SUPREME COURT OF QUEENSLAND

CITATION:	*Lambourne and Ors v Marrable and Ors* [2023] QSC 219
PARTIES:	**Kate Lambourne** (First Applicant) And **Luke John Marrable** (Second Applicant) And **Helen Lambourne** (Third Applicant) v **Harvey Warren Marrable** (First Respondent) And **Philip Murphy** (Second Respondent) And **Jason Campbell McGifford** (Third Respondent) And **Brooke Leila McGifford** (Fourth Respondent)
FILE NO/S:	BS 9948 of 2022
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 October 2023
DELIVERED AT:	Brisbane
HEARING DATES:	11 October 2022, 12 October 2022, 13 October 2022, 19 October 2022, 23 November 2022, 24 November 2022, 25 November 2022, 28 November 2022, 29 November 2022, 30 November 2022, 6 December 2022, 12 December 2022 and 27 January 2023
JUDGE:	Martin SJA
ORDER:	**I will hear the parties on the appropriate form of order and on costs**
CATCHWORDS:	HEALTH LAW – GUARDIANSHIP, MANAGEMENT AND ADMINISTRATION OF PROPERTY OF PERSONS WITH IMPAIRED CAPACITY – GUARDIANSHIP AND SIMILAR APPOINTMENTS – GENERAL PRINCIPLES –

where there is a statutory presumption of capacity – where there is an enduring power of attorney appointing family members as attorneys – where the donor is declared by medical practitioners to have lost capacity – where an enduring power of attorney is declared by a medical practitioner to have been activated – where a further enduring power of attorney is made after the activation of an enduring power of attorney – where the further enduring power of attorney removed family members as attorneys – where there are statutory obligations by a power of attorney – where a donor disputes the loss of capacity and the activation of an enduring power of attorney – whether the further enduring power of attorney is valid – whether an enduring power of attorney has been activated – whether an enduring power of attorney is the correct enduring power of attorney to be activated – whether the enduring power of attorney is still active

HEALTH LAW – GUARDIANSHIP, MANAGEMENT AND ADMINISTRATION OF PROPERTY OF PERSONS WITH IMPAIRED CAPACITY – GUARDIANSHIP AND SIMILAR APPOINTMENTS – REVIEW, REVOCATION, ETC – where there is a statutory presumption of capacity – where a medical practitioner declares a donor to lack capacity – where a medical practitioner declares an enduring power of attorney to be activated – where the donor disputes the loss of capacity – where the donor makes a further enduring power of attorney – where applicants dispute the validity of the further enduring power of attorney on grounds of capacity – whether the donor had impaired capacity to make new enduring power of attorney – whether the applicants have rebutted the statutory presumption of capacity to revoke enduring power of attorneys

Conveyancing Act 1919 (NSW)
Evidence Act 1977 (Qld) s 92
Guardianship and Administration Act 2000 (Qld) ss 250
Powers of Attorney Act 1985 (United Kingdom), s 6(5)(a)
Powers of Attorney Act 1998 (Qld), ss 6A, 6C, 41, 47, 50, 111, 111A, 113, 115
Powers of Attorney Act 2003 (NSW)
Protected Estates Act 1983 (NSW)
Public Trustee Act 1978 (Qld), s 59(1A)
Statutory Instruments Act 1992 (Qld) s 7

Adamson v Enever (2021) 9 QR 33, considered
Aziz v Prestige Property Services Pty Ltd [1999] QSC 182, considered
Ball v Mannin (1829) 1 Dow & Cl 380, 6 ER 568, cited
Birkin v Wing (1890) 63 LT 80, cited
BP v PM & Ors [2022] QSC 268, considered
Boughton v Knight (1873) LR 3 P & D 64, cited

Briginshaw v Briginshaw (1938) 60 CLR 336, considered
Commissioner for Railways (NSW) v Agalianos (1955) 92 CLR 390, cited
Estate of Park (1954) P 112, cited
Ghosn v Principle Focus Pty Ltd [2008] VSC 574, considered
Gibbons v Wright (1954) 91 CLR 423, considered
Hamill v Wright [2018] QSC 197, cited
Jenkins v Morris (1880) 14 Ch D 674, cited
Leigh v Bruder Expedition Pty Ltd (2020) 6 QR 475, followed
Lorimer v Smail (1911) 12 CLR 504, cited
Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705, cited
Mersey Docks and Harbour Board v Henderson Bros (1888) 13 App Cas 595, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355, cited
Ranclaud v Cabban (1988) NSW ConvR ¶ 55-385, considered
Re C (TH) and the Protected Estates Act [1999] NSWSC 456, cited
Re: Graham Percival Andrew Caldwell [1999] QSC 182, considered
Re K (Enduring Power of Attorney) [1988] Ch 310, considered
Saravinovski v Saravinovska [2017] NSWCA 85, considered
Sarkis v Morrison [2013] NSWCA 281, cited
Scott v Scott (2012) 7 ASTLR 299, considered
Szozda v Szozda [2010] NSWCA 804, considered
Victims Compensation Fund Corporation v Brown (2003) 201 ALR 260, considered

Guardian and Administration and Other Legislation Amendment Bill 2018
Queensland Capacity Assessment Guidelines 2020

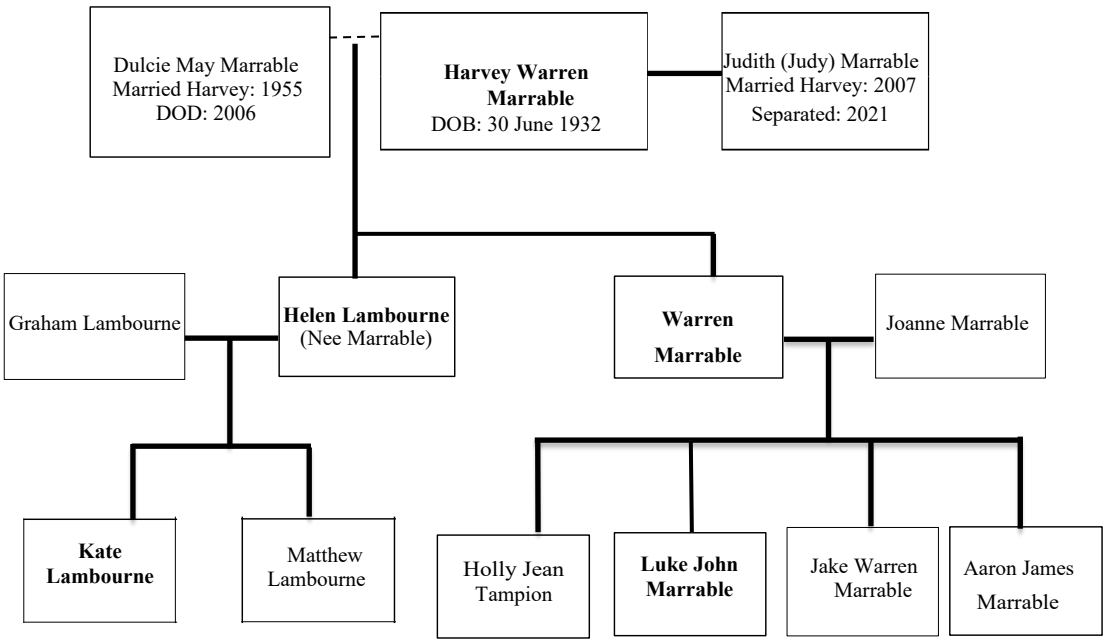
COUNSEL: R Treston KC and A Bratti for the first, second and third applicants
P Dunning KC and T Pagliano for the first respondent
No appearance by the second, third and fourth respondent

SOLICITORS: Gall Stanfield Smith for the first, second and third applicants
Provest Law for the first respondent
No appearance by the second, third and fourth respondents

[1] In 1956 Harvey and Dulcie Marrable opened a bakery at Mermaid Beach on the Gold Coast. It led to the creation of a large enterprise which became known generally as Gold Coast Bakeries. It, along with related enterprises, remained under the control of companies the shares in which were held by members of the Marrable family.

[2] Harvey Marrable had kept close control of all parts of the business. In 2020 he was 88 years old. He held then, as he had for some time, concerns about the possibility that, after his death, his estate might be the subject of dispute by members of his family. He took steps which he thought might prevent that. Part of his estate planning involved the execution of various enduring powers of attorney (EPOAs). This application concerns those EPOAs, whether they came into effect, whether they were validly revoked and whether later revocations and EPOAs took effect. At the heart of this application is the question of his capacity at various times.

[3] A family tree which sets out the relationship of many of the major participants in the relevant events will aid in understanding what occurred:



[4] During the hearing Harvey Marrable was referred to by most participants as Harvey. His children and grandchildren address him in that way. In keeping with that, and because the family members were generally referred to by their given names during the hearing, I will maintain that practice in these reasons when I refer to his actions but as the respondent when dealing with arguments made on his behalf.

[5] The 2nd, 3rd and 4th respondents did not, apart from giving evidence, play an active role in these proceedings.

The Enduring Powers of Attorney

[6] On 9 December 2020, Harvey executed:

(a) an EPOA for personal matters in favour of Kate Lambourne, Luke Marrable and Helen Lambourne (the Personal EPOA); and

(b) an EPOA for financial matters in favour of Kate and Luke (the Financial EPOA).

(the 9 December EPOAs)

[7] The powers under the Personal EPOA were expressed to commence "when [Harvey does not] have capacity to make decisions for personal (including health) matters only." A similar pre-requisite existed in the Financial EPOA.

[8] There is no dispute about the validity of the Personal EPOA and the Financial EPOA.

[9] On 27 and 28 June 2022, Harvey executed revocations of the 9 December EPOAs.

[10] On 12 August 2022, Harvey:

(a) executed two further revocations in respect of the Personal EPOA and the Financial EPOA;

(b) executed a new EPOA for personal matters in favour of Judy Marrable and Brooke McGifford (the 4th respondent); and

(c) executed a new EPOA for financial matters in favour of Jason McGifford (the 3rd respondent), Judy Marrable and Erin Falvey.

(the 12 August EPOAs)

[11] On 15 August 2022, Harvey executed an EPOA in which he appointed:

(a) Philip Murphy (the 2nd respondent) and Brooke McGifford as his attorneys for personal (including health) matters; and

(b) Philip Murphy and Jason McGifford as his attorneys for financial matters.

(the 15 August EPOAs)

[12] The applicants' case is that Harvey lost capacity for personal and financial matters on 8 June 2022 and has not recovered it. Thus, they argue, each of the revocations, the 12 August EPOAs and the 15 August EPOAs are invalid.

[13] The respondent's case is that he did not lose capacity at any time, that the Personal and Financial EPOAs have been revoked and that the 15 August EPOAs are valid.

[14] The respondent also submits that if the applicants do not establish that Harvey did not have the capacity to make the revocations of 27 and 28 June 2022 then, as they ceased to be attorneys by virtue of the revocations, their interest in what happened after those dates is at an end. It would follow, then, that they would have no interest in the status of the documents executed after those dates.

What relief do the applicants seek?

[15] The applicants seek orders pursuant to various sections of the *Powers of Attorney Act* 1998 (the Act).

[16] Under s 111:

(a) a declaration that Harvey had impaired capacity for all matters from 8 June 2022; and

(b) a declaration as to whether Harvey:

(i) had impaired capacity as at 27 June, 28 June and 12 August 2022; and

(ii) has impaired capacity for all matters at the date of this hearing.

[17] Under s 113, declarations as to the validity or otherwise of each of the following documents:

(a) the purported revocations of the Financial EPOA dated 28 June 2022 and 12 August 2022;

(b) the purported revocations of the Personal EPOA dated 27 June 2022 and 12 August 2022;

(c) the purported enduring power of attorney for personal and financial matters granted by Harvey in favour of Judy Marrable, Brooke McGifford, Jason McGifford and Erin Falvey dated 12 August 2022; and

(d) the purported enduring power of attorney for personal and financial matters granted by Harvey in favour of Philip Murphy, Brooke McGifford and Jason McGifford.

[18] Under s 115:

(a) a declaration that the power under the Financial EPOA began on 8 June 2022; and

(b) a declaration that the power under the Personal EPOA began on 8 June 2022.

What are the issues which require resolution?

[19] The proceedings were commenced by way of an originating application. The applicants apprehended that there was a need for urgent action and interlocutory orders were made which effectively froze Harvey's assets.

[20] As the hearing proceeded, it became clear that this was a matter which should have proceeded by way of pleadings. The applicants filed an amended originating application and provided particulars. Those particulars, while extensive, did not confine the issues as pleadings can. There was also disagreement between the

parties about the way in which the particulars should be read with the opening submissions which had been provided in writing.

[21] The parties explored every avenue available to them and in great detail. No stone was left unturned. Some were turned over more than once. This approach, added to the absence of pleadings in a complicated matter, led to a hearing which took longer than it might otherwise have done.

[22] I have dealt with what I consider to be the major matters relevant to the issues which need to be decided. There was a lot of evidence of a peripheral nature. Some of it descended to excruciating detail but was of limited value.

