SUPREME COURT OF QUEENSLAND

CITATION:	*Exponential Trading Pty Ltd v. Anscombe-Black* [2002] QSC 388
PARTIES:	**EXPONENTIAL TRADING PTY LTD** **(ACN 084 088 979)** (plaintiff) **v** **WILLIAM ALEXANDER BRUCE ANSCOMBE-BLACK** (defendant)
FILE NO:	S 6392 of 2000
DIVISION:	Trial
DELIVERED ON:	26 November 2002
DELIVERED AT:	Brisbane
HEARING DATE:	28, 29, and 30 August 2002
JUDGE:	Helman J.
CATCHWORDS:	STATUTES – INTERPRETATION – where defendant entered into contract for sale of land with plaintiff company – where plaintiff's sole director was defendant's attorney – whether plaintiff was a 'business associate' of its sole director within the meaning of s.87 of the *Powers of Attorney Act* FRAUD, MISREPRESENTATION AND UNDUE INFLUENCE – UNDUE INFLUENCE – SALE OF LAND – where presumption defendant was induced to enter into contract by attorney's undue influence – whether presumption rebutted *Acts Interpretation Act* 1954 (Qld), s.14A(1) *Land Title Act* 1994 (Qld), s.178 *Powers of Attorney Act* 1998 (Qld), s.87 *Adenan v Buise* [1984] W.A.R. 61, referred to *Bridgewater v Leahy* (1998) 194 C.L.R. 457, referred to *Inche Noriah v Shaik Allie Bin Omar* [1929] A.C. 127, referred to *Louth v Diprose* (1992) 175 C.L.R. 621, referred to
COUNSEL:	Mr N.M. Cooke Q.C. and Mr M.M. Varitimos for the plaintiff Mr M.R. Bland for the defendant

SOLICITORS: Cranston McEachern for the plaintiff
McCullough Robertson for the defendant

[1] The defendant is, and was at all material times, the registered proprietor of land at 139-159 Wises Road, Maroochydore, Queensland described as lot 1 on registered plan 205143 in the County of Canning, Parish of Mooloola. He was born on 24 February 1910 and resides in a house on part of the land. On 20 October 1999 the plaintiff company entered into a written contract with the defendant to purchase his land for $400,00. Mr Timothy Eggmolesse, whom the defendant had known since the former was a small boy, was the sole director and one of two shareholders of the plaintiff - the other shareholder being Mr Eggmolesse's fiancée at the time, Ms Flora Sebbens. Mr Eggmolesse was also the defendant's attorney pursuant to an enduring power of attorney executed on 17 December 1998. On 9 November 1999 the parties executed a deed of variation of the contract.

[2] On 25 January 2000 the defendant entered into a written contract to sell the land to a company called Braveheart Developments Pty Ltd for $450,000. On 2 March 2000, by facsimile from the defendant's solicitors to the plaintiff's solicitors, the defendant elected to avoid the contract with the plaintiff and, on the same day, he caused an originating application to be issued out of this court in which he sought a declaration that 'consequent upon the provisions of s.87 of the *Powers of Attorney Act* 1998' the contract and deed were void, or alternatively were voidable and had been avoided. On 19 May 2000 the plaintiff by its solicitors sought to tender moneys payable under the contract with it to the defendant's solicitors but the defendant by his solicitors refused to accept the tender. It is common ground between the parties that the defendant has at all material times refused to perform and complete the contract, and that the defendant is not, and at all material times has not been, ready, willing, and able to perform the contract. (Section 87 of the *Powers of Attorney Act* provides:

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

[3] The plaintiff, alleging that it is, and at all material times has been, ready, willing and able to perform its obligations under the contract, seeks specific performance of it and all necessary and consequential accounts, directions, and enquiries.

[4] The defendant resists the plaintiff's claim on two grounds. First, he asserts that the plaintiff was a business associate of Mr Eggmolesse within the meaning of that expression in s. 87 of the *Powers of Attorney Act* and that the defendant is therefore presumed to have been induced to enter into the contract by Mr Eggmolesse's undue influence upon him, that the plaintiff entered into the contract with notice of Mr Eggmolesse's undue influence over the defendant, that the contract was voidable at the instance of the defendant, and that by the defendant's solicitors' facsimile of 2 March 2000 the defendant elected to avoid the contract. In response, it was argued on behalf of the plaintiff that the plaintiff was not a business associate of Mr Eggmolesse, but that if he were held to be then the presumption of undue influence had been rebutted by reason of the following facts pleaded in paragraph 6(c) to (g) inclusive of its amended reply:

> (c) at the time the transactions were entered into the Defendant:
>
> (i) acted voluntarily;
> (ii) was free to make an independent and informed estimate of the expediency of the transactions;
> (iii) fully understood what he was doing and deliberately agreed to the transactions.
>
> (d) the transactions were entered into by the Defendant as a result of his free exercise of independent will;
>
> (e) the Defendant received independent advice before entering into the transaction;
>
> (f) the consideration entered into for the transactions was fair and the Defendant was not placed under any manifest disadvantage as a result of the bargain;
>
> (g) Eggmolesse did not at any time abuse any position or relationship with the Defendant.

[5] The defendant in his amended rejoinder does not admit the allegations of fact in paragraphs 6(c)(iii) and 6(e), and denies the allegations in paragraphs 6(c)(i), 6(c)(ii), 6(d), 6(f), and 6(g). The second ground upon which the defendant resists the plaintiff's claim is then that the plaintiff has failed to rebut the presumption of undue influence.

