real detriment by not pursuing these claims. In my view, the evidence in support of the claims is so poor, particularly against Mary, that it is impossible to conclude that Michael suffered any real detriment in reliance on the representation that Mary would bequeath Emerald View to him.

[128] The estoppel claim fails.

Intention to Create Legal Relations

[129] On behalf of the defendants, it was submitted that this was an agreement involving members of the family and it should be inferred that there was no intention to create legal relations; and that the onus was upon Michael to establish otherwise.¹⁹

[130] In *Riches v Hogben*, it was held that whether the agreement was intended to be legally binding depends on “*the intention of the parties to be inferred from the language which they use and from the circumstances in which they use it*”.²⁰

[131] In the present case, there is not only an agreement reduced to writing, but one which also contains language couched in legal terms. It not only contained operative terms which required both parties to perform, but also a mutual confidentiality clause and a release clause. The signatures were witnessed.

[132] Reliance was placed upon the evidence of Michael that Mary wished the agreement to be documented and nominated the person to witness their signatures. I do not accept the self-serving evidence that these things occurred at the wish of Mary but do accept the non-contentious fact that there was an agreement which was in writing and that it was witnessed.

[133] It is true that the agreement was not felicitously drafted, with the agreement to pay being expressed in two places, some expressions being not defined, and the obligations being expressed as “*conditions*”. It is also true that the genesis of the agreement appears to lie in some moral, as opposed to any legal, obligation and to arise out of historical grievances by one side or some person against the other side of the family. Nevertheless, the agreement reasonably recites the issues said to be resolved and the obligations to be performed. In my view, it is more than a family arrangement unenforceable at law because the parties lacked the necessary intention to create legal relations.

[134] This defence fails.

Undue Influence

[135] One of the final issues is whether the agreement was vitiated by undue influence.

¹⁹ *Sorbello & Ors v Sorbello & Anor* [2005] QSC 219 at 14-15 [61]-[65]; *Kennedy & Hunt v Griffiths* [2011] QSC 369.

²⁰ [1985] 2 Qd R 292 at 297 [30].

- [136] Absent some recognized special relationship between the parties, a transaction will be set aside if facts proved by the defendants show that the transaction was the outcome of such an actual influence over the mind of the alienor that it cannot be considered their free act.²¹ Equitable principles may be invoked on this ground even where the donor was perfectly competent to understand and intend what they had done.²² The issue is not whether they understood what they were doing, but how the intention was produced.²³ Age, state of health, blood relationship, experience or lack of it in business affairs, the period and closeness of the relationship, the relative strength of character and personality of the donee and the opportunity to influence the donor may be factors to influence a donor to depend on the donee.²⁴ Independent legal advice is an important factor in determining whether the transaction was a purely voluntary and well understood act of the donor.²⁵
- [137] Mary was 96 years old at the time of the agreement and frail. She had been admitted to hospital on a number of occasions.
- [138] There is evidence from her solicitor, Mr Pender, that Mary understood what had happened and from two general practitioners that she had capacity to make a will.
- [139] In his oral evidence, Michael expressed the view that Mary did not appear to be suffering from any obvious mental impairment or disability. On the other hand, Michael himself had written a letter in December 2011 to Stephen, prior to the agreement, expressing his concern that Mary was showing signs of deterioration, both in mind and body, and had also spoken to Mr Pender about her condition.
- [140] Michael says that Mary said that she did not want lawyers involved and that she impugned the ability of Mr Pender to keep any arrangement confidential. I reject that evidence. It is inconsistent with the fact that Mary went to see Mr Pender a number of times over the years about her will, and the frank discussions that I accept that she had with him about Michael and her affairs.
- [141] Michael painted the picture in his oral evidence of Mary, knowing of the problems that had occurred between the families, of her wanting to make up for or recompense his side of the family for what had happened in the past. I do not accept that evidence. There is plenty of evidence that Michael felt that Mary should do so, but I am unable to accept Michael's evidence that Mary reciprocated. Michael was so caught up with his own view of the circumstances that I find it unlikely that he could give an objective or completely truthful account of any statements made by Mary in relation to those events.
- [142] Michael specifically denied harassing Mary about his rightful share and the illegal dealings with her family, but his own evidence suggests that he constantly raised the subject with Mary and her sisters and made clear to them his sense of grievance. Michael said in his oral evidence that he had been hearing about the issues since at least the age of four and said he had been discussing them with Mary and her sisters from about 1990s. In his letter to Stephen and in documents given to Mary, Michael

²¹ *Johnson v Buttress* (1936) 56 CLR 113 at 134.

²² *Bridgewater & Ors v Leahy & Ors* (1998) 194 CLR 457 at 491 [118].

²³ *Bridgewater & Ors v Leahy & Ors* (1998) 194 CLR 457 at 491 [118].

²⁴ *Union Fidelity Trustee Co of Australia Limited v Gibson* [1971] VR 573 at 577-578.