[23] I directed the parties to confer with a view to agreeing on a joint statement of the issues which needed determination. The parties could not agree completely upon the issues but there is substantial overlap in the two lists provided to me.

[24] In their list of issues, the applicants sought, among other things, the resolution of 22 matters including whether Harvey had impaired capacity for all financial matters at the date of hearing and, if not, whether he had capacity for complex financial matters or a specific financial matter or matters. If it were found that he had capacity for financial matters at the date of hearing then the identification of the particular financial matter or matters was sought. This level of detail goes beyond the ambit of the orders sought in the amended originating application.

[25] In her final submissions, Ms Treston said that there were two principal questions which the applicants seek to be answered. First, did the powers under the 9 December EPOAs commence? Secondly, do those powers remain in force?

[26] I will adopt, with some minor changes, the list of issues proposed by Harvey's representatives. They more accurately marry the legal and factual matters which arose in this litigation and respond to the orders sought in the amended originating application. The broad issues which may need to be resolved are:

(a) whether the applicants have rebutted the presumption that Harvey had the capacity to revoke his EPOAs on 27 and 28 June 2022;

(b) whether the applicants have rebutted the presumption that Harvey had the capacity to make the 12 August EPOAs;

(c) whether the applicants have rebutted the presumption that Harvey had the capacity to make the 15 August EPOAs;

(d) if the statutory presumption has not been rebutted, which EPOAs apply and, if they came into effect, the date the EPOAs came into effect; and

(e) if the statutory presumption has been rebutted (and the 9 December EPOAs still apply), whether the power under those EPOAs begin on 8 June 2022 or some other time.

[27] If the applicants have not rebutted the presumption that Harvey had the capacity to revoke the 9 December EPOAs on 27 and 28 June 2022, then the balance of the questions do not fall to be answered. If the 9 December EPOAs were revoked, then the applicants have no further interest in this matter.

Capacity – the relevant provisions of the Act and other principles

[28] This case revolved around the issue of Harvey's capacity – "capacity" in the sense used in the Act. So far as this case is concerned there are two ways in which capacity can be assessed. First, it can be assessed with respect to the making and revocation of EPOAs. And, secondly, it can be assessed with respect to particular matters or transactions.

[29] The Act is to be read in conjunction with the *Guardianship and Administration Act* 2000 (GAA). If there is a conflict between the two statutes, then the GAA prevails.[1]

[30] The Act sets out in s 6C principles which "must be applied by a person or other entity that performs a function or exercises a power under this Act". It was submitted by the respondent that, as the Court is exercising powers under the Act, it is bound to follow those principles. I do not agree.

[31] Section 6C applies to "a person or entity that performs a function or exercises a power" under the Act. That section does not apply to this Court. Section 6C was inserted into the Act by the *Guardian and Administration and Other Legislation Amendment Bill* 2018. In the Explanatory Notes to that Bill the following appears with respect to s 6C:

> "New subsection 6C (General principles) provides that the general principles contained in the section must be applied by a person, or other entity that performs a function or exercises a power under the Act or an enduring document (an EPA or AHD).
>
> Subsection 6C also sets out the new general principles (1 to 10) which recognises the presumption of capacity; an adult's right to the same human rights and fundamental freedoms regardless of an adult's capacity; the importance of empowering an adult to exercise their basic human rights and fundamental freedoms; the importance of maintaining an adult's existing supportive relationships; the importance of maintaining an adult's cultural and linguistic environment and values; an adult's right to privacy; an adult's right to liberty and security on an equal basis with others; and the importance of maximising an adult's participation in decision making.
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> General principles 9 and 10 provide specific guidance for a person or other entity exercising a power or performing a function under the Act or under an enduring document (i.e., an EPA or AHD). The person or other entity must perform these functions or exercise the

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1 *Powers of Attorney Act* 1998, s 6A.

> power in a way that: promotes and safeguards the adult's rights, interests and opportunities; and is least restrictive of the adult's rights, interests and opportunities.
>
> General principle 10 provides guidance for applying the requirements in general principle 9, setting out the steps that should be followed."[2]

[32] The language of s 6C is directed to persons who have obligations because they are, for example, attorneys under an EPOA. The principles do not apply to the Court when it is asked to make a declaration about the validity or otherwise of an EPOA.

[33] Chapter 6 of the Act sets out the powers of this Court with respect to, among other things, general powers of attorney made under the Act. That chapter contains s 111A which provides:

> "(1) If, in performing a function or exercising a power under this Act, the court or tribunal is required to make a decision about an adult's capacity for a matter, **the court or tribunal is to presume the adult has capacity for the matter until the contrary is proven**."
>
> (emphasis added)

[34] That provision was inserted into the Act by the same amending legislation which inserted s 6C. The Explanatory Note about s 111A provides:

> "Clause 75 inserts new section 111A (Application of presumption of capacity). Consistent with the corresponding amendments made to the GAA, **new section 111A sets out how the Supreme Court and QCAT are to apply the presumption of capacity in particular circumstances.** Subsection 111A(1) states that if, when performing a function or exercising a power under this Act, the Supreme Court or QCAT are required to make a decision about an adult's capacity for a matter, the court or QCAT is to presume the adult has capacity for a matter until the contrary is proven."[3] (emphasis added)

[35] The direction in s 111A to presume capacity relates to the functions or powers available to the Court under the Act. It relates to a set of circumstances distinct from those which concern attorneys and persons with other obligations under the Act. It relates directly to the making of a declaration available under s 113 or s 115 of the Act.

Are the principles in s 6C otherwise relevant?

[36] The principles set out in s 6C encompass a constellation of considerations – many of which may be of little relevance in particular matters. They are principles which, if

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2 *Explanatory Notes, Guardianship and Administration and Other Legislation Amendment Bill* 2018 at p 34.

3 *Explanatory Notes, Guardianship and Administration and Other Legislation Amendment Bill* 2018 at p 40.

otherwise relevant, should be taken into account by an attorney or other person with similar obligations under the Act. They are, in many respects, aspirational. For example, principle 10(2)(b) requires that "the person or other entity must … if possible, support the adult to make a decision." That is not something a court is capable of doing, but it is something that a court would take into account when dealing with an application under s 118 of the Act. That section allows an attorney to seek advice, directions and recommendations from the court as to the manner in which an attorney's powers should be exercised. In s 118(2), the court is required to be satisfied that a proposed transaction would be in accordance with the general principles. This was considered by Henry J in *BP v PM & Ors*[4] where, in relation to s 6C, he said:

> "[29] … The guidance they provide will be of variable assistance depending upon the nature of the incapacity the relevant adult suffers and the nature of the decision in consideration."

[37] The respondent submitted that the applicants had repudiated the obligations imposed upon them by the general principles set out in s 6C. Whether that is correct or not was explored in some detail during the hearing. The conduct of the applicants was the subject of much cross-examination and much criticism. If their conduct was inadequate or inappropriate then, so far as it might explain Harvey's actions leading to his purported revocation of the 9 December EPOAs, it can be relevant. But this was not a case which required a detailed assessment of whether they had behaved properly or observed the principles in s 6C. Whether their evidence should be accepted is a different matter.

[38] Harvey's capacity is presumed. The applicants set themselves the task of demonstrating that they could rebut that presumption at the relevant times.

[39] Harvey does not have to engage in some process whereby he seeks to justify his conduct. He does not have to demonstrate that every decision he made was an objectively "good" or "correct" decision. A person with capacity can make a good or a bad decision.

[40] This principle was considered by Young J in *Re C (TH) and the Protected Estates Act*[5] where his Honour considered an application under the *Protected Estates Act* 1983 (NSW) for the revocation of a declaration that the applicant was incapable of managing her affairs. That legislation is similar in some respects to the GAA. In revoking the declaration, Young J said:

> "[17] … There is no room in the legislation for benign paternalism. A person is allowed to make whatever

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4 [2022] QSC 268.
5 [1999] NSWSC 456.

> decision she likes about her property, good or bad, with happy or disastrous effect, so long as she is capable."[6]

[41] That statement applies equally to the court's powers and duties under the Act on an application of this kind. Of course, a decision which is objectively bizarre may allow a submission that that tends to show a lack of capacity. But this is a case about capacity, not wisdom.

Capacity – the making and unmaking of EPOAs

[42] As set out above, s 111A provides that, in the circumstances, the court "is to presume the adult has capacity for the matter until the contrary is proven." The definition of "capacity" (whether under s 41 or Schedule 3 of the Act) dictates that that presumption includes the implicit presumption that the principal was capable of making the EPOA freely and voluntarily, and that the principal understood the nature and effect of the EPOA.

[43] This presumption is to be applied by the court but it may be rebutted if "the contrary is proven." Such proof need only meet the civil standard but, given the nature of the matter and the consequences of a finding of a lack of capacity, the proof must be to the *Briginshaw*[7] standard. I respectfully adopt what Sofronoff P[8] said in *Leigh v Bruder Expedition Pty Ltd*[9] about that standard:

> "[23] … it must be borne in mind that the case does not establish a third standard of proof which lies between the civil and criminal standards. *Briginshaw* establishes that, when applying the civil standard of proof, it is only common sense for a rational tribunal of fact which is deciding whether evidence actually proves a fact to bear in mind the seriousness of the allegation in issue, or the gravity of the consequences of a finding, when considering the probative value of the evidence."

[44] The heavy burden upon a party seeking to rebut the presumption was noted by Mackenzie J in *Re Caldwell*[10] where his Honour said that the "onus to be discharged is substantial".[11]

[45] The word "capacity" is defined in the Dictionary of the Act:

> "***capacity***, for a person for a matter, means the person is capable of—
>
> (a) understanding the nature and effect of decisions about the matter; and

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6 Adopted by Forrest J in *Ghosn v Principle Focus Pty Ltd* [2008] VSC 574 (No 2) at [100].
7 *Briginshaw v Briginshaw* (1938) 60 CLR 336.
8 With whom Davis and Wilson JJ agreed.
9 (2020) 6 QR 475.
10 [1999] QSC 182.
11 Ibid at [14].

(b) freely and voluntarily making decisions about the matter; and

(c) communicating the decisions in some way."

[46] That definition is cumulative in the sense that, should it be shown that one limb is not satisfied, then the presumption of capacity will be rebutted. The definition, though, is with respect to "a matter". The GAA contains, in Schedule 4, an identical definition of "capacity". In *Aziz v Prestige Property Services Pty Ltd*,[12] Lyons J, when considering the definition in that statute, said:

> "[23] Clearly the scheme of the [*Guardianship and Administration*] Act is such that the issue of capacity is determined not on a global basis but rather on the basis of whether a person has capacity for a particular matter. In this case it is not a question of whether the plaintiff has impaired capacity for matters in general but specifically whether he has impaired capacity in relation to legal matters and particularly whether he has capacity to bring or defend a proceeding including settling a claim. This principle was clearly recognised in the decision of *Gregory v Nominal Defendant & Anor* where it was held that:
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> > "The material presently before the court does not deal comprehensively with the plaintiff's incapacity for financial matters. He has the capacity to instruct his lawyers, to understand the compromise and to consent to it. That capacity may extend to finalising questions of costs as between him and his solicitors. If it does not, then in the circumstances of this case it is a matter for an administrator appointed under the *Guardianship and Administration Act*."
>
> [24] This decision clearly indicates that the capacity for a matter is specific to the decision which needs to be made."

[47] The questions which must be asked and answered with respect to "capacity" under the GAA and the Act are alike. It follows that the examination of the meaning of "capacity" under the GAA can assist with the inquiry as to meaning of that word in the Act.

[48] In *Adamson v Enever*[13] (a case concerning the compromise of a personal injuries action), Applegarth J said:

> "[6] Capacity is decision specific. A person may lack capacity for some decisions but not others. For instance, a person may lack capacity to manage and invest a very large sum but have capacity to manage a smaller amount. A person

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12 [2007] QSC 265.
13 (2021) 9 QR 33.

> may lack capacity to agree to a complex settlement of a large commercial dispute but not to settle a simpler claim."

[49] Schedule 2 of the Act sets out the types of matter which come within the broad description of "matter" used throughout the Act. They include financial matters, personal matters, special personal matters, health matters, special health matters and legal matters.

[50] The presumption in s 111A applies with respect to an "adult's capacity for a matter". "Matter" is not defined in the Act but the parties accepted that it includes the making or revocation of an EPOA. Under the first iteration of the Act, General Principle (1) in s 6C which provides – "An adult is presumed to have capacity for a matter" was to be found in Schedule 1. Of that, Mackenzie J said in *Re Caldwell*:

> "Section 41(1) of the *Powers of Attorney Act* 1998 states that a principal may make an enduring Power of Attorney only if the principal understands the nature and effect of it. The principal matters as to which there must be an understanding are set out in s 41(2). Importantly, in the context of the present matter there is a presumption in schedule 1 s 1, that an adult has capacity for a matter.
>
> Like any presumption it can be rebutted by satisfactory evidence."[14]

[51] Section 41 of the Act provides the definition of capacity necessary for the making of an EPOA:

> "(1) A principal has capacity to make an enduring power of attorney only if the principal—
>
> (a) is capable of making the enduring power of attorney freely and voluntarily; and
>
> (b) understands the nature and effect of the enduring power of attorney.
>
> *Note—*
>
> Under the general principles, an adult is presumed to have capacity. See section 6C, general principle 1.
>
> (2) Understanding the nature and effect of the enduring power of attorney includes understanding the following matters—
>
> (a) the principal may, in the power of attorney, specify or limit the power to be given to an attorney and instruct an attorney about the exercise of the power;
>
> (b) when the power begins;
>
> (c) once the power for a matter begins, the attorney has power to make, and will have full control over, the matter subject to terms or information about exercising the power included in the enduring power of attorney;

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14 *Re: Caldwell* [1999] QSC 182 at [12]–[13].