[6] It was not argued on behalf of the defendant that s. 87(a) had any application to this case; and, on behalf of the plaintiff, it was argued that, upon a proper construction of s. 87(b), it had no application either because the expression 'business associate' does not refer to a corporation but rather to a natural person. In the argument advanced for the plaintiff reliance was placed on the context in which the expression 'business associate' appears, i.e., after 'relation' and before 'friend' both of which expressions refer, it was argued, to natural persons, as is shown by the definitions appearing in the dictionary in schedule 3 to the Act:

> **'close friend'**, of a person, means another person who has a close personal relationship with the first person and a personal interest in the first person's welfare.

…

'relation', of a person means –

(a) a spouse of the first person; or
(b) a person who is related to the first person by blood, marriage or adoption or because of a de facto relationship, foster relationship or a relationship arising because of a legal arrangement; or

…

(c) a person on whom the first person is completely or mainly dependent; or
(d) a person who is completely or mainly dependent on the first person; or
(e) a person who is a member of the same household as the first person.

[7] It was argued further that it would be a strained construction of the expression 'business associate' to conclude that a company listed on stock exchanges could properly be regarded as a business associate of its directors and shareholders or they of it. From that extreme example the argument proceeded to apply the proposition to all companies. I should record here that it was conceded on behalf of the defendant that if the argument for the plaintiff on this point were held to be correct the defendant had no ground for resisting the plaintiff's claim.

[8] While I accept that there may be some substance in the latter argument for the plaintiff in relation to companies larger than the plaintiff, I do not accept it for the case of a company like the plaintiff, a shelf company acquired by Mr Eggmolesse in the latter half of 1998 that had not traded and had no assets prior to October 1999. It does not, I think, put a strained interpretation on the provision to conclude that it includes a corporation so closely connected to its director and substantial shareholder. Such an interpretation best achieves the chief purpose of the *Powers of Attorney Act* which is to protect those empowering attorneys and so, as s. 14A(1) of the *Acts Interpretation Act* 1954 provides, is to be preferred to any other interpretation. The position of the words 'business associate' in a list the other members of which are natural persons does not lead me to reject that interpretation, which is a natural one in the context.

[9] The relationship of company to director and shareholder sufficiently establishes the 'business' quality of the association and no more is required.

[10] It follows that the presumption provided for in s. 87 applies to the contract. For the plaintiff to succeed in its claim it must therefore rebut that presumption.

[11] As I have related, the defendant had known Mr Eggmolesse since the latter, who was born on 4 April 1956, was very young. The defendant knew his grandfather. Mr Eggmolesse attended a high school in Maroochydore until grade 10. He became a bricklayer, and later purchased a cabinet-making business. He supplied the defendant with doors and panelling for the defendant's house at Wises Road. Mr Eggmolesse was not successful in business and was declared bankrupt in 1990, discharged he thought 'a couple of years later'. In 1998 Mr Eggmolesse assisted the

defendant with some of his affairs and then, at the defendant's request, moved into his house in November or December of that year. The defendant, who had been a builder and inventor, had been married twice but had no children apart from a step-daughter. He lived alone at Wises Road. Although he was then eighty-eight years old he was not physically disabled, apart from being hard-of-hearing and having a slight limp the result of a motorcycle accident in his youth. He drove his car to and from a golf club and stayed there for four hours each day. Mr Eggmolesse became the defendant's attorney at the defendant's request.

[12] After moving into the defendant's house, Mr Eggmolesse performed household chores for the defendant: cleaning, cooking, gardening, and mowing. Mr Eggmolesse also attended to the defendant's financial affairs. He obtained repayment of a loan from the defendant to a tenant on part of the land at Wises Road, opened bank accounts in the defendant's name, made payments on the defendant's behalf, met an officer of the Department of Social Security concerning the defendant's pension entitlements, and dealt with solicitors, real estate agents, and prospective purchasers concerning the sale of the land which became the subject of the contract. Mr Eggmolesse retained new solicitors to act for the defendant, terminating the instructions of Mr David Alexander of D.R. Alexander & Co. of Buderim whom the defendant had previously retained. On 10 February 1999 the defendant made a new will in which he appointed Mr Eggmolesse the executor and trustee of his estate and in which he left the residue of his estate to Mr Eggmolesse. That will was drafted by the new solicitors, McInnes Wilson of Maroochydore.

[13] The sale of the land at Wises Road to the plaintiff followed attempts to sell it for nearly three years. In early 1997 the defendant was interested in selling the land. Letters to him dated 10 February and 5 March from Mr Alexander concerned that subject. A letter dated 7 March 1997 from Mr Alexander to the Queensland Housing Commission referred to an expected price of $1,100,000. That figure was given as the price for which the defendant was prepared to sell the land in a letter dated 26 March 1997 from Mr Alexander to Mr John Dick of Ray White Real Estate. The letter also referred to the reservation of two acres for the defendant 'in any area which approximately contains the current house'. The defendant later reduced that requirement to his retention of 'the land immediately around his house and workshop, approximately half an acre' as revealed in a letter dated 24 April 1997 to Barker Gosling solicitors acting for A.V. Jennings Ltd with which the defendant was then negotiating. On or about 1 May 1997 a company called Chinderra Pty Ltd agreed to buy the land from the defendant for $1,130,641, on the condition that the purchaser was successful in obtaining a rezoning of the land for subdivision. The rezoning application had not been successful by November 1998, when Chinderra offered $400,000 for the property in an unconditional contract. It proposed that the terms of the new contract would include the purchase of the land on which the defendant's house was built, but would reserve to the defendant the right to live on that part of the land for the remainder of his life: see Mr Alexander's letter dated 19 November 1998 to the defendant. On 9 December 1998 the defendant gave Mr Alexander written instructions to reject Chinderra's offer of $400,000.