²⁵ *Union Fidelity Trustee Co of Australia Limited v Gibson* [1971] VR 573 at 577-578.

had listed the grievances. The grievances included allegations of family members being liable for fines and criminal penalties. Michael admitted that the sort of stuff he was raising would be “*pretty overwhelming*” to a 90-year-old lady.

- [143] In addition, Mr Pender says that Mary said to him in a number of conferences in 2013, in particular conferences on 6 May, 28 May and 31 July 2013, that she felt pressured and manipulated into signing the agreement, and that she was concerned as she was becoming elderly and frail, Michael had taken advantage of her.
- [144] Mr Pender, who saw Mary in the relevant period, described Mary as “*intelligent, was becoming increasingly frail and, from my point of view, increasingly vulnerable*”.
- [145] In the course of his evidence, Mr Pender described Michael as a very determined man, and said, “*He was determined throughout his dealing with her that things should be the way he wanted them to be*”.
- [146] Mr Pender described Michael as a person with an “*overbearing personality*”.
- [147] These were also the impressions I had from the manner and the way in which Michael gave his evidence. It was clear that he had a fixation about the past dealings of which he spoke and that he was very angry about them.
- [148] It is abundantly clear from the description of the state of Mary given by Stephen and Mr Pender, the statements she made to both of them, and the contents of her letter to Michael and her affidavit that the agreement was the product of undue influence and that her will was overborne by the pressure placed upon her by Michael into signing the agreement, and hence the agreement is voidable.

Unconscionable conduct

- [149] Similar, though different, considerations apply to the other equitable defence relied upon by the defendants, namely that the agreement was vitiated by unconscionable conduct. They are related, but distinct, equitable defences. Undue influence looks to the quality of the consent of the weaker party, whereas 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.²⁶
- [150] A transaction will be set aside on the basis of unconscionable conduct where one party to a contract is placed at a special disadvantage to the other in the sense that the condition or circumstance seriously affects the ability of that party to make a judgment as to their best interests and the other party understood that the person was at a special disadvantage and its effect with respect to their not being able to look after their interests and there is unconscientious exploitation by the stronger party of the weaker party’s disadvantage.²⁷

²⁶ *Commercial Bank of Australia Limited v Amadio & Anor* (1983) 151 CLR 447 at 461-462 per Mason J and at 474-475 per Deane J; *Louth v Diprose* (1992) 175 CLR 621 at 637.

²⁷ *Commercial Bank of Australia Limited v Amadio & Anor* (1983) 151 CLR 447 at 461-462 per Mason J and at 474-475 per Deane J; *Kakavas v Crown Melbourne Limited* (2013) 250 CLR 392 at 398 [6].

- [151] Disadvantage may be situational or relational, have been created or exacerbated by an absence of advice or explanation and may exist with a full understanding of the transaction.²⁸ The disadvantage which attracts the intervention of equity is one where it involves an inability of a party to make a judgment as to their own best interests.²⁹
- [152] The actions of Michael, in pressing his view of the history of the family dealings, clearly seriously affected the ability of Mary, a person of advanced age and frailty, to make a judgment as to her own best interests. Michael knew the age and frailty of Mary; as appears by what he said to Stephen and Mr Pender. Michael surely by these means knew that Mary was at a serious disadvantage to him. He took advantage of the situation by typing up a very one-sided agreement where Mary got nothing in return except, on his case, absolution from him for the sins of her father. Michael got her to sign the agreement and had the signatures witnessed by a person close-by to where the agreement was made and before she had any opportunity to discuss it with her cousin, Stephen, who was also a lawyer or her usual solicitor, Mr Pender.
- [153] The agreement is also voidable by reason of being the product of unconscionable conduct.

Delay

- [154] It was argued on behalf of Michael that the first defendants had lost their right to have the contract voided by the passage of time, the conduct of Mary after the event and the impossibility of unwinding the dealings between Michael and Mary.
- [155] As to time, the agreement was made in February 2012. The promise was to bequest Emerald View. This was reversed by the will made in August 2013; though, it would seem, not to the knowledge of Michael. Mary died in 2016. It was only in the defence filed in 2020 that the first defendants elected to void the agreement.
- [156] Although the breach of contract (if there was one) and (accordingly) damage occurred on 16 August 2013, the whole of the circumstances needs to be considered. Whilst the promise was to bequeath Michael the property, he would only have obtained title to the property after the death of Mary and during the course of the administration of the estate. There is no evidence on that subject, though presumably any transfer would have taken some months or years. The claim to enforce the agreement was filed on 24 August 2017. The argument that the agreement was made under undue influence and was unconscionable was laid out in a defence previous to the defence filed where a formal election was made.
- [157] It is obviously possible that if the election to void the agreement had been made earlier, Michael would have issued the proceedings earlier. It is, however, difficult to see how the result would have been any different; even assuming that the

²⁸ *Bridgewater v Leahy* (1998) 194 CLR 457 at 490-491 [115]-[118].