(d) the principal may revoke the enduring power of attorney at any time the principal is capable of making an enduring power of attorney giving the same power;

(e) the power the principal has given continues even if the principal becomes a person who has impaired capacity;

(f) at any time the principal is not capable of revoking the enduring power of attorney, the principal is unable to effectively oversee the use of the power.

Note—

If there is a reasonable likelihood of doubt, it is advisable for the witness to make a written record of the evidence as a result of which the witness considered that the principal understood these matters.

(3) For this section, schedule 3, definition *capacity* does not apply."

[52] Section 41 imposes a two-part test for the assessment of capacity and excludes the definition of "capacity" contained in the Dictionary.

[53] Section 41 must be read together with the presumption of capacity provided for in s 111A. It follows, then, that when a court is required to make a decision about an adult's capacity it is presumed that the principal (in this case, Harvey) understands the nature and effect of an EPOA and is presumed to understand the matters set out in s 41(2).

Revocation of an EPOA

[54] An EPOA may be revoked in two ways.

[55] Section 47 of the Act provides for revocation by a deliberate act:

"(1) A principal may revoke an enduring power of attorney in writing only if the principal has the capacity necessary to make an enduring power of attorney giving the same power.

Note—

See section 41 (Principal's capacity to make an enduring power of attorney).

(2) However, a principal may revoke an enduring power of attorney in writing, to the extent it gives power for a health matter, if the principal has the capacity necessary to make an enduring power of attorney giving the same power for the health matter."

[56] Section 50 of the Act provides for revocation as a result of the making of a later inconsistent document:

> "(1) A principal's enduring power of attorney is revoked, to the extent of an inconsistency, by a later enduring document of the principal.
>
> *Example—*
>
> If a principal gives—
>
> (a) power for a matter to an attorney by an enduring power of attorney; and
>
> (b) either—
>
> (i) power for the matter to a different attorney by a later enduring power of attorney; or
>
> (ii) a direction about the matter in a later advance health directive;
>
> the earlier enduring power of attorney is revoked to the extent it gives power for the matter."

[57] The same test of capacity applies to both making and revoking an EPOA and the making of a later EPOA. It must be remembered that the test is one for the applicants to satisfy. They need to demonstrate that Harvey did not have the necessary capacity. I now turn to the separate parts of that test.

Was the principal capable of making the enduring power of attorney freely and voluntarily?

[58] In *Adamson v Enever*, Applegarth J considered this issue and referred to the Queensland Capacity Assessment Guidelines 2020 (the Capacity Guidelines). Those guidelines were introduced to help assess an adult's capacity to make decisions for the purposes of the GAA. As I have already observed the definitions of capacity in the Act and the GAA are relevantly the same.

[59] While the definitions of capacity in each statute are relevantly indistinguishable it is important to bear in mind that the roles played, on one hand, by attorneys under an EPOA and, on the other, the court when deciding the question of capacity, are different. The Capacity Guidelines are an educative tool. In the Explanatory Note,[15] it was said:

> "The Bill inserts a provision into the GAA (new section 250) that requires the Minister to prepare and issue guidelines for assessing the capacity of adults to make decisions (the guidelines). The guidelines are to include principles to be applied in making such capacity assessments and practical information and advice. In preparing the guidelines consultation must occur with relevantly qualified persons with experience in this area. Finally, the Minister is obliged to review the guidelines at least every five years.
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> …

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15 Explanatory Notes, *Guardian and Administration and Other Legislation Amendment Bill* 2018 at 19.

> **It is not proposed that the guidelines be provided for in subordinate legislation**. It is intended that they act as a complementary educative tool for individuals or entities that have to make a determination about an adult's capacity, e.g. an attorney or administrator or a witness to an enduring document. As noted they are required to be prepared in consultation with relevant experts.
>
> The consequence of a finding of impaired capacity is that the adult will no longer be able to exercise decision-making autonomy for a matter. Consequently, the QLRC considered it **important that guidelines be developed to assist individuals, such as substituted decisionmakers, in assessing whether an adult has capacity to make a decision for a matter**. The majority of stakeholders in their submission to the QLRC supported the proposal. It is argued that **the departure is justified on the basis that it will provide practical assistance to individuals or entities required to assess an adult's capacity**." (emphasis added)

[60] The respondent argued that the Capacity Guidelines is a statutory instrument under s 7 of the *Statutory Instruments Act* 1992. The Capacity Guidelines may satisfy that definition but that takes this debate no further. They are made pursuant to s 250 of the GAA which provides:

> "(1) The Minister is to prepare guidelines to assist persons required to make assessments about the capacity of adults to make decisions about matters to make the assessments."

[61] The role of the court is established in Chapter 6 of the Act. It is, among other things, to determine the validity of steps which have already been taken. That is what the applicants seek in their amended originating application.

[62] The Capacity Guidelines may assist in identifying matters which should properly be taken into account, but the court is not bound in some way by the Capacity Guidelines. That much is made clear throughout the document. For example, a note on p 38 of the Guidelines informs the reader: "Your conclusion is your opinion only. It can be reviewed or challenged. QCAT or the Supreme Court can make a formal declaration or finding about the adult's capacity." The Capacity Guidelines distinguish between using the guidelines to assist an attorney and the role of the court. Nowhere does it suggest that the court is, in some way, bound to apply the principles.

[63] With that in mind, I accept that some of the matters identified by Applegarth J in *Adamson v Enever* are relevant to consideration of the first part of the test under s 41 of the Act, for example:

(a) it must be clear that the adult making the decision is not being pressured or coerced into making the decision;

(b) matters which might be considered as affecting the ability to freely and voluntarily make a decision include:

(i) family conflict;

(ii) the history of threats or perceived threats of violence;

(iii) the withdrawal of care and support; and

(iv) sudden and out of character decisions to make changes to arrangements; and

(c) merely seeking advice from another does not necessarily mean that the person has not acted freely and voluntarily in making the decision.[16]

Did the principal understand the nature and effect of making the enduring power of attorney?

[64] Section 41(2) provides that understanding the nature and effect of an EPOA includes understanding the matters set out in s 41(2)(a)-(f). An inclusive definition like that allows for other relevant matters to be taken into account in assessing the principal's understanding.

[65] The arguments for the parties depend to a considerable extent on the proper construction of "understands the nature and effect of the power of attorney" in s 41(1)(b).

[66] The applicants argued that, in addition to the matters set out in s 41(2), to understand the nature and effect of the power of attorney, a principal:

(a) must have a contextual understanding of the principal's assets for a grant of power for financial matters, and

(b) must have a contextual understanding of the principal's personal circumstances for a grant of power for personal and health matters.

so that the principal may understand the kinds of decisions which a proposed attorney may make and the powers which may be exercised.

[67] From that, it is argued that the complexity of the matters which the principal must understand increases proportionately to the complexity of those contextual matters. For the reasons which follow, I do not accept that submission.

[68] While acknowledging that there is a rebuttable presumption in Harvey's favour that he understood those particular matters and so understood the nature and effect of making and revoking EPOAs, the applicants go on to contend that "the threshold for capacity under section 41 is demanding." That threshold has been met by Harvey because of the legislative presumption in his favour. It is not a demanding task for him, rather it is for the applicants to overcome that presumption.

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16 *Adamson v Enever* (2021) 9 QR 33 at [46] – [48].

[69] The applicants referred to the analysis by Lyons J in *Aziz*[17] of the cognate provision in the GAA where her Honour held that it was helpful to consider this limb as having two separate questions:

(a) did the principal understand the nature of the decision which was to be made?

(b) did the principal understand the effect of the decision which was to be made?

[70] Ms Treston described "nature and effect" in *Aziz* as "one concept with two parts" and not as two separate concepts. The applicants submitted that the distinction drawn in *Aziz* between the "nature" of a decision and its "effect" is correct. They argued that the former denotes the general purport of the task to be completed by the decision-maker and that a requirement that a person be capable of understanding the "effect" of a decision requires a deeper understanding of the consequences of that decision, which extends beyond the immediate decision itself to encompass long-term and remote consequences.

[71] The applicants argued that Applegarth J's analysis in *Adamson v Enever*[18] assists on this point and that the following are matters which can be relevant to the satisfaction of the second part of the test:

(a) the principal needs to be able to understand the information that is relevant to the decision, including the options and their consequences. A "basic understanding of the key features" of that information is sufficient, but more complex decisions require greater understanding;

(b) the principal must also be able to retain the relevant information for a period which is long enough to make a decision; and

(c) the principal must be able to identify the advantages and disadvantages and consequences of the available options and to weigh the consequences to make a decision.[19]

[72] The analysis in *Adamson v Enever* was with respect to a mediated settlement of a personal injury claim and whether Mrs Adamson had the capacity for "a matter" which in that case was her ability to manage the settlement sum. Capacity was not assumed – the Court had to decide whether Mrs Adamson was a "person under a legal disability" as defined by s 59(1A) of the *Public Trustee Act* 1978 so as to require that the settlement be sanctioned. The matters referred to as being relevant to understanding the nature and effect of decisions must be read in the light of the broader questions being considered.

[73] The respondent rejected the bifurcated test advanced by Lyons J in *Aziz* and submitted that the phrase "nature and effect" is a compound expression. I agree with that construction for three reasons.

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17 [2007] QSC 265 at [26].
18 (2021) 9 QR 33.
19 Ibid at [42]–[45].

[74] First, as a general rule of statutory construction, it is not a satisfactory mode of arriving at the meaning of a compound phrase to sever it into its several parts and to construe it by the separate meaning of each of such parts when severed.[20] Even if it is not a compound expression (or hendiadys), it is still necessary to construe the words together.

[75] In *Victims Compensation Fund Corporation v Brown*,[21] the term "symptoms and disability" had to be construed. Heydon J (with whom McHugh ACJ, Gummow, Kirby and Hayne JJ agreed) said:

> "[34] The contention that "symptoms and disability" could be treated as being "a composite or portmanteau phrase" is reminiscent of, though perhaps not identical with, a method of avoiding collisions between conjunctive constructions and disjunctive constructions which was raised in oral argument as a possible solution to the present problem. That method turned on construing the expression "symptoms and disability" as a hendiadys - an expression in which a single idea is conveyed by two words connected by a conjunction, like "law and heraldry" to mean "heraldic law". Thus the expression "shall promptly co-operate with the Committee and assist to carry out its duties" has been construed to create an obligation of prompt cooperation with the Committee in the area of carrying out its duties. For the first and second respondents the advantage of that approach would be that it would not render fatal the fact that, approaching any limb independently, they had symptoms but no disability. However, subcll (c) and (e) of cl 5 proceed on the assumption that "symptoms" and "disability" are distinct entities, not linked integers or elements in a single idea more complex than each taken singly. **A composite expression is one which is a compound created out of at least two elements or integers which is different from each of them. A portmanteau expression combines the meanings of two distinct words to create a new expression**. The characterisation of "symptoms and disability" as "a composite or portmanteau phrase" did not explain how, short of bluntly reading "and" as "or", the two elements or integers worked together to create a new composite or portmanteau result." (emphasis added)

[76] In *Saravinovski v Saravinovska*[22] Leeming JA (with whom Beazley ACJ agreed) considered the phrase "for fee or reward" and said:

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20 *Mersey Docks and Harbour Board v Henderson Bros* (1888) 13 App Cas 595 at 599-600, adopted by Barton J in *Lorimer v Smail* (1911) 12 CLR 504 at 510.

21 (2003) 201 ALR 260.

22 [2017] NSWCA 85.

> "[33] It is not necessary to go so far as to conclude that the words are a "composite expression", in the sense stated by Heydon J in *Victims Compensation Fund Corporation v Brown*. But there is plainly a similarity between these words and (to take but one example) the liability caused by a dog "attacking or chasing" an animal, considered in *Sarkis v Morrison*. After noting at [34] that the words could hardly be said to be independent, in the sense of being mutually exclusive, Basten JA concluded at [35]:
>
> > No doubt it is entirely appropriate, in most cases, to look for difference in meaning when the conjunctive 'or' is used; however, where there is a clear explanation for that construction being used without different meanings being intended, the search may properly be abandoned.
>
> [34] Here too there is very considerable overlap between "fee" and "reward". I think it is sufficient to observe that the question posed by the statute is best answered by addressing the statute in terms: whether the person provided domestic support and personal care "for fee or reward", rather than asking merely whether he or she did so "for reward"." (citations omitted)

[77] There is considerable overlap between the words "nature" and "effect" and, to dissect the phrase and then examine the entrails of each part as if they are separate and distinct requirements, ignores the effect that their grouping together has on the meaning of the phrase.