[14] In late 1997 the defendant and his friend, Mrs Elizabeth Walters, purchased a home unit at McNaughton Street, Redcliffe with moneys borrowed from the Westpac bank by way of a Bridging Option Home Loan which matured in

September 1998. The loan was secured by a registered mortgage in favour of the Westpac Banking Corporation. At the time that loan was made it had been contemplated that it would be repaid from the proceeds of the sale of the Wises Road land. The bank extended the term of the loan beyond September 1998 because the sale of the land at Wises Road had not then been completed, but in a letter dated 24 February 1999 to Mrs Walters and the defendant, the bank proposed conversion of the loan from a bridging loan to one with a term of up to thirty years.

[15] Chinderra acknowledged in a letter dated 27 May 1999 to McInnes Wilson and signed by Mr Ray Watson as director that its contract to purchase the Wises Road land had come to an end.

[16] In June 1999, there were discussions in the course of which Mr Watson (this time on behalf of Braveheart Developments) made an oral offer of $400,000 for the land, and the defendant (by Mr Eggmolesse) orally agreed on that figure. But Braveheart Developments then made a written offer to purchase part of the Wises Road land (1.669 ha) for $200,000 and sought an option to purchase another part of the land (3.984 ha) for $700,000. Braveheart Developments also offered $50,000 as a 'Consultation Fee' in a proposed side agreement with Mr Eggmolesse to 'renumerate' (*sic*) him for his 'Consultation Services'. Those offers were rejected, but some months later the defendant and Mrs Walters told Mr Eggmolesse that the defendant had agreed orally with Mr Watson over a lunch to the sale for $200,000. Mr Eggmolesse then asked the defendant if he would be interested in selling the land to Mr Eggmolesse for $400,000 and the defendant said he was. Discussions followed and agreement was reached.

[17] The purchase price of the land the subject of the contract of 20 October 1999 was, as I have mentioned, $400,000. The sale was, by special condition 13.1, subject to and conditional upon the rezoning of the land to light industry on terms and conditions satisfactory to the plaintiff on or prior to the settlement date, which was to be 19 May 2000. It was not in issue that the market value of the land in October and November 1999 was $250,000 or no greater than that sum, and, with the relevant approval $400,000 or no greater than that sum.

[18] Special condition 14 concerned the deposit:

> **14. Deposit**
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> 14.1 On or prior to the 19th November 1999 the buyer will advance sufficient funds to the seller's mortgagee Westpac Bank in order to ensure that the mortgage registered over the land and the seller's unit situated at 2/10 McNaughton Street, Redcliffe is paid out so that the mortgage will be released from the land and the seller's unit at Redcliffe.
>
> 14.2 The seller agrees that from the date of execution of this Contract the principal sum advanced under the mortgage to Westpac will not be increased.

14.3 The seller warrants that the amount required to discharge the mortgage to Westpac will be approximately $90,000.00.

14.4 The actual amount required to discharge the mortgage to Westpac shall constitute the deposit monies payable by the buyer to the seller under this Contract.

14.5 The buyer's agreement to pay out and discharge the mortgage to Westpac will at all times be subject to the buyer registering a caveat over the land pursuant to Section 74 of the Property Law Act 1974 and the land being otherwise unencumbered.

Special condition 15 concerned the payment of the balance of the purchase moneys:

15. Balance of Purchase monies

The seller agrees that at the buyer's option the buyer may elect to either:

15.1 Pay to the seller the balance of the purchase price on the Settlement Date; or

15.2 Pay to the seller the balance of the purchase price on or before thirty six (36) months from the Settlement Date on the basis:-

a. The seller will transfer the land to the buyer;
b. The buyer will grant back to the seller a first registered mortgage to secure the payment of the balance of the purchase price ("the principal sum");
c. Interest at the rate of 4.5% per annum on the principal sum or so much thereof as shall from time to time remain owing shall be paid by the buyer to the seller monthly in arrears;
d. The buyer shall have the right, not obligation, to make principal reductions of the mortgage debt at any time and shall have the right to early repayment of the mortgage debt without penalty;
e. The mortgage shall be prepared, stamped and registered over the land by the buyer's solicitor at the cost and expense of the buyer and shall adopt the mortgage covenants contained in the registered Document No. H902333 filed in the Department of Natural Resources;
f. The seller consents to the buyer granting a second registered mortgage to any third party over the land

for the purposes of raising funds to develop the land.

Special condition 21 provided that all of the special conditions were for the benefit of the plaintiff:

21. Benefit of Special Conditions

All of the special conditions contained in this Contract are for the sole benefit of the buyer who may waive the benefit or compliance with any special condition at any time.