²⁹ *Thorne v Kennedy* (2017) 263 CLR 85 at 112 [64].

proceeding was taken and finalized whilst Mary was alive and had capacity to give evidence.

- [158] Whilst it was submitted in the course of the submissions as to estoppel that if the agreement had not been made, Michael would have sought more evidence to justify his case, there is no reason to consider that this would have produced any tangible results. Michael had, after all, been agitating his case for more than a decade and had no admissible proof of any of it. There is no suggestion that any evidence has been lost by the passage of time between 2012 and 2021.
- [159] In short, the delay has not in fact been that great in the scheme of the events the subject of the litigation and there is nothing to show that Michael has been prejudiced by it.
- [160] As to the conduct of Mary, reliance was placed upon the facts that after the agreement Mary declined to change her will, at no stage whilst she was alive did Mary rescind or terminate the agreement or otherwise do anything about the agreement and payment of the sum of \$250,000 was made and title in the Thagoona property was transferred as provided for in the agreement.
- [161] All of these acts, however, are consistent with Michael having and continuing to have an influence over Mary and her inability to act in her own best interest. The payment of the sum of \$250,000 and the transfer of the Thagoona property were required by the agreement which was directly a product of the undue influence and unconscionable conduct of Michael. It is hardly surprising, given the pressure placed upon her by Michael to get her to sign the agreement, that Mary would feel she was in a position not to comply with its terms, let alone confront Michael on the subject or have herself confronted by Michael should she have rescinded or terminated the agreement.
- [162] There is no suggestion that the rights of any third party have been affected by the conduct of Mary or the first defendants in voiding the agreement only in 2020. It is hard to see how they obtained any advantage by delaying the inevitable. Michael has, in fact, been advantaged by it: he has had the Thagoona property, rent from the property and the benefit of \$50,000 since 2012.
- [163] Any prejudice that Michael may have suffered in allowing the agreement to be voided after the passage of time and the events that occurred are more than outweighed by the financial benefit he obtained by reason of his undue influence and unconscionable conduct.
- [164] As to the impossibility of unwinding the dealings, it was submitted on his behalf that Michael had spent a considerable amount of time and money improving the Thagoona property after he purchased it.
- [165] This submission is rejected. First, the evidence of Michael does not justify the submission. In cross-examination, Michael explained that he used \$200,000 of the money given to him by Mary to pay for the acquisition of the Thagoona property. When asked about the other \$50,000, Michael responded that it was used for other things, and added that a lot of it was used to repair the house. He said he would have spent \$30,000, which subsequently changed to \$40,000, repairing the house. In re-examination, he explained that he had to re-screw the roof, the plumbing was in a

bad way, a lot of the stumps underneath the house had to be levelled, there was a problem with the electricity, and he had to recarpet the house. His comments made it clear that some of this work was in response to matters raised with him by the tenants. When asked about whether he engaged tradesman or did it himself, Michael responded that he did most of it himself. No other details, let alone documentary proof, were provided of the time taken to do the work or the costs of any materials. Michael is prone to exaggeration and hyperbole. I am not satisfied that Michael spent a considerable amount of time and money on the property. Secondly, if any costs were incurred, they were, of course, taken out of the funds provided by Mary.

- [166] As to unwinding the dealings generally, it would seem that the Thagoona property had been tenanted since its acquisition, and that all that has happened with respect to this land is that Michael has continued to benefit from the payment of rent by the tenants. The nature of the tenancy is not clear. It is not suggested that any other interest has been created or exists over the land, or that there exists any legal or equitable inhibition to the re-transfer of the land.

Orders on Claim

- [167] The result is that the plaintiff's claim is dismissed.

Counterclaim

- [168] In the event that the agreement was voided, the estate of Mary seeks orders that Michael pay to the first defendants, as executors of the estate, the sum of \$250,000 and a declaration that Michael holds the Thagoona property on trust for them and an order that it be transferred to them.
- [169] In oral submissions, counsel for the first defendants suggested that perhaps the Court, despite a finding that the agreement was void, may decide not to fully unwind the transactions. In making that submission, reference was simply made to the wide discretion given to a court acting in equity.
- [170] Given the findings I have made that the entry into the agreement was caused by the undue influence and unconscionable conduct of Michael, it is appropriate that a declaration be made that the agreement is void. The Court cannot condone or be seen to condone such conduct. Similarly, there shall be an order for the repayment of monies paid under the agreement. The order in relation to the payment of monies should take into account the fact that \$200,000 of the \$250,000 was repaid by Michael to Mary as the purchase price for the Thagoona property.

Final Orders

- [171] The parties are to deliver draft orders reflecting these reasons by 15 August 2022. The draft orders are to include orders as to costs.
- [172] If the parties are unable to agree the terms of the orders, they are to separately file and serve draft orders by 15 August 2022. If the parties are unable to agree the orders (including as to costs), the defendants are to file and serve submissions by 22 August 2022 and the plaintiff is to file and serve submissions by 29 August 2022.