[78] Secondly, it is consistent with the provisions of s 41 which sets out in s 41(2) the minimum requirement for understanding the "nature and effect" of the enduring power of attorney. There is, in that provision, no splitting of the phrase, rather it lists the matters relevant to that compound expression.

[79] Thirdly, it is broadly consistent with the approach taken in cases decided before the enactment of the Act which contributed to an understanding of the terms used in the Act. The Act uses terms and concepts which have been developed and interpreted by different courts and that history assists in the understanding of the Act.

[80] I commence with the decision of the High Court of Australia in *Gibbons v Wright*[23] in which the court considered the capacity of two sisters to understand the nature and effect of instruments which they had signed with respect to land in Hobart which they had owned or inherited. The trial was heard before a judge and jury and some of the questions left to the jury involve consideration of whether one or other of the sisters was capable of understanding the effect of the deed or deeds which had been executed.

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23 (1954) 91 CLR 423.

[81] The court said:

> "It seems reasonably clear, we think, that the expression "the effect of the deed" as used in the questions asked of the jury referred to the broad operation of the deed, as distinguished from its precise terms.
>
> The learned Chief Justice was clearly right in treating the validity of the instruments in suit as depending upon the possession by Ethel Rose Gibbons and Olinda Gibbons of a degree of understanding relative to the nature of that which they were doing. **The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation**." [24] (emphasis added)

[82] Their Honours went on to consider some earlier English decisions and said:

> "The principle which the case[25] supports, and for which *Boughton v Knight; Jenkins v Morris; Birkin v Wing* and *Estate of Park* may also be cited, appears to us to be that **the mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument**, and may be described as the capacity to understand the nature of the transaction when it is explained. As Hodson LJ remarked in the last-mentioned case, 'one cannot consider soundness of mind in the air, so to speak, but only in relation to the facts and the subject-matter of the particular case'.
>
> Ordinarily the nature of the transaction means in this connection the broad operation, the 'general purport' of the instrument; but in some cases it may mean the effect of a wider transaction which the instrument is a means of carrying out" [26] (emphasis added)

[83] *Gibbons v Wright* is not a case about powers of attorney but more generally about the nature of the capacity which must be present in order that persons may enter into contracts and conveyances.[27] On that point, the High Court did not require that there be a level of understanding commensurate with the complexity of the contract under consideration. What was required was that the relevant party be capable of "understanding the **general nature** of what he is doing by his participation."[28]

[84] In *Re K (Enduring Power of Attorney)*,[29] Hoffman J considered what was needed to show that the donor of a power of attorney understood the nature and effect of the juristic act by which the power was conferred. Miss K had executed an enduring

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24 At 437.
25 *Ball v Mannin* (1829) 1 Dow & Cl 380, 6 ER 568.
26 At 438.
27 (1954) 91 CLR 423 at 444.
28 Ibid at 438.
29 [1988] Ch 310.

power of attorney and sought to have it registered pursuant to s 6(5)(a) *Powers of Attorney Act* 1985 (UK). Some of her relatives objected to registration on a ground made available under that legislation, namely, "that the power purported to have been created by the instrument was not valid as an enduring power of attorney." The alleged cause of invalidity was that Miss K did not have the necessary mental capacity at the time of execution. In a hearing in the Court of Protection the application for registration was dismissed. The Master found that on the day in question:

> "Miss K. enjoyed a period during which she was able to understand that Mr. K. was to be her attorney under an enduring power of attorney and that she understood what an enduring power was; but that she was incapable by reason of mental disorder of managing her property and affairs."[30]

[85] The legislation considered by Hoffman J did not specify the mental capacity needed to execute an enduring power and so the answer had to be found in the common law. His Lordship considered the common law rules relating to the power able to be exercised if a donor has lost the mental capacity to be a principal and, in so doing, referred to *Gibbons v Wright.* He went on to pose the following question:

> "… whether, as a matter of construction, a power is 'valid' for the purposes of section 6(5)(a) of the Act only if the donor had the mental capacity which would have made it exercisable. This must be decided by having regard to the purpose of the Act as a whole, which is to enable powers to be exercised notwithstanding that the donor does not have the mental capacity required by the common law."[31]

[86] He went on to consider that, in one sense, Miss K did have the powers to manage her property because she owned it. But she could not exercise those powers on a regular basis because she lacked mental capacity. Hoffman J said:

> "… there is no logical reason why, though unable to exercise her powers, she could not confer them upon someone else by an appropriate juristic act. **The validity of that act depends on whether she understood its nature and effect and not on whether she would hypothetically have been able to perform all the acts which it authorised.**"[32] (emphasis added)

[87] Hoffman J went on to acknowledge that the power of attorney does not amount to an outright disposition of assets like a gift, settlement or will. He made particular reference to the fact that the exercise of the power is hedged about on all sides with statutory protection for the donor. In these circumstances, he said, it did not seem to be necessary to impose too high a standard of capacity for its valid execution. While those statements must be read in the light of the UK legislation (which did not include a presumption of capacity) the reference to powers being "hedged about on

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30 At 313.
31 At 314-315.
32 At 315.

all sides" is reflected in the usual duties of attorneys and the provisions of s 6C of the Act.

[88] For the purposes of this case, Hoffman J's reasoning[33] about the meaning of "understanding the nature and effect" is of importance. His analysis was referred to by the Queensland Law Reform Commission in its recommendations which found final form in s 41(2) of the Act. He said:

> "Finally, I should say something about what is meant by understanding the nature and effect of the power. What degree of understanding is involved? Plainly one cannot expect that the donor should have been able to pass an examination on the provisions of the Act. At the other extreme, I do not think that it would be sufficient if he realised only that it gave Cousin William power to look after his property. Mr. Rawson helpfully summarised the matters which the donor should have understood in order that he can be said to have understood the nature and effect of the power. First, (if such be the terms of the power) that the attorney will be able to assume complete authority over the donor's affairs. Secondly, (if such be the terms of the power) that the attorney will in general be able to do anything with the donor's property which he himself could have done. Thirdly, that the authority will continue if the donor should be or become mentally incapable. Fourthly, that if he should be or become mentally incapable, the power will be irrevocable without confirmation by the court."[34]

[89] This case (and *Gibbons v Wright*) directs attention to the nature and effect of the decision and, at common law, the task is to properly characterise the decision. It is, as Hoffman J said, the decision to appoint and its ramifications, rather than a detailed understanding of the property or undertakings of the donor:

> "I think that my conclusions are in accordance with what appears to be the general policy of the Act. **In practice it is likely that many enduring powers will be executed when symptoms of mental incapacity have begun to manifest themselves.** These symptoms may result in the donor being mentally incapable in the statutory sense that she is unable on a regular basis to manage her property and affairs. But, as in the case of Mrs. F., **she may execute the power with full understanding and with the intention of taking advantage of the Act to have her affairs managed by an attorney of her choice** rather than having them put in the hands of the Court of Protection. **I can think of no reason of policy why this intention should be frustrated**."[35] (emphasis added)

[90] Hoffman J concluded: "As I read the master's findings, Miss K. understood the nature and effect of the enduring power to the extent which I have described." The appeal was successful. There is nothing in the reasons which suggests that the

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33 At 316.
34 At 316.
35 At 315.

understanding of the "nature and effect" included understanding the extent or complexity of Miss K's property and affairs – rather, that was unnecessary.

[91] The provisions of s 41(2) are, as I have observed, inclusive. There may be other matters which are relevant to the consideration but s 41 speaks of the "nature and effect of the enduring power of attorney" and not of the assets or business of the principal.

[92] The applicants submit that, while there is a rebuttable presumption of capacity, the "threshold for capacity under section 41 is demanding. It requires that the principal actually understands the matters contained in section 41(2), rather than merely being capable of understanding them. In that sense, the second limb of the test in section 41 is more demanding than its counterpart in Schedule 3 of the POA Act."

[93] It is not correct to refer to a "threshold for capacity" when the capacity is presumed. Rather, it is for those who wish to overturn that presumption to demonstrate that the principal is either incapable of making the EPOA freely and voluntarily or does not understand the nature and effect of the EPOA or both.

[94] This argument leads to consideration of Australian decisions which have dealt with these types of matters.

[95] The applicants rely upon the decision of Young J in *Ranclaud v Cabban*.[36] That case concerned a general Power of Attorney said to have been conferred under the *Conveyancing Act* 1919 (NSW). That statute did not afford a presumption of capacity. There was a preliminary question as to whether Miss Ranclaud, a 79-year-old woman living in a rest home, was an "incompetent person" within the meaning of the Supreme Court Rules and so could not, except by her next friend, commence or carry on proceedings. Under the rules, an incompetent person was someone who could not manage her affairs. His Honour did not have to consider the second question as to whether a particular Power of Attorney was valid because he found that Miss Ranclaud was not competent to commence proceedings without a next friend.

[96] The statement relied upon by the applicants is part of a brief (and obiter) reference by Young J to the making of a general Power of Attorney under the New South Wales legislation. Of that, he said:

> "Such a power permits the donee to exercise any function which the donor may lawfully authorise any function which the donor may lawfully authorise an Attorney to do. When considering whether a person is capable of giving that sort of power one would have to be sure not only that she understood that she was authorising someone to look after her affairs but also **what sort of things** the Attorney could do without further reference to her."[37]

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36 (1988) NSW ConvR ¶ 55-385.

37 At 57,548.

(emphasis added)

[97] The expression "what sort of things the attorney could do without reference to her" is put in a very broad way – the "sort of things" – and does not reflect the regime established under the Act where an attorney has numerous duties requiring consultation and so on.

[98] *Ranclaud* was considered in *Ghosn v Principle Focus Pty Ltd & Ors*.[38] In that case, Forrest J dealt with an application for orders that certain Powers of Attorney were valid. Those instruments were all executed in Lebanon by Mr Moussi but, in the absence of any evidence as to Lebanese law concerning either the formal validity of the Power of Attorney or as to requirements relevant to the capacity of a donor of such a power, the Court assumed that the foreign law was the same as the law of the forum. The central issue was that of the capacity of the donor to execute the respective powers. At that time in Victoria there was no statutory presumption of capacity and, if doubt was thrown on the capacity of a donor, then the burden rested on the donor of establishing possession of the requisite capacity to execute a Power of Attorney.

[99] Forrest J referred to *Gibbons v Wright*, *Re K* and *Ranclaud v Cabban*. He said:

> "[78] In my view, the *Ranclaud* test should be accepted. It is consistent with *Re K* in requiring more than just an appreciation of the purport of a Power of Attorney and is not inconsistent with what was said in *Gibbons* particularly in the light of the reference to *In the Estate of Park*. Each instrument and its execution is to be examined in accordance with the accompanying circumstances. Indeed, the facts of this case demonstrate amply why the *Ranclaud* test should be applied in relation to complex matters. The two properties which have been sold are the property of two trustee companies which owe fiduciary obligations to the beneficiaries. As Mr Moussi was the sole director of the companies, he in a practical sense was the trustee. Application of the *Ranclaud* test means, I think, that it must be proved that Mr Moussi knew that when he executed the Powers of Attorney, he was giving Mr Abi Ghosn control over trust properties in a real, if not legal, sense. **He did not, in my view, need to understand all the intricate parts of the transactions that Mr Abi Ghosn was about to enter into. But given that there were significant assets, it was necessary that he understood at the time of the execution of the Powers of Attorney that Mr Abi Ghosn would have the ability to transfer the shareholdings and the directorship of the trust companies to others (including himself) and to effect the sale of the properties which were the subject of the trust**

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38 [2008] VSC 574.

> **deed at a price determined by Mr Abi Ghosn.**" (emphasis added)

[100] The applicants argue that s 41(2) does not contain an exhaustive list of matters which must be understood by a principal. Rather, they argue that the criteria constitute the minimum understanding necessary. They go on to contend that:

> "A contextual understanding of the principal's assets for the grant of a power for financial matters, and personal circumstances for a grant of power for personal and health matters, is required in order that the principal may understand the kinds of decisions which of their proposed attorney may make and the powers which may be exercised under the instrument. It follows that the complexity of the matters which the principal must understand increases proportionately to the complexity of those contextual matters."

[101] The test advanced by the applicants – that there be a proportionate increase in understanding of complex financial matters – must be rejected for two reasons. First, it harbours within it a reversal of the onus of establishing incapacity. Secondly, it is based upon decisions made under a different statutory regime and ignores the duties imposed on attorneys.

[102] The notion that a proportionate increase in understanding, if otherwise applicable, is required, carries with it an implicit reversal of onus. The vagueness of the test – "a proportionate increase" – places a donor in the position of having to lead evidence of his or her understanding because the extent of the necessary understanding is so difficult to quantify. It can be accepted that an evidentiary burden may shift if the party alleging incapacity provides evidence which tends to discharge the substantial burden.[39]

[103] Secondly, and more importantly, the test is drawn from decisions made in a different statutory framework, in particular, *Ranclaud* and *Ghosn*. The justification for the test in a jurisdiction which has neither the statutory presumption of capacity nor the duties imposed on attorneys by s 6C of the Act was considered by Barrett J in *Szozda v Szozda*.[40] In that case, declarations were sought that a general and enduring power of attorney was invalid. Other declarations were sought as to whether other powers of attorney had been revoked. The central issue for trial was identified as: whether the donor had the capacity to grant a general and enduring power of attorney in September 2006.