[19] The deed of variation concerned special conditions 14 and 15 of the contract and added a new condition 22. Clause 1 was as follows:

1. The seller and buyer covenant and agree that the terms and conditions of the contract shall be varied as follows:-

1.1 The date referred to in Clause 14.1 of the contract is to be extended to 19th May 2000.

1.2 An additional Clause 14.6 is to be inserted into the contract as follows:-

'In addition to Clause 14.5 if the buyer borrows funds to payout and discharge the mortgage to Westpac then the seller consents to the buyer's financier registering a first registered mortgage over the land to secure the repayment of the borrowed funds'

1.3 An additional Clause 14.7 is to be inserted into the contract as follows

'Pending the payout and discharge of the mortgage to Westpac the buyer agrees to pay directly to Westpac the sum of $600.00 per month or such amount sufficient to meet the seller's loan repayments under the mortgage to Westpac which payments are to be credited towards the purchase price'.

1.4 Clause 15.2 b of the contract is to be amended by deleting the word 'first' therefrom

1.5 Clause 15.2 f is to be deleted and the following Clause is inserted in lieu thereof:-

'The seller consents to the buyer granting further registered mortgages to any third party over the land for the purposes of raising funds to develop the land.'

1.6 An additional Clause 22 is to be inserted into the contract as follows:-

'Protection of buyer

> The seller acknowledges that subsequent to entering into this contract the buyer will be expending considerable time and funds in pursuing the rezoning of the land to light industry in accordance with Clause 13 and that it is therefore reasonable and the seller agrees with the purchaser to execute upon signing of this Deed a Form 18 General Consent for lodgement of a Caveat by the buyer against the land noting the interest of the buyer under this contract'

The only other clause, 2, provided that the plaintiff and the defendant ratified and confirmed the terms and conditions of the contract in all other respects.

[20] Ms Sarah Andrew, accountant and justice of the peace, witnessed the execution of the contract by the defendant at his house at Wises Road. Ms Andrew had become a justice of the peace in February 1998. At about 5.00 p.m. on 20 October 1999 Ms Andrew drove to the house where she found the defendant, Mrs Walters, and Mr Eggmolesse who introduced her to the other two. There was some brief conversation in which the defendant participated. Mr Eggmolesse explained that the document was a contract between his company and the defendant, that the price was $400,000 and that the property concerned was at Wises Road. Ms Andrew thought Mr Eggmolesse went through 'other points of the contract' but she could not remember exactly. Ms Andrew noted that the defendant was 'quite an elderly gentleman', but saw no evidence of physical or mental infirmity, and no indication that he did not understand the document, that he was reluctant to sign it, or that he was under any pressure to sign it.

[21] The execution of the deed of variation by the plaintiff and the defendant was witnessed by Mr Kevin Cook, a Post Office licensee for nearly seven years. He owns and operates the Cotton Tree Post Office at Maroochydore. He has been a justice of the peace for twenty years. He was a Commonwealth Bank officer for approximately twenty-eight years and manager of the Kawana Waters branch when he ceased working for the bank. Mr Cook went to the defendant's house at Wises Road after he had finished work on 9 November 1999. Mr Eggmolesse was there, and he introduced Mr Cook to the defendant. Mr Eggmolesse told Mr Cook that previously there had been a contract signed for the sale of the property and that the deed of variation was necessary to change the settlement instructions, or the settlement procedure, because the defendant had purchased a unit and now the financier of that unit wanted repayment and part of the deed was provided that Mr Eggmolesse was to pay out the debt and there was to be a caveat over the property. The defendant was present while that was said and the defendant did not say anything to disagree with what Mr Eggmolesse had said. Mr Cook swore that his normal practice in witnessing documents was to make sure that the parties were comfortable with what they were signing and understood it and that he usually asked them that. Mr Cook said he could not recall whether he followed his practice on that occasion but he was 'very, very confident' that he would have asked both parties if they understood the document and were comfortable with signing it. There was no evidence, Mr Cook said, that the defendant 'wasn't coherent or didn't understand what was happening'. He was 'very coherent'. The defendant did not appear to Mr Cook to be physically infirm; he was not frail or anything like that; he 'wasn't doddery'.

[22] In the week beginning 16 January 2000 the defendant began questioning Mr Eggmolesse about how his pension money was being spent. Then on 24 January the defendant and Mrs Walters ordered Mr Eggmolesse out of the defendant's house and he left that day and did not return. On 8 February 2000 the defendant made another will which revoked all the defendant's previous testamentary acts, and under which Mr Alexander, who had drafted it, was appointed executor and trustee of the defendant's estate. Mr Eggmolesse was not mentioned as a beneficiary or otherwise.

[23] The defendant was examined in 1999, 2000, 2001, and 2002 by doctors who had been asked to assess his mental state.

[24] On 3 March 1999 the defendant was seen by Dr Ian Markwell, general practitioner, who had known him for eighteen years. In a functional capacity report dated 9 March 1999 Dr Markwell recorded the defendant as having a poor short-term memory resulting from a cardio-vascular accident in June 1996. A score of 29 out of 30 was shown for a Folstein mini-mental state examination. Dr Markwell was unsure whether the defendant's cognitive impairment affected his ability to manage his financial affairs, but concluded that it did not affect his ability to make medical decisions which required informed consent or to make 'lifestyle decisions' such as where he wished to live. Dr Markwell considered the defendant had the capacity to execute an enduring power of attorney.