[104] The relevant New South Wales legislation did not create a presumption of capacity but Barrett J accepted that a party who wished to pursue a claim that a power of attorney is invalid must affirmatively displace the "presumption of sanity". He went on to say that:

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39 *Re Caldwell* [1999] QSC 182.

40 [2010] NSWSC 804.

> "… the inquiry in the present case must be directed towards the ability to understand the creation of a general and enduring power of attorney, that is, an instrument empowering the attorney or attorneys to do for the donor anything and everything that the donor may lawfully do and creating an authority that continues even if the donor comes to lack capacity."[41]

[105] His Honour rejected the analogy with testamentary capacity which is sometimes sought to be drawn. He identified that different considerations attend a decision to grant a general power of attorney without reference to any foreshadowed transaction. Because no particular transaction is in contemplation, there is no specific dealing to be assessed as an indispensable concomitant of the power of attorney. Barrett J said:

> "**The only matter that can sensibly become the subject of assessment is the creation of the power of attorney itself**, for use as and when the need may arise in the future. It is the nature of that act (by which I mean to include its ramifications and consequences) that the donor must sufficiently understand."[42]
>
> (emphasis added)

[106] Barrett J referred to *Gibbons v Wright* and *Re K* and concluded:

> "[34] The central concept is thus one of complete and lasting delegation to a particular person, albeit with the ability to put an end to the delegation while capacity to do so remains. That concept of empowering another person to act generally in relation to one's affairs raises two basic questions. First, is it to my benefit and in my interests to allow another person to have control over the whole of my affairs so that they can act in those affairs in any way in which I could myself act — but with no duty to seek my permission in advance or to tell me after the event, so that they can, if they so decide, do things in my affairs that I would myself wish to do (such as pay my bills and make sure that cheques arriving in the post are put safely into the bank) and also things that I would not choose to do and would not wish to see done — sell my treasured stamp collection; stop the monthly allowance I pay to my grandson; exercise my power as appointor under the family trust and thereby change the children and grandchildren who are to be income beneficiaries; instruct my financial adviser to sell all my blue chip shares and to buy instead collateralised debt obligations in New York; have my dog put down; sell my house; buy a place for me in a nursing home? Second, is it to my benefit and in my interests that all these things — indeed, everything that I can myself lawfully do — can be done by the particular person who is

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41 Ibid at [28].

42 At [32].

> to be my attorney? Is that person someone who is trustworthy and sufficiently responsible and wise to deal prudently with my affairs and to judge when to seek assistance and advice? The decision is one in which considerations of surrender of personal independence and considerations of trust and confidence play an overwhelmingly predominant role: am I satisfied that I want someone else to be in a position to dictate what happens at all levels of my affairs and in relation to each and every item of my property and that the particular person concerned will act justly and wisely in making decisions?"

[107] That exposition of the central concepts is an apt description of the situation in New South Wales but not in Queensland. Many of the matters referred to do not apply because of the provisions of s 6C of the Act. The general principles enunciated in s 6C which must be applied by an attorney create a different legal environment. The attorney who is governed by the Act does have a duty to allow participation by the donor in making decisions unlike the New South Wales attorney who can "do things [a donor] would not choose to do and would not wish to be done" such as "sell all [the donor's] blue chip shares and to buy instead collateralised debt obligations in New York" or "have [the donor's] dog put down."

[108] Section 6C imposes a duty on an attorney which is not explicit in other jurisdictions. General Principle 8, in particular, requires that an attorney do things which go beyond the duties imposed at common law:

> "The principles (the general principles) set out below must be applied by a person or other entity that performs a function or exercises a power under this Act or an enduring document—
>
> …
>
> 8 Maximising an adult's participation in decision-making
>
> (1) An adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life must be recognised and taken into account.
>
> (2) An adult must be given the support and access to information necessary to enable the adult to make or participate in decisions affecting the adult's life.
>
> (3) An adult must be given the support necessary to enable the adult to communicate the adult's decisions.
>
> (4) To the greatest extent practicable, a person or other entity, in exercising power for a matter for an adult, must seek the adult's views, wishes and preferences.

> (5) An adult's views, wishes and preferences may be expressed orally, in writing or in another way, including, for example, by conduct.
>
> (6) An adult is not to be treated as unable to make a decision about a matter unless all practicable steps have been taken to provide the adult with the support and access to information necessary to make and communicate a decision."

[109] General Principle 10 provides for structured decision making and the importance of the attorney taking into account any views, wishes and preferences expressed or demonstrated by the principal.

[110] As Hoffman J said in *Re K* the question of validity "must be decided by having regard to the purpose of the Act as a whole." This general principle of statutory interpretation has been confirmed many times.

[111] In *Project Blue Sky Inc v Australian Broadcasting Authority*,[43] it was expressed in this way:

> "[69] The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed."

[112] Section 6C must be taken into account when considering whether a donor has been shown not to have understood the "nature and effect of the enduring power of attorney" because the "nature and effect" must be considered within the legal environment created by s 6C. It imposes upon an attorney a positive duty to enable participation of the principal and to give "the **support** and **access to information** necessary to **enable the adult to make** or participate in decisions". A principal may confer a power of attorney in the knowledge that the attorney is required to provide the principal with the relevant information in a way which enables the principal to make the decision.

[113] It follows then that the task of the applicants is to demonstrate that Harvey did not understand the nature and effect of making an enduring power of attorney. It is not directly relevant to that inquiry to closely examine his recollection and understanding of the corporate restructure. There was no evidence which tied the

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43 (1998) 194 CLR 355.

two areas of understanding together so that an inability to recall the details of the many transactions which constituted the restructure meant that incapacity to create a power of attorney followed.

[114] It would be contrary to the obvious intention of the Act if a principal, who recognised that he or she was no longer able to engage in complicated business affairs but who knew that his or her wishes or preferences could be acknowledged and fulfilled by the appointment of an attorney, could be denied that because the principal was not able to engage in those complicated business affairs. The construction advanced by the applicants would have this effect.

If capacity is presumed, why are these tests relevant?

[115] These tests are relevant to the rebuttal of the presumption of capacity. If the applicants can demonstrate to the requisite degree that one or other of these limbs is not present, then the presumption may be rebutted.

The type of evidence which assists in deciding whether the assumption of capacity has been rebutted

[116] The applicants gave evidence of their observations of Harvey at various times which, they argue, is relevant to the execution of the revocations and the later EPOAs. Evidence was also received from persons who knew Harvey as well as from experts in the field of geriatrics.

[117] The means by which a person's capacity may be assessed has been considered in cases in which a party bears the burden of proving capacity. In this case, the burden is reversed but the consideration of what may be relevant and helpful in discharging that burden will, inevitably, involve consideration of similar types of evidence.

[118] Assistance can be found in the analysis of Lindsay J in *Scott v Scott*.[44] In that case, his Honour dealt with the *Powers of Attorney Act* 2003 (NSW). It did not provide for the same presumption of capacity as the Act does and, so, in resolving the issues, Lindsay J referred to the tests for assessing capacity. His remarks[45] help to identify the types of evidence which can be relevant to a consideration of whether a lack of capacity has been established:

> "[199] … There is no rule of general application relating to all powers of attorney without regard to particular facts. Attention must be focused on all the circumstances of the case, including the identities of the donor and donee of a disputed power of attorney; their relationship; the terms of the instrument; the nature of the business that might be conducted pursuant to the power; the extent to which the donor might be affected in his or her person or property by

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44 (2012) 7 ASTLR 299.

45 Adopted by Applegarth J in *Hamill v Wright* [2018] QSC 197 at [157].

> an exercise of the power; the circumstances in which the instrument came to be prepared for execution, including any particular purpose for which it may ostensibly have been prepared; and the circumstances in which it was executed.
>
> [200] An exploration of all the circumstances of the case will, not uncommonly, call for consideration of events leading up to, and beyond, the time of execution of the disputed power of attorney, as well as on the focal point of the time of execution itself. A longitudinal assessment of mental capacity, along a time line extending either side of the focal point, may be necessary, or at least permissible, in order to examine the subject's mental capacity in context. Medicos and lawyers, alike, tend to embrace that approach. It is difficult to do otherwise. Context has a temporal as well as spacial [sic] and relational dimensions."

[119] I also bear in mind the caveat expressed by Lindsay J about the elevation of statements in analogous cases:

> "[206] … care needs to be taken not to elevate helpful passages in potentially analogous cases into rules of general application, whether characterised as an applicable "standard" or rules of law or merely practice. At the end of the day, a qualitative judgment needs to be made in each case on the facts of the particular case. Process and form are not unimportant. In some cases, they may point the way to a substantive outcome of a dispute. However, they are not ends in themselves. The focus of the court must be on the substance of the inquiry whether the particular subject had, in fact, the requisite capacity — understanding — to effect a particular transaction."

[120] That statement has similar force in a case such as this where the inquiry is whether the applicants have rebutted the presumption of capacity.

The applicants' case – in a nutshell

[121] Ms Treston posited two major submissions which may conveniently be set out here:

(a) as to whether the powers of the 9 December EPOAs have commenced, "the evidence supports a finding that Mr Marrable does not understand the nature and effect, firstly, of all financial matters. He's forgetful, and he's confused. And although the determination of capacity isn't just a memory test, Mr Marrable's memory is critical because his evidence before [this Court] shows that his functioning cannot be improved with the provision of support. He has no real grasp on his financial position because he can't recall the restructure of his assets in 2021, and that's been so since at least May of 2022;" and

(b) as to whether those powers remain in force, "Mr Marrable has impaired capacity to make and revoke an enduring Power of Attorney. And that's because the statutory test enhanced by the common law requires that Mr Marrable understand the kinds of things that an attorney can do for him, in other words, understands contextually what an attorney must do, and Mr Marrable cannot do that … the evidence … demonstrates Mr Marrable doesn't understand the matters in section 41(2) of the Act which required him to understand [those matters] on each occasion that he made and revoked an enduring power of attorney."

Relevant events in the history of this matter

[122] In order to deal with the various issues which arise in this proceeding it will assist if a brief outline is given of some of the events which preceded the revocations and execution of later EPOAs.

Estate Planning – the restructuring and ownership of Gold Coast Bakeries and other properties

[123] Between 2018 and 2021, Harvey was considering what he could do to prevent a dispute within his family over his estate after he died. He had, for over half a century, built his bakery business and acquired numerous pieces of real property in the Gold Coast area. Ownership of many of the properties was in the name of various companies which he had established and which he controlled through the ownership of the shares in those companies. He understood that there was disharmony between his two children – Helen and Warren. The prospect of his will being challenged concerned him and, so, he wanted to take steps to prevent that occurring.

[124] Harvey consulted and took advice from advisors, including:

(a) his solicitor, Richard Holt (the principal of Holt Lawyers). Mr Holt acted for Harvey and the Gold Coast Bakery group of companies from the early 1980s until the early 2000s and then, again, between 2018 and 2021; and

(b) his accountant, Stephen Holmes.

[125] Mr Holt was an impressive witness who was impartial and careful in his evidence. He took care in giving his answers and was resolute in confining himself to his own knowledge and observations. I accept his evidence.

[126] Mr Holmes was, likewise, a witness whose evidence was given with care and attention to detail. I accept his evidence of what he saw and did.

[127] It is necessary to go into a little detail about the changes which were made as their nature and effect is relevant to the arguments about Harvey's capacity at various times.

[128] One of the steps Harvey took was to transfer ownership of his shares or his personal assets so that he held them as a joint tenant with other entities or people. Thus, on his death, those properties would pass to the other joint tenant.

[129] In April 2018, Harvey had various options to transfer shares in the Gold Coast Bakery from him to a trust prior to his death costed. Harvey was told that this would incur additional tax but, according to Mr Holmes, he was quite determined to make the changes.

[130] In 2019, Harvey commenced a process by which he divested himself of assets held in his own name to himself and various other persons as joint tenants. He wanted to transfer some of his personal assets and told both Mr Holt and Mr Holmes of his intention. After that, Mr Holt advised Harvey of the estimated stamp duty and capital gains tax payable in relation to transactions relating to residential properties held by him.

[131] In March 2019, Harvey executed transfers in relation to two properties and was advised of the stamp duty consequences of those transactions.

[132] In August 2020, he instructed Mark Mortimore (a solicitor then acting for him) and Mr Holmes that he wanted to transfer a property at Mermaid Beach to himself and Luke as joint tenants and a property at Runaway Bay to himself and Helen as joint tenants. He executed the relevant transfers in late August.