[25] On 21 March 1999 the late Dr Emiel Neynens, described as 'Director of Extended Care', examined the defendant at the request of Mr Eggmolesse. The defendant was again given the mini-mental state examination in which his score was this time 23 out of 30. In a report dated 23 March 1999 to the legal friend Dr Neynens recorded these conclusions:

> He does admit to forgetfulness which he feels is only of six weeks duration. We proceeded on to an Mini-Mental Status Examination (Folstein) in which the patient scored 23/30.
>
> He was given 7/10 for orientation, 0/3 for recall, but did well in other areas including language and visuo-spatial function. There was no evidence of executive frontal lobe dysfunction and no ideomotor dyspraxia. He had mild agraphaesthesia, no evidence of any delusions or hallucinations throughout the interview and no suggestion of any disorder of affect. His gait was normal.
>
> At present, Enduring Power of Attorney is Timothy Eggomolesse (as of six (6) months ago) and Bill is aware of what this means. He also is aware that he has a new Will as of (10 February, 1999), and noted that his friend Elizabeth Walters and a number of nephews (I believe four) and sisters (two) and his step-daughter from the first marriage are beneficiaries of the Will and he has made Mr Timothy Eggomolesse his Trustee. He estimated the value of the 10½ acres at approximately $1,000,000.00 which Mr Eggomolesse confirmed as correct. He stated he had no Stocks and Shares and, whilst he had a bank account with the ANZ, he had no idea at all of how much money was in there. He had briefly forgotten to mention his

> Redcliffe property which I believe has some bridging finance on it at present.
>
> At this stage, I can not obtain a clear history of progressive cognitive loss. It is clear that Bill has significant cognitive loss which, if progressive in nature, would be consistent with dementia. I do not believe that he is capable any longer of managing his day to day affairs in terms of thing such as running a bank account, but I also believe that he is in a position still to give clear direction to an agent such as Mr Eggomolesse. I do believe that this gentleman retains testamentary capacity at the present time

[26] On 25 January 2000, the day after Mr Eggmolesse was ordered out of the defendant's house, Dr Markwell saw the defendant in order to assess his testamentary capacity. In a very brief report to Mr Alexander dated that day Dr Markwell recorded that the defendant had significant problems with his short-term memory and concentration - 'a significant deterioration since early 1999'. The defendant did, however, score 27 out of 30 in a mini-mental state examination. Dr Markwell did not express any opinion about the defendant's testamentary capacity, but it appears he referred the defendant to a specialist for a more expert opinion.

[27] On 1 February 2000 Dr Ronald Dolton, consultant physician, examined the defendant at Dr Markwell's request. Dr Dolton's report to Dr Markwell, dated 2 February 2000, was as follows:

> Many thanks for asking me to review Mr Black. As you are well aware the major problem is that of a Power of Attorney and whether Bill is competent to conduct his own affairs. He gave me verbal permission to send this report to his Solicitor as well. First of all I will go through his medical history. He has had bilateral knee replacements. He has had an ulcer in the past and he says he is on therapy for this which has just changed and he does not know the name. However, he says if he stops his treatment he will get indigestion. He has had a prostate problem in the past. He stopped smoking 15 years ago. He does have a past history of probably too much alcohol ingestion, but says he now has two to three bottles a night. There are no allergies that he is aware of. We could not really get him to complain of any definite symptoms. There is no definite family history. He has never had children, and his only relatives are nieces and nephews, and he really has not had that much to do with them. He did have an older brother. On physical examination pulse was 64 and regular, blood pressure was 135/80, there was a very soft ejection systolic murmur listening to his heart, his chest was clear, JVP was not raised, there were no vascular bruits, reflexes were equal and not exaggerated.
>
> Physically therefore there is still no major problem despite his age. The problem then is his mental status. He certainly has a problem with names. He did not know the name of the Prime Minister or the Premier, and did not know the date. However, he knew which day of

> the week it was, he knew his own address and date of birth, and he could do serial 7's, although quite slowly. He also told me about his activities as an inventor and working out a device for the bath to get disabled people in and out of the bath. I note from talking to you later that this is in fact true and not a figment of his imagination.
>
> Although he had problems with names, he described the Prime Minister as a little fellow who was a Liberal man from New South Wales, and it certainly did appear he knew exactly who he was talking about. The Premier he described as a Labour man who not that long ago had taken over from a National Party man that was a big fellow, and once again it certainly appeared he knew exactly who he was talking about.
>
> He took an interest in politics and we were able to go back and for example he knew Bob Menzies very well, he knew that his nickname was "Pig Iron Bob", and when I asked who the Labour leader was when Bob Menzies nearly lost the 1961 election, he was able to tell me Arthur Cardwell [*sic*] – indicating that he still retains his past memory, and that dementia really is not the situation at the present time.
>
> We then discussed his Power of Attorney. He says that a fellow that he has known since the age of 6, he said by the name of Tim Egmollesse, was his Power of Atorney, but he was spending all the money – even his pension. He said he was particularly upset when he could not go out to get a meal on one occasion, and he describes how if he does not feel like cooking he often goes into town and he describes the way to get to Kentucky Fried Chicken where he often goes for a meal. He told me that his Solicitor, David Alexander, was sorting things out. I asked him then about his Will, and he says that the one thing he knows is that he does not want Tim Egmollesse to have anything. He feels that his property should go to somebody who deserves it. He then suggested that his friend Elizabeth should share his property, she however said at that stage that she does not want anything of it. He talked about a niece that was quite bright, but he said at this stage he really has not made up his mind who should have his property, but as I said he was quite definite that this Tim Egmollesse should not have anything to do with it.
>
> My conclusion therefore is that Bill is in fact competent. He does have a major defect in short-term memory when it comes to names, though he has not lost all short-term memory. He is still quite definite in what he wishes to happen with his property, and would for example be quite competent in making a new Will or expressing his dissatisfaction with any that is presently in place. I hope that this does satisfy his needs. Once again, many thanks for allowing me to review Bill.