[133] In December 2020, Harvey executed the Personal EPOA and the Financial EPOA. He also executed general powers of attorney for various companies:

(a) for Gold Coast Bakeries (Queensland) Pty Ltd, a power of attorney which appointed Mr Holmes, Luke and Kate as the attorney for the company in the event that Harvey did not have capacity to make decisions for personal (health) and financial matters;

(b) a general power of attorney of Gold Coast Bakeries (Queensland) Pty Ltd as trustee for the El Paso Trust, which appointed Mr Holmes, Luke and Kate as the attorney in the event that Harvey did not have capacity to make decisions for personal (including health) and financial matters; and

(c) a general power of attorney for Gold Coast Bakeries Pty Ltd which appointed the same people as attorney for the company on the same basis.

[134] In late December 2020, Harvey executed a codicil to his will which gave effect to the intentions he had previously expressed concerning his estate.

[135] In February 2021, Harvey instructed Mr Holt to call Luke and ask him whether he would return from Western Australia (where he then lived and worked) to the Gold Coast to work at Gold Coast Bakeries. That communication took place.

[136] Harvey had a series of meetings with Mr Holt in March about his desire for a planned transition of the management of Gold Coast Bakeries to Luke and Kate. Consistent with that, Luke travelled from Western Australia to attend a meeting with Harvey and Kate at Mr Holt's office. Harvey explained that he intended to transfer control of Gold Coast Bakeries to Kate and Luke.

[137] In order to give effect to that intention a series of company meetings were held.

[138] In March 2021, Mr Holt, acting on Harvey's instructions, established Gold Coast Bakeries (No. 3) Pty Ltd and Gold Coast Bakeries (No. 2) Pty Ltd. In each of those companies, two ordinary shares were issued:

(a) one to Harvey and Luke as joint tenants; and

(b) the other to Harvey and Kate as joint tenants.

[139] In May 2021, Harvey signed a number of documents in which he transferred 15 properties from his own name to himself, Kate and Luke as joint tenants. At the same time, three documents entitled "Declaration of Trust by Transferees" were executed. Each declaration related to a bundle of properties within the group of properties referred to above.

[140] He also transferred shares in Gold Coast Bakeries Pty Ltd:

(a) one ordinary share from his name to himself and Luke as joint tenants;

(b) one ordinary share from his name to himself and Kate as joint tenants;

(c) two B class redeemable preference shares from his own name solely to himself and Luke as joint tenants; and

(d) two B class redeemable preference shares from his own name solely to himself and Kate as joint tenants.

[141] He also executed transfer forms for shares in Gold Coast Bakeries (Qld) Pty Ltd:

(a) one ordinary share from his own name to himself and Luke as joint tenants; and

(b) one ordinary share from his own name to himself and Kate as joint tenants.

[142] On the same day, Harvey executed a deed of forgiveness of debts in relation to various debts which were owed to him by family members and he executed a new will.

[143] About a week later, Kate travelled to Darwin for the purpose of delivering a number of documents to Luke for his execution. They included transfer forms, declarations of trust, the acceptance of general powers of attorney, transfer forms and the acceptance of the Personal EPOA and the Financial EPOA.

[144] On 24 May 2021, Harvey attended at Mr Holt's office and signed a number of documents including minutes of meetings of various Gold Coast Bakeries companies.

[145] Contemporaneously with the execution of the many transfer documents, Kate and Luke executed general powers of attorney in favour of Harvey which gave him the power to undo the transactions and call back any assets which had been transferred.

[146] Each of Kate and Luke gave an explanation for how they came to sign the power of attorney in favour of Harvey. Each also gave their own understanding of that particular document. I do not accept the account given by either of them for the following reasons.

[147] Kate said that no one ever explained to her that the purpose of the power of attorney was to give Harvey the option of unwinding the transactions and severing the joint tenancy if he were dissatisfied with the performance of either Kate or Luke in managing the business. Her evidence was that no one ever said that, in the event that Harvey was dissatisfied with the management arrangements over the next year or two, he could unwind those arrangements.

[148] Luke said that the first time he knew of the power of attorney in favour of Harvey was at the airport in Darwin when Kate brought the documents for him to execute. He spoke to Mr Holt on the telephone and his recollection was that Mr Holt told him that the power of attorney was for his protection in case of a "family sort of break-up". He said he did not give instructions at a meeting to Mr Holt to prepare the power of attorney in favour of Harvey. He denied that suggestion a "hundred percent".

[149] Mr Holt gave evidence, which I accept, that, on 30 April 2021 he met with Harvey, Kate and Luke. He kept a note of that meeting and his contemporaneous record is in direct conflict with the evidence of Kate and Luke. He recorded:

> "Kate and Luke gave me instructions to prepare Powers of Attorney by them in favour of Harvey Marrable giving Harvey the power to transfer all jointly owned shares in:
>
> 1 Gold Coast Bakeries Pty Ltd
>
> 2 Gold Coast Bakeries (Queensland) Pty Ltd
>
> 3 Gold Coast Bakeries (No 2) Pty Ltd
>
> 4 Gold Coast Bakeries (No 3) Pty Ltd
>
> To Harvey.
>
> Kate, Luke and Harvey explained that the purpose of these Powers of Attorney was that it would give Harvey the power to regain the status of sole

> shareholder of the above companies in the event that the proposed management arrangements for the next 1 and ½ to 2 years were not satisfactory to him."

[150] Mr Holt said that he did not give Kate or Luke an explanation in relation to the powers of attorney that involved some other reason for their existence. He said he had no recollection of telling them that the powers of attorney were designed for their protection should they have a breakdown in a personal relationship with a spouse or partner and that there would have been no basis for giving such advice.

[151] On 4 May 2021 Mr Holt met again with Harvey and Kate. At that meeting they reviewed, among other things, the powers of attorney by Kate and Luke in favour of Harvey. The contemporaneous note taken shows that the discussion concerned the ability that those powers of attorney gave Harvey to transfer all of the jointly owned shares in the four companies referred to above to himself "in event of dissatisfaction with the management arrangements over the next year or two."

[152] In order to achieve many of these changes, there needed to be a number of meetings of the various companies. Those all took place on one day and, as so often happens with these types of companies, strict adherence to the rules of meetings was not observed but all necessary records were kept. In the minutes of one of the meetings relating to share transfers it is recorded that:

> "He [Harvey] advised the meeting that he expected Luke John Marrable and Kate Lambourne to take responsibility over the next 18 months for the management of the bakery business, the Company and of the assets of the Company for the benefit of the employees, the business, himself and for his children Warren Marrable and Helen Lambourne and all his grandchildren."

[153] One of the matters upon which weight was placed in the case advanced by the applicants to demonstrate Harvey's incapacity was his alleged misunderstanding about who or what should bear the liability for the costs and expenses of the various transfers. It was never the intention that Harvey should bear that burden. At a meeting of 24 May 2021, it was resolved that the Group Companies would be liable for payment of the costs and expenses of the areas transfers. That was consistent with Mr Holt's evidence that the company had resolved to pick up any expense to which Harvey might be exposed.

[154] Kate gave evidence that the arrangement was that it was Harvey, personally, not the company which would be responsible for the costs and that the notion that the companies would pay the expenses was never discussed. Her reasoning appears to have been that the "business" and Harvey were synonymous and that "we use them interchangeably". She disputed the minutes and said that, rather than the company covering all legal expenses, "whenever I was in a discussion with Harvey and Richard … it was that Harvey would cover the expenses."

[155] I do not accept Kate's evidence on this point. The minutes are clear and it is more rational that the expenses be borne by the business rather than Harvey when, amongst other things, the EPOAs Kate and Luke executed in Harvey's favour contemplated the possibility of a reversal of the changes.

[156] On 19 July 2021, Harvey sent a letter to Mr Holmes in which he said:

> "As you have been aware, I have been working with Richard Holt of Holt Lawyers for over 18 months to discuss and organise my estate.
>
> We have been working to finalise my wishes and begin to implement such wishes prior to my death to avoid family issues and a contention of my will; which would cause great costs and upheaval to the business.
>
> As such, please find an attached summary which was implemented 24th May 2021. We have also attached the update ASIC search for both companies, plus new company details.
>
> I understand that you are bound to have questions and queries regarding the above, so please do not hesitate to reach out to Kate, Richard or myself. Kate will also be in touch to discuss updates that need to occur and ongoing accounting functions."

[157] The letter was sent by email and attached to it was a summary of the changes which had been made to the various Gold Coast Bakeries companies including the new share ownership details. Mr Holmes replied to that letter within an hour of receiving it and expressed his concerns. He sent an email to Kate in which he said:

> "Thanks for informing me of the restructure that has appears to have already taken place.
>
> I assume the tax consequences of these changes had been looked at by other tax advisers as this is a bit of a shock to me.
>
> Nevertheless, I am very concerned that the tax/stamp duty outcomes have not been thought through. For example, with changing the shares in GCB Pty Limited to joint tenants every single property owned by the company that was acquired prior to September 1985 (pre-CGT) is likely now converted to a post CGT property at the market value in March when the changes occurred.
>
> I can see quite a few other tax issues with the properties that have been settled onto Trusts for the benefit of the new companies also."

[158] That expression of concern was revived later by Mr Holmes in evidence to which I will refer.

[159] It is accepted by all parties that Harvey did have the capacity to engage in the series of transfers, resolutions and instructions which he made or gave in 2020 and 2021.

[160] At about this time Harvey was also engaged in property settlement proceedings in the Family Court with his second wife Judy Marrable. In October 2021, he swore an

affidavit in those proceedings which accurately sets out his assets including those which he owned jointly with either Kate or Luke, or both of them as a result of the restructure referred to above.

[161] The exercise undertaken by Harvey was designed to create, and did result in, a scheme which ensured that the assets he owned would find their way into the hands of his chosen beneficiaries – Luke and Kate – without any opportunity for other family members to contest that disposition. That Luke and Kate were his chosen beneficiaries is evident from all the transactions which took place and from his last will and testament of 17 May 2021 where, apart from a small pecuniary legacy to Judy, he leaves his entire estate to Luke and Kate in equal shares as tenants in common.

[162] Luke and Kate held the various interests in the transferred properties upon trust for the Group Companies but they held their interest in the shares in those companies absolutely. Each of them gave evidence that they knew that they held their interests in the properties as trustees.

[163] A different situation exists so far as the company shares are concerned. Luke and Kate each acquired a joint interest in the shares in the Group Company with Harvey. The share transfers had the effect that, on Harvey's death, each of Luke and Kate would own one half of the Group Companies both legally and beneficially. This was an outcome consistent with the terms of Harvey's will.

The sale of Gold Coast Bakeries

[164] In late 2021 and early 2022, negotiations took place for the sale of the Gold Coast Bakeries business to Homestyle Baking Company (Homestyle). The sale was completed in February 2022. Gold Coast Bakeries did not sell the land upon which the bakery stood. It leased that land to Homestyle.

Have the applicants rebutted the presumption that Harvey had the capacity to revoke his EPOAs on 27 and 28 June 2022?

[165] The applicants argue that the evidence supports a finding that Harvey experienced a marked decline in his cognition and functional capacity between about October 2021 and May 2022 such that, by June 2022 he did not have the capacity to make an enduring power of attorney and therefore could not revoke an enduring power of attorney.

[166] They point to evidence which they submit supports these findings for the period October 2021 to May 2022:

(a) Harvey's capacity to carry out both simple and complex financial transactions declined;

(b) he became increasingly forgetful and confused;

(c) he became increasingly trusting of strangers and newcomers to his life and was more susceptible to their influence;

(d) he became more suspicious and exhibited signs of paranoia including in relation to his family members and former professional advisers; and

(e) he became increasingly aggressive and emotionally labile.

[167] By 11 May 2022, they argue Harvey had either forgotten or no longer understood the restructuring which he and Mr Holt had put in place. That conclusion is supported, they argue, by:

(a) Mr Holmes' evidence; and

(b) Harvey's inability since late June 2022 to explain to Pharmacis Canning (his then new solicitors):

(i) the nature and extent of his assets;

(ii) why his assets are held in the way they are; and

(iii) that his ownership of assets (in particular, the joint tenancies) reflected his long held in tension to insulate his estate from challenge after death.

(c) Harvey's inability, at trial, to demonstrate that he understood:

(i) the purpose for the restructuring;

(ii) the means by which the restructuring had been implemented;

(iii) the fact that the restructuring had occurred; and

(iv) the documents which he had executed to put the restructuring in place.

Harvey's evidence – what he said and how he said it

[168] The applicants made much of Harvey's evidence in court. Notwithstanding that he was a respondent, Harvey gave evidence first. He was criticised for choosing not to give evidence-in-chief as to what he knew and understood about the restructure. He did not need to. Apart from giving some evidence about his relationship with his children and grandchildren, he was there to be cross-examined. It was not for him to prove capacity. In any event, his understanding at the time of trial is of little relevance when considering his state of mind some six months before that.

[169] A matter which quickly became obvious was that Harvey was not economical in his speech. He was and, according to those who knew him well, always had been garrulous. The point of any story he was disposed to relate was usually well cloaked in layers of detail.

[170] In various parts of the respondent's written submissions there were criticisms of the manner of cross-examination of Harvey by Ms Treston KC. The use to which any of

that cross-examination can be put is another matter, but I do not accept that Ms Treston did anything other than question Harvey in a careful and detailed way. All those associated with the hearing knew that Harvey was 90 years old but no special accommodation or treatment was sought for him.

[171] The applicants place weight on Harvey's responses in cross-examination and his apparent inability to recall or understand the details and intricacies of the restructure put in place by him. For the reasons which follow, I do not accept that his responses and other behaviour in cross-examination assist in determining the issue of whether the presumption of capacity has been rebutted.

[172] First, the time at which capacity is to be assessed is the time at which the particular actions the subject of dispute occurred. The cross-examination took place some four months after the 15 August EPOAs were executed and about six months after the revocations in June 2022.

[173] Secondly, assessment of capacity on the basis of evidence being given either in chief or by way of cross-examination is beset with problems caused by the nature of the process. Giving evidence in a trial is subject to the rigidity of the laws of evidence and the rules of procedure. There is no real opportunity for an exchange between the questioner and the witness. While I accept that Ms Treston did take Harvey to the relevant documents in an ordered and logical way the questioning was, of necessity, conducted in an environment to which Harvey was not used and in which he was isolated. Cross-examination is adversarial. Its purpose is not to assess capacity but to elicit information, to challenge the witness and to highlight the inadequacies of an opponent's evidence or argument.

[174] Professor Philip Morris (a psychiatrist who was called for the respondent) said that he would not have been surprised that Harvey was not able, in cross-examination, to identify the assets which he held even with the benefit of the relevant documents being shown to him. Professor Morris said that it all depends on the context of the attempt to elicit information. He noted that he, who was in the process of being cross-examined, was feeling exhausted and compared that to the effect of cross-examination on a 90-year-old. He went on to say that it could have been that when Harvey was answering questions he may have been exhausted and, in those circumstances, he could have been answering questions and not understanding what he was saying.

[175] Ms Deborah Anderson, a clinical neuropsychologist, said that the standard clinical practice for a neuropsychologist when undertaking an assessment of cognitive capacity included providing an optimal environment, that is, a place that is distraction free, private and calm. The standard manner in which trials are conducted does not satisfy any of those criteria.

[176] Thirdly, the consistent evidence of all the experts was that if an attempt was made to assess somebody's capacity to deal with a matter, such as a complex financial

transaction, the assessment should be undertaken by explaining the financial transaction in the most "accessible" way possible. Professor Tuly Rosenfeld (a psychiatrist called by the applicants) said that, in such a case, he would generally try to illustrate diagrammatically where the transaction starts and finishes. This could be done by way of a chart or flowchart which broke the transaction down into components. He agreed that identifying whether an adult could reflect the information given in that way back to the questioner would be a very important aspect of testing whether that adult understood the particular aspect being explained to them. Harvey was shown charts and other documents but it was done as part of cross-examination, not as a recognised form of assessment.

[177] Evidence was called from Mr Holmes to the effect that he did not think that Harvey understood the transactions he had entered into and that that was epitomised by Harvey's not understanding the reason for an increased tax bill. I accept that Harvey did demonstrate that degree of uncertainty. In contrast, Mr Holt's evidence was:

> "In the context of your discussions with Mr Marrable in relation to the restructure that occurred in 2021, what would – how would you describe Mr Marrable's understanding as you observed it yourself from your discussions with him of that restructure? Did he know what was going on? – – Yes.
>
> How well did he understand what was going on from your observations? – – I believe he fully understood it."

Harvey's behaviour during late 2021 and 2022

[178] The applicants rely on what they describe as changes in Harvey's cognition and behaviour from late 2021. They rely on the observations of Helen, Kate, Luke and Graham Lambourne who were working with Harvey in the bakery and seeing him on a daily basis.

- The weekly banking

[179] One of the matters upon which they relied as evidence of incapacity was Harvey's perceived inability to complete the weekly banking task for the group companies. The banking would be prepared for him, explained to him, and notes were sometimes attached to the banking to assist him. They said he was frequently unable to successfully complete the task.

[180] Harvey accepted that there were times when he would return from doing the banking and would be told that he had forgotten to make some of the payments or that he would return forms that were incomplete and that, sometimes, missing bank forms were found in his car. He also said that sometimes the "bankings were not always correct" or that there was a need for further explanation.

[181] There was little in the way of detail with respect to this assertion. Observations of his behaviour by family members would not usually be recorded and so the alleged

errors of a particular transaction could not be put to him. It was not suggested to him that he made mistakes on every occasion nor was there any evidence of any substantial errors. The applicants had the banking records in their control and did not provide any evidence as to the extent or frequency of Harvey's alleged failings in this regard. It was a broad accusation unsupported by documentary evidence.

► Kate's diary

[182] Kate said that she began recording in a notebook instances where, she said, Harvey had forgotten something or had done something she considered unusual. She maintained it for only a few months (August to November 2021) but discontinued because "it was becoming quite a laborious task". These are fragmented notes with little context and are recorded in an emotional, rather than a dispassionate, way.

► The sale of Gold Coast Bakeries

[183] Richard Holt had acted for Harvey for over twenty years in two distinct periods. He had had extensive dealings with Harvey in the period of October 2021 to February 2022 which included the time when negotiations for the sale of the business were taking place. During that time, he would see Harvey on an almost weekly basis.

[184] The COVID pandemic had badly affected many businesses and Gold Coast Bakeries was no different. There was a real possibility that it would have to close. The various payments made by the Commonwealth government had assisted the business to trade but they could not continue. Mr Holt's evidence about Harvey's condition at this time was telling. He was referred to the negotiations for the sale and was asked:

> "Now, obviously, this was a, in a commercial sense, a stressful period for all involved? – Very.
>
> Mr Marrable – as in Harvey – didn't step back from what he'd done, in your experience, and that was, in effect, provide leadership to the running of the business? – – No. He did not step back.
>
> No. And he was an active and useful participant in the finding of a – or the completion of a sale of the bakery business when it was essential to do so? – – Yes.
>
> All right. And, certainly, in this period we're talking of, of October '21 to February '22, in your extensive dealings with him, he remained a sufficiently sharp and astute businessman to lead those sorts of fraught commercial negotiations? – – Yes.
>
> All right. And can I suggest to you that you didn't observe any change in the period after that in your dealings with Mr Marrable? – – No."

[185] Mr Holmes was Gold Coast Bakeries' external accountant and he had dealt with Harvey for a long time. He was asked about Harvey's involvement with the

business during the problems caused by the COVID pandemic. He agreed that one of the consequences of the measures taken with respect to the pandemic was that the business started to make "spectacular losses". Mr Holmes was dealing with Harvey during those times and agreed that he was giving sensible instructions. Mr Holmes said that the instructions were clear even though sometimes the motivation wasn't entirely clear to him. He became involved in approaches to other major bakeries to see if they were interested in purchasing the business. Mr Holmes agreed that during this time Harvey was "providing [him with] sensible rational instructions to deal with a very challenging commercial situation".

► Other observations by Harvey's family

[186] Kate, Luke, Helen and other members of the family gave evidence of their observations of Harvey's conduct during this period. Those observations included that:

(a) he was frequently forgetful and confused;

(b) he became impulsive in his decision-making;

(c) he was repetitive and difficult to follow in conversation, regularly fell asleep in meetings and struggled to focus;

(d) he became more trusting of strangers and newcomers in his life, and distrusting of those he had previously trusted;

(e) he became angry and agitated and would lose his temper and was more prone to tears; and

(f) he became less able to safely operate a motor vehicle.

[187] It was also observed that his physical health deteriorated and Kate made notes on several occasions that he seemed to be unsteady on his feet and that he suffered a number of falls.

[188] Examples were given of decisions which the applicant said were inconsistent with his previous decisions and actions as an astute businessman.

[189] Luke said that Harvey wanted to "kick Homestyle out so that he could put a car park there". Kate gave evidence that Harvey was "adamant not to extend the lease [to Homestyle], but that a car park ought to be created instead." It was suggested to Kate that Harvey never stated in front of Mr Holt that Harvey did not want to extend the lease. She responded "No. He did. I remember."

[190] I do not accept that either Kate or Luke have accurately reported what Harvey said about the land upon which the bakery was being conducted. Harvey denied this allegation and he is corroborated in that by the evidence of Mr Holt. Mr Holt said that Harvey was in favour of extending the lease and that, while he wanted to explore whether Homestyle would upgrade a part of the land into a car park, he did

not, at any stage, suggest that there should be no extensions on the lease unless there was an upgrade on the car park.

[191] Another matter which appeared to carry weight for the applicants was that Harvey had engaged some people to lay or repair asphalt on a part of the property. The work was performed incompetently and this is said to be an example of him no longer being an astute businessman. This was an isolated instance.

[192] An equally insignificant incident was Harvey's alleged purchase of two goats from Mr McGifford for $5,000. This did not occur. I accept that he did purchase two goats from Mr McGifford but for the more reasonable price of $400.

[193] Another matter concerned the purchase of a crop farm in Kerry. Harvey agreed to purchase the farm for $2.7 million within one week of meeting one of the owners of that farm. The applicants point to this as demonstrating impulsivity. The farm was not compatible with the family's business and no one in the family had experience in crop farming.

[194] At first sight, this does appear to be an unusual transaction. But Harvey discussed this purchase with Professor Morris and told him that he saw long-term value in the property for future development. He was able to provide his reasons for purchasing the farm and there was evidence that he wanted to buy the farm for Luke as Harvey was interested in obtaining an option for an adjacent lot.

[195] The applicants contended that the purchase was at an over value and this is supported by the valuation evidence which was to the effect that the range of values for the property was $1.86 million to $2.135 million. At the time of the hearing, it was on the market for $2.6 million.

[196] Mr Holmes records that Kate told him that Mr Holt's advice was not to proceed with the sale. If Kate did say that that to Mr Holmes then it was not correct. Mr Holt's evidence was that he did not, at any stage, advise Harvey not to purchase the property.

[197] The evidence on this point is uncertain but it is suggestive, at best, of a misapprehension by Kate and Luke as to what had occurred. Kate did agree that she had, contrary to Harvey's express wishes, instructed Mr Holt to seek an extension for the completion of the contract.

[198] The applicants accepted that many of the matters they raised were insignificant if taken alone but which, taken together, demonstrated "a significant and sharp decline in functional capacity both in respect of lifestyle, health and financial matters". I accept that many of the matters raised were insignificant but of those which might have carried more weight, I am not satisfied that Kate or Luke have given an accurate or faithful account of them.

► The meeting at Upton Street – April 2022

[199] The applicants relied on the events at a management meeting on 5 April 2022 at Upton Street as demonstrative of Harvey having forgotten that certain properties had been leased and that he had made decisions with respect to farming properties at Currumbin and Kerry. This meeting was audio taped by Kate. Harvey wanted minutes of the meeting to be maintained but they were not. The recording demonstrates that Harvey made requests for documents relating to the properties rented by the tenants, that he requested the minutes which recorded when properties had been tenanted, and that he wanted this information recorded in writing. The applicants say that this demonstrates that Harvey had forgotten that certain properties had been leased. The tone adopted by Kate during the meeting was dismissive of Harvey and may have contributed to the view he later held that she was not acting in his interests.

[200] The recording establishes that Harvey had forgotten that one of his properties had been rented out and, after initially reacting angrily, he accepted that he had forgotten.

► Meeting with Mr Holmes on 11 May 2022 – the Christmas pudding list

[201] The applicants argue that, in a meeting with Mr Holmes on 11 May 2022, Harvey did not properly recall the details of the restructure referred to above. For reasons given above, this is of little relevance to the issues which require resolution.

[202] This meeting was the first that Mr Holmes had had with Harvey for more than a year. Harvey would, from time to time, fall out with advisors and family members and Mr Holmes was no different. In the middle of 2021, for example, Mr Holmes was not, in Kate's words, "flavour of the moment". Mr Holmes admitted as much when he related Harvey's practice of dropping off a Christmas pudding at Christmas time and that he "was off the Christmas pudding list in '21, so I figured I was in the bad books."

[203] There were misunderstandings between the two of them partly because Mr Holmes did not have all the necessary information. Harvey asked Mr Holmes why he (Harvey) was going to have a large tax bill. Mr Holmes was not aware of the minutes of the meeting of 24 May 2021 in which it was resolved that the relevant company would pay all expenses (including tax) arising from the restructure.

[204] Mr Holmes placed a series of diagrams setting out the details of the restructuring on a whiteboard. They were diagrams which had been provided to him in a letter from Harvey in July 2021. Harvey said that the representation was not how he remembered the restructure or understood how it would work.

[205] In a note of the events of that day, Mr Holmes stated: "There are some obvious signs that Harvey is not remembering anything that he has previously agreed to or is

conveniently forgetting what suits him." He was cross-examined on that note and agreed that Harvey was conducting a rational conversation with him but that he was asking about things that struck Mr Holmes as irrational and explicable either by having been forgotten or by Harvey being deliberately coy. Mr Holmes agreed that, when it suited Harvey, he would "hold his cards close to his chest" and that sometimes his motivation or intent was never really clear at the start.