I have quoted Dr Dolton's report in full because it is, I think, the most significant detailed report by a doctor by reason of its proximity in time to the execution of the

contract and the deed of variation by the defendant. It shows that the defendant's mental infirmity appears to have been largely confined to a difficulty in remembering names, and in particular those of contemporary politicians. In his oral evidence, Dr Dolton said that if the defendant had been asked to sign a contract on the day Dr Dolton saw him, Dr Dolton felt he would know what he was doing.

[28] On 3 April 2000 Professor Lawrence Evans, psychiatrist, saw the defendant at the request of the solicitors acting in this proceeding for the defendant now on the instructions of the Public Trustee. Professor Evans provided a report dated 3 April 2000 concerning his assessment of the defendant's capacity to provide the solicitors with instructions in this proceeding. The defendant was given a number of simple cognitive tests of immediate recall, short-term memory retention and recall, concentration, and reasoning. 'I had no doubt that from my interview with him and as a result of this fairly simple straightforward testing', Professor Evans said in the report, 'he showed definite evidence of a severe cognitive deficit'. Professor Evans found the defendant was confused and did not have a clear comprehension of his financial affairs. Mrs Walters had accompanied the defendant to Professor Evans's rooms and she spoke to Professor Evans about the defendant. Professor Evans's conclusion about the defendant's condition was as follows:

> I consider that Mr Black does not have testamentary capacity in relationship to his own affairs. I have based this a opinion on my interview with him and the information that I have obtained from Mrs Walters. I am not sure of the aetiology of his condition but he certainly does appear to me to be suffering from some form of organic brain syndrome. This is manifest by his confusion, slight disorientation, and slowness in thinking, difficulty with reasoning, perseveration, and memory and concentration disturbances.
>
> In the circumstances I do not feel that Mr Black has capacity to provide you with instructions in relation to current court proceedings.

[29] In a letter dated 6 June 2000 from the last-mentioned solicitors Professor Evans was asked for his opinion concerning the defendant's mental capacity at relevant times before 3 April 2000: 17 December 1998, 24 (*sic*) October 1999, 9 November 1999, and 25 January 2000. Professor Evans responded with this report, dated 12 June 2000:

> I must say that I find it difficult to answer some of the questions that you have posed, as this requires an opinion in retrospect. I make the assumption that Mr Black has clearly evidence of an advancing degenerative process of the brain in that he now shows signs of dementia. Judging from the reports of those who have seen him previously this condition now seems to be deteriorated and has been deteriorating over the past few years. It is the natural course of dementia that the condition does tend to fluctuate over a period of time, although obviously with an overall deterioration. There is also evidence that those who are demented will fluctuate in their capacity to deal with stresses and life situations. Their cognitive levels and cognitive functioning will fluctuate and can be affected by external factors. Medication, for example, can often have a disadvantageous

effect on their levels of cognitive function. In addition to this, different times of the day can produce different levels of cognitive function. Another example is that those with dementia are often more able to deal with their environment earlier in the day but as they become tired their resources diminish as does their ability to deal cognitively with surrounding events.

I have no doubt that when I saw Mr Black at the beginning of April of this year he was no longer able to understand his affairs and he showed clear evidence of reasonably severe cognitive impairment. As a consequence of this I felt that Mr Black did not have capacity to provide you with instructions at that time and clearly he did not have the capacity to deal with his affairs.

He has been seen by a number of doctors with the view to making an assessment of this capacity.

The first report obtained was at the beginning of April 1999 by his local medical practitioner Dr Ian Markwell. Dr Markwell felt that he was capable of making many decisions but even at that time was unsure as to whether Mr Black was capable of managing his affairs. He did comment on the cerebro-vascular accident, which Mr Black had suffered in 1996 and noted that Mr Black had some difficulties with his short-term memory at that stage. He also felt that there was some deterioration of his mental state, which was age related. On the mini-state evaluation however Mr Black performed reasonably well.

Soon after this, Dr Neynens, who was obviously an experienced practitioner in dealing with matters of capacity as he was apparently employed as a Director of Extended Care at that time, saw Mr Black. He sent a letter to the legal friend concerning Mr Black's capacity. He did note that Mr Black had significant cognitive loss, which he thought would be consistent with dementia if this were to be progressive in nature. He also felt that he was not capable of managing day-to-day affairs but he did believe that he retained his testamentary capacity at that time. It is clear that Mr Black has shown his cognitive impairment to be progressive therefore the diagnosis of dementia would be consistent with Dr Neynens opinion.

There is a further report from Dr Markwell dated 25th January 2000 when he states that Mr Black has significant problems with short-term memory and concentration at that time. He notes as significant deterioration since early 1999.

Doctor Ron Dalton [*sic*], a consultant physician, saw Mr Black at the beginning of February 2000 and noted in his report that Mr Black had a major deficit in his short-term memory when it came to names. He gave the opinion that Mr Black had not lost all of his short-term memory. It does seem that Dr Dalton tested Mr Black on a number of items that drew on long-term memory although clearly did ask him one or two questions which would test his short-term memory.

> Even at that time however Mr Black seemed to be unsure of the date and also seemed very preoccupied with the story which he had told yourself, and at a later state stage me, and to which I refer in my report.
>
> In answer to your specific questions:-
>
> 1.
> I think it is possible that Mr Black did have capacity to understand what he was doing at the time the enduring power of attorney was signed on 17th December 1998. It would naturally depend on whether or not he was affected by either prescription drugs or alcohol and possibly even the time of day when it was signed. There are reports from around about that time of his capacity although even these reports do raise some issues suggesting that he had cognitive impairment clearly in evidence.
>
> 2.
> It is less likely at the end of October 1999, when this contract was signed, that Mr Black has had capacity to understand what he was doing. The opinions that were given by Dr Markwell and Dr Neynens were reasonably clear in their view that he had capacity at the beginning of the year. However, those which where given later, at the beginning of this year, did raise questions about his capacity. By the time I saw him at the beginning of April it was quite clear that he did not have this capacity.
>
> 3.
> I do think that the same comments above concerning Mr Black's capacity in October 1999 apply to his capacity in November 1999.
>
> 4.
> I think that there is considerable doubt as to whether he had capacity to enter into a contract at the end of January 2000. You'll recollect that I saw him just over a month after this and there was no doubt in my mind that this man did not have capacity to provide you with instructions as he did not have a clear idea of his affairs and showed obvious evidence of organic dementia.

The error in giving Professor Evans the date of the contract is of no moment, in my view.

[30] In a brief report dated 20 January 2001 to the Public Trustee, Dr Phil Wignall, family practitioner, recorded his view that the defendant's physical and mental state was 'fair considering his age', adding that the defendant's poor hearing made it difficult to assess his mental state fully 'but subjectively he is in control of his mental faculties'.

[31] In a report dated 24 August 2002 to the defendant's present solicitors Professor Evans gave the opinion that, having seen him the day before, he concluded it would not be just inappropriate and unhelpful for the defendant to attend court but that he considered that it would be disadvantageous to the

defendant's overall well-being as it would be extremely stressful. The defendant was not called to give evidence.

[32] The plaintiff, as the party to the contract presumed to be the stronger, bears the onus of showing that in executing the contract and the deed of variation the defendant acted voluntarily, i.e., as a result of the free exercise of his independent will: *Adenan v. Buise* [1984] W.A.R. 61 at p.68 per Burt C.J. and Kennedy J. referred to with approval by Gaudron, Gummow, and Kirby JJ. in *Bridgewater v. Leahy* (1998) 194 C.L.R. 457 at p.477. Chief among the matters relevant to the determination of that question, in the circumstances of this case as the issues have emerged, are: the degree to which the plaintiff was the stronger party; the extent to which the defendant was found to be suffering from relevant mental infirmity; the defendant's behaviour before, at the time of, and after the transactions in question; the extent to which the contract as varied could be regarded as disadvantageous to the defendant; whether the defendant had received independent advice before he entered into the transactions in question; and whether the defendant had adequate time properly to consider the terms of the contract and of the deed of variation before executing them.

[33] In this case it is presumed that the plaintiff, acting at all times by Mr Eggmolesse, was the stronger party and the defendant the weaker. But how much stronger than the defendant was Mr Eggmolesse? It is relevant therefore to make some assessment of the characters of the two people concerned as they are revealed in the evidence: cf., in the related context of unconscionable conduct, *Louth v. Diprose* (1992) 175 C.L.R. 621 at pp. 639-640 per Dawson, Gaudron and McHugh JJ. Mr Eggmolesse, it appears, was prepared to adopt a position subservient to the defendant, motivated at least partly by a desire to exploit the association. I do not, however, discount the possibility that he was in part seeking to assist an old friend of his grandfather. He did so commend himself to the defendant as to move the defendant to reward him in his will. The defendant was also content to entrust his day-to-day affairs to Mr Eggmolesse, but, when necessary, was strong-willed and decisive, as when he rejected the first Braveheart Developments offers and peremptorily broke with Mr Eggmolesse - immediately entering into an agreement with Braveheart Developments, and soon after making a new will. Such actions were not those of a man who could be easily manipulated or did not know his own mind. It may reasonably be concluded I think that the defendant possessed a confidence in his judgment born of his long experience and success in his life's work, a confidence not readily overcome by Mr Eggmolesse, a younger man who had had his share of failure in business.

[34] The defendant was not physically infirm at the relevant time despite his advanced years, and, on my assessment of the evidence of the doctors, he was not then suffering from any relevant mental infirmity, although it seems that he did suffer a decline later. The weight of the evidence of the doctors supports that conclusion. Of particular importance is Dr Dolton's report of 2 February 2000 which revealed that the defendant's chief difficulty was in remembering the names of contemporary politicians. Dr Dolton's opinion, derived from an examination which took place closer in time to the relevant transactions than that of Professor Evans's first examination, is of more weight in the determination of the issue before me than is Professor Evans's. Professor Evans conceded in his report of 12 June 2000 the difficulty of giving a retrospective opinion, a difficulty he conceded again in his oral evidence. That reservation is of particular importance in a case like this, since the

onset of dementia in the elderly can be quite rapid. The evidence of Ms Andrew and Mr Cook supports the conclusion that the defendant was alert and not suffering from any relevant mental infirmity at the time of the transactions in question.

[35] The defendant's actions from early 1997 through to early 2000 show a continuous keen interest in the sale of the Wises Road land and in the terms upon which he might be able to sell it. After the purchase of the home unit at Redcliffe the defendant's interest intensified. The defendant had left the conduct of his day-to-day finances in the hands of Mr Eggmolesse, but the evidence shows, in my assessment, that the defendant had – with one brief lapse, the agreement reached over the lunch - a shrewd understanding of the terms upon which he might be able to sell his land before and after the transactions in question. It is most unlikely that that understanding deserted him at the time of those transactions.

[36] Mr Bland, on behalf of the defendant, submitted that the contract could properly be described as improvident from the defendant's point of view. In support of that submission Mr Bland argued that although it seemed that the purchase price payable under the contract represented the market value of the land, it was hardly prudent for a man of the defendant's age to agree to transfer title to the purchaser at settlement while permitting the purchaser to defer payment of the balance of the purchase price for a further three years. It must, however, be noted that the contract was entered into after nearly three years of attempts by the defendant to sell the land and that the contract provided for the defendant's most immediate concern, the discharge of the mortgage debt arising from the purchase of the home unit. Furthermore, the plaintiff was obliged to pay the defendant interest on the outstanding balance at the rate of 4.5 per cent. per annum, which would have entitled the defendant to monthly payments of $1,162 on the remaining debt of $310,000. It was submitted that the deed of variation deprived the defendant of the right under the contract to a first registered mortgage to secure the payment of the balance of the purchase money and that it deprived him of the right to have his mortgage registered in priority to that granted to any lender who provided finance to develop the land. The first part of that proposition is undoubtedly correct, but that could be regarded as a reasonable price to pay for the discharge of the debt owing to the Westpac bank on the purchase of the home unit. The second part of the proposition does not accord with my construction of the deed of variation which appears to me to have the effect of amending special condition 15 to provide that the defendant's mortgage should rank ahead of any 'further' mortgages granted to a third party who might advance funds to develop the land. But in any event any mortgage in favour of the defendant would be lodged for registration immediately after the memorandum of transfer to the plaintiff thus having priority over any further mortgages granted to a third party: s.178 of the *Land Title Act* 1994. It was further submitted on behalf of the defendant that since the plaintiff had no assets or income when the contract was entered into and its obligations under the contract were not supported by a guarantee the rights to payments from the plaintiff could in practical terms be treated as illusory. In his opening Mr Cooke Q.C., on behalf of the plaintiff, after referring to relevant parts of the pleadings, said that it was not in issue that at all material times the plaintiff was ready, willing, and able to perform its obligations under the contract. No submissions were made to the contrary of that proposition on behalf of the defendant in the course of the trial, apart from indirectly in the submission I am now discussing. There is then an inconsistency between the defendant's failure to challenge the plaintiff's readiness, willingness, and ability to perform its obligations under the contract and the assertion that the

contract was improvident by reason of the plaintiff's lack of assets and income. But in any event I think that the latter proposition is answered by the provision for the mortgage to be granted to the defendant to secure the payment of the balance of the purchase price.

[37] The defendant did not receive any independent legal or other professional advice before he entered into the transactions in question, but the absence of such advice is not fatal to the plaintiff's case: see *Inche Noriah v. Shaik Allie Bin Omar* [1929] A.C. 127 at p.135 and *Cheshire & Fifoot's Law of Contract*, 8th Australian ed. (2002), para. 14.11 pp. 679-680. The contract was entered into after the defendant had entered into and considered other contracts for the sale of his land, and for one familiar with the terms of those previous contracts understanding the contract with the plaintiff would present no difficulty. That was the defendant's view: Mrs Walters gave evidence that she had suggested to him that he seek legal advice and he said that it was not necessary. (There was an issue at the trial as to what Mrs Walters's evidence on this subject meant: Mr Bland submitting that the effect of her evidence was not as I have related, but rather that it was Mr Eggmolesse and not the defendant who said that legal advice was not necessary. I have considered her evidence, which is at pp. 178, 179, and 183 of the transcript, and reached the conclusion that the effect of her evidence was as I have related.)

[38] There was a conflict between Mr Eggmolesse's evidence and that of Mrs Walters on the question whether the defendant had properly considered the terms of the contract before he executed it. Mr Eggmolesse swore that he had had discussions with the defendant and Mrs Walters about its terms over seven days and then the defendant and Mrs Walters took further time to consider the draft contract whereas Mrs Walters swore that the defendant misunderstood the terms of the contract, believing it related to water rates. It could no doubt be thought that Mr Eggmolesse in giving that evidence was motivated by self-interest and that Mrs Walters in giving hers was motivated by her evident antipathy to Mr Eggmolesse. Taking into account the defendant's history of considering proposals put to him for the sale of the land, I think Mr Eggmolesse's account is probably the correct one - if not in every detail at least in its essentials. So too do I think Mr Eggmolesse's explanation for the deed of variation is more probable than that of Mrs Walters: according to Mr Eggmolesse when Mrs Walters discovered that Ms Sebbens was to provide the $90,000 to discharge the mortgage debt on the home unit, the defendant, guided by Mrs Walters, objected to that course and so Mr Eggmolesse was faced with raising the money elsewhere. I accept Mr Eggmolesse's evidence that after further discussions with the defendant he handed the deed of variation to the defendant the day before it was executed and that on the latter day the defendant told Mr Eggmolesse he was satisfied with it, whereupon Mr Eggmolesse arranged for Mr Cook to come to Wises Road to witness the execution of the deed. Accordingly I find the defendant had adequate time properly to consider the terms of the contract and of the deed of variation before executing them.

[39] In the result my conclusion is that the plaintiff has discharged the onus of rebutting the presumption of undue influence, and so the plaintiff will have the relief it seeks. I shall invite further submissions on the form of the orders to be made, and costs.