[206] Mr Holmes explained the transactions as he understood them and Harvey asked him: "Can I reverse them?" There was some difference between Mr Holmes' oral evidence and his affidavit evidence on this point. In his affidavit, he said that Harvey told him that he "wanted to 'unwind' them or 'reverse' them as he no longer wanted Kate or Luke to own the various assets." I find that Harvey asked whether he could reverse them rather than giving instructions to reverse them. That is more consistent with the contemporaneous notes taken by Mr Holmes on the day than his account of it in his affidavit.

[207] The applicants argue that it should be inferred that by 16 May 2022 Harvey had no particular recollection of his meeting with Mr Holmes which had taken place only five days before that. They say that that inference is strengthened by Harvey's evidence at trial. I reject that part of the submission. His evidence was given some seven months later and, as I have set out above, his recollection in the witness box does not assist in determining his capacity at a different point in time.

[208] The conduct of Harvey at that time and the fact that he did not ask Mr Holt about these matters when he saw him with Kate and Luke on 16 May 2022 does not necessarily lead to the conclusion that he had forgotten what he had discussed with Mr Holmes. There were many other things pressing for his attention at that time.

► The creek works at the Currumbin farm

[209] Harvey engaged Jim Jellick to perform work at the Currumbin property such as removing fallen trees and other debris from the creek. This was another matter relied upon by Kate as evidence of Harvey doing things which were not the decisions or actions of a prudent businessperson. Mr Jellick was called to give evidence and was cross-examined about the instructions he had been given. The cross-examination was premised on Mr Jellick having done work which damaged the creek and surrounds. Nothing emerged from the evidence which would support a conclusion that Harvey gave instructions which were imprudent. This need not be pursued. It was not relied upon by the applicants in their submissions.

► Other matters

[210] There were some occasions, according to Helen and Kate, when Harvey expressed beliefs or opinions which were suggestive of unjustified suspicion. For example, they said he had expressed the view:

(a) that a competitor, Tip Top, was in some way assisting Judy Marrable in the Family Court proceedings;

(b) that one of his employees was working for Tip Top; and

(c) that the purchaser of the bakery business, Homestyle, was a front for another of his competitors – Buttercup.

[211] None of these matters were put to Harvey and I do not give them any weight.

Harvey is injured and goes in to hospital

[212] On 18 May 2022, Harvey was injured in a cattle yard at a property in Currumbin. He had been assisting Kate and Luke to load cattle onto a truck when he was knocked over by a cow. He suffered skin tears to his legs.

[213] Harvey drove himself home, showered, and then attended a medical centre to have his wounds cleaned and dressed. His wounds failed to heal satisfactorily and, at his own instigation, he was admitted to the Gold Coast Private Hospital.

[214] He was examined in hospital and views were formed about his capacity. The events at the hospital play an important part in the applicants' case.

[215] The hospital records were admitted for all purposes, subject to Dr Jones being available for cross-examination. There was, then, no contest about the observations recorded by doctors, nurses and other hospital employees. There was, though, argument about the weight to be accorded to that evidence, especially evidence of expert opinion. Section 92 of the *Evidence Act* 1977 makes documentary evidence (such as the hospital records) admissible subject to conditions about calling the maker and so on. The admission by the respondent amounts to an acceptance that the conditions for excusing the maker have been met. Evidence of a fact includes the expression of an opinion, provided that the giver of the opinion would be qualified to express it in person. Neither s 92 nor any common law principle allowing admission of documents trespasses upon the court's ability to assess the weight to be afforded to an admitted fact.

[216] While he was in hospital, Harvey was observed and examined by Dr Jones and Dr Khateeb (a geriatrician). The applicants rely on the notes made by Dr Khateeb which form part of the hospital records. Many of those notes are in the type of shorthand often seen in hospital records where abbreviations and symbols are used. In such a situation, it is important to refrain from imposing a construction on the notes which cannot be supported by the clear words used.

[217] Dr Khateeb did not have a good relationship with Harvey. Harvey was examined by Dr Khateeb on 3 and 7 June 2022 and was uncooperative and unwilling to assist. Dr Khateeb recorded that Harvey "was most condescending, was dismissive of my

involvement, questioned my training and qualifications and seemed discriminatory to my person." Harvey thought he was rude and demeaning.

[218] On 6 June 2022, Harvey withdrew before an MRI scan could be completed but, according to his notes, there were sufficient images to generate a report for Dr Khateeb. The notes include:

> "To my view:
>
> Global + hippocampal atrophy
>
> Is in keeping with ALZHEIMER'S
>
> (given clinical picture)"

[219] Later, he notes:

> "6) If report needed for financial capacity then
>
> - I will need some details into his financials BEFORE I check his capacity
>
> …
>
> Told him Δ [diagnosis] of MRI As he asked "Get to <u>the POINT</u>"
>
> When explained to Dementia likely ~~AD~~ ALZHEIMER'S
>
> He said he wants to read The report himself
>
> Could not continue conversation Unable to engage
>
> P - To this point he is NOT able to Complete any meaningful
> conversation to address his MENTAL CAPACITY"

[220] He also noted that: "I believe family should be engaged to make decisions on lifestyle, healthcare".

[221] The applicants refer to those notes as constituting a diagnosis of dementia and say that the probative value of his opinion is significant given that he was not required for cross-examination. It is true that, in the absence of cross-examination, his apparent diagnosis is unchallenged. But, his opinion is confined to Harvey's ability to deal with personal matters. He expressly excludes any view on Harvey's financial capacity. He also notes that he was unable to complete any meaningful conversation "to address his mental capacity".

[222] It is difficult to arrive at a conclusion about the assistance which Dr Khateeb's opinion provides. He and Harvey did not get on – Dr Khateeb later declined to undertake any other examination – and this would not have been conducive to the assessment needed to arrive at Dr Khateeb's diagnosis. It is also just that, a diagnosis. It is provided without any support other than the brief and sometimes cryptic medical notes. Dr Khateeb was not called by the party relying upon his notes, perhaps on the basis that the notes had been admitted. There was a dispute

about Dr Khateeb's involvement in the trial. I accept that the applicants served an affidavit of Dr Khateeb and that the respondent's solicitors informed the applicants' solicitors that he was required for cross-examination. His name appears in the applicants' trial plan, but he was not called. In those circumstances, there is an inevitable absence of that type of reasoning which allows for evaluation of the validity of the conclusion. It is not the only evidence which was before the court on this topic and it does not have the weight which a fully reasoned opinion might otherwise have.

[223] Dr Andrew Jones was a consultant physician engaged at the hospital. He is an infectious diseases expert, not a geriatrician. On 8 June 2022, he recorded in the hospital notes:

> "I agree Harvey does not have capacity and I support the activation of POA for medical, lifestyle and financial decision making."

[224] The agreement referred to is with Dr Khateeb's diagnosis. Dr Jones refers to "financial decision making" notwithstanding that Dr Khateeb made it clear that he had not expressed a view on Harvey's capacity for financial matters.

[225] Harvey and family members (including the applicants) were told of this diagnosis soon after it was noted. The hospital notes record that discussions were had between hospital employees and the applicants including one which records that "Helen does not agree with NHP [Nursing Home Placement]. EPOAs arguing amongst themselves. Have suggested all options. I will get Home Instead to discuss 'private care'. To explore best possible outcome for Pt. Also discussed Respite/Perm."

[226] The applicants gave evidence that they were told of this diagnosis by a nurse (Paige) and that it was an upsetting and confronting conversation. Helen said Paige told them that Harvey needed permanent care. Kate also said that Paige told them that Harvey needed full-time care. On being asked if anyone at the hospital ever said Harvey needed 24-hour care, Kate answered that "Paige, the nurse, did."

[227] A series of discussions among the applicants then took place with consideration being given to various options for Harvey's care after he left hospital. On 14 June 2022, there was a discussion among Dr Jones, Harvey and the applicants in which he explained the dementia diagnosis and supported the activation of the EPOAs for all major decisions. Dr Jones recalled Harvey's understandable discomfort and his concern about how he had been treated in this way:

> "One was after he had been reviewed by Dr Khateeb. Harvey … expressed discomfort with his interaction with Dr Khateeb and … felt that he had not perhaps been fairly assessed, I think, but that was often an issue for Harvey, … the fairness of the testing. So he was – he was uncomfortable then and he was very uncomfortable actually, the meeting of the 14th he became understandably much more uncomfortable during that meeting and – and more agitated than I saw him at any other time. But then we had just obviously conversed

> about him having a diagnosis of dementia, which it would not … surprise me in that setting. But yeah, there were a couple of occasions where he was plainly more concerned that the fairness of the process was … not there and that he was therefore being undone [sic] without good reason. But – and those were the two occasions I remember it being the most marked."

[228] In another discussion had the same day, it is recorded that a nurse explained to Harvey that the family wanted him to be discharged for private care at home and that Harvey was agreeable to that course. Dr Jones told Harvey that his condition was "not severe".

[229] Harvey was concerned about the property he wanted to purchase in Kerry and he told Dr Jones that his decision had taken that purchase out of Harvey's hands. Dr Jones said that: "The power of attorney is appointed to assist with those things." Helen said: "That's us dad. We're here to support your wishes. That's not going to change. That's what Luke is saying and that's what I'm saying. If you want to go ahead with the property, we go ahead with the property." Kate told Harvey that "those decisions stand already Harvey." Notwithstanding that assurance, Kate and Luke later gave instructions not to proceed with the purchase, did not involve Harvey in the decision-making, and did not tell him about their actions until after the event.

[230] Harvey was supposed to be discharged from hospital on 17 June 2022. The applicants regard an entry in the nursing notes at 3:30 AM on that day as significant. The notes record that Harvey was awake for most of the night shift and that he reported to nursing staff that "he had too many things going on in his head about the discharge and family dynamics". The applicants say this is consistent with a marked change in Harvey's attitude to the discharge arrangements. It is also, I consider, consistent with a reasonable concern on the part of Harvey about the circumstances of his discharge, what was to happen to him and how he perceived he was being treated by his family. This was one of the matters which Harvey said he had in mind when he sought the assistance of Pharmacis Canning.

[231] Harvey's unhappiness about his situation is encapsulated in another note, made at 2:30 PM on 17 June 2022, which records:

> "Pt was meant to discharge today, but granddaughter [Kate] did not want pt to go home due to his dementia + wants pt to go to a nursing home. pt was quite distressed + not happy due to not being able to be discharged. Incharge had a conversation with Pt + explained why he couldn't go home, but pt was still not happy. Pt claims he will get his lawyer involved. Pt has two visitors with him currently."

[232] While Harvey was an inpatient at the hospital, he was not confined to the hospital. He was able to leave on what was called "gate leave". This was the subject of considerable friction between the applicants and Harvey. The notes record that his

family expressed concern about him having gate leave because they believed he would try to drive and they were concerned about his safety and whether he would return.

[233] On 22 June 2022, Harvey was assessed by an aged care assessment team for his eligibility for permanent residential care. On the same day, he was taken from the hospital by his friend, Jason McGifford. They went to Jason's home and were met by James Jellick. They had a discussion in which Harvey expressed his disappointment with Mr Holt. Mr Jellick recommended that he get in touch with a barrister, Brent Blond, to see if he could assist.

[234] On 27 June 2022, Mr McGifford took Harvey on gate leave to see a new solicitor. This was when Harvey met Mr Pharmacis of Pharmacis Canning and revoked the Personal EPOA.

[235] At about the same time in late June 2022, Harvey telephoned Mr Holmes and sought to make an appointment to see him. Mr Holmes said that Harvey told him that a doctor had decided he had lost capacity but that he did not agree with that opinion. An appointment was made and Harvey travelled with Mr McGifford to see Mr Holmes on 28 June 2022. Harvey told him that he was in hospital, that he had been diagnosed with dementia and that a doctor had determined that he lacked decision-making capacity. Harvey said that he disagreed with that diagnosis and told Mr Holmes that the diagnosis of dementia when he was unwell was "opportunistic".

[236] Harvey asked Mr Holmes to provide him with a statement of his assets and liabilities. This was unusual, as Harvey had never previously asked him to do that. Mr Holmes provided him with those details, together with a copy of Harvey's financial EPOA. Harvey then left Mr Holmes's office and went to Pharmacis Canning where he revoked the financial EPOA.

[237] Soon after that occurred, the hospital notes record that the hospital received advice that an enduring Power of Attorney had been revoked.

[238] Doctor Jones made an entry in the hospital notes to this effect:

> "Events noted.
>
> I have certified Mr Marrable as not competent to make decisions and therefore he cannot have effectively signed a new POA or revocation of the old!"

► Gate leave

[239] "Gate leave" was the expression used to describe the ability of patients at the hospital to leave the hospital during the day and return the same day. The hospital records show that from at least 8 June 2022, Harvey's legs were "better", that "gate leave at any time is fine", and that "gate leave over w/e is fine". In his evidence,

Doctor Jones said that Harvey was "medically equipped for gate leave from quite early in his admission".

[240] These views were contradicted, according to hospital records, by Kate, Luke and Helen who gave instructions that Harvey was to "only have gate leave with EPOA". Luke recalled taking Harvey out of hospital on gate leave on one occasion, but Kate never took him out on leave. The basis advanced by the applicants for that instruction was that they were concerned that Harvey would attempt to drive his car (which would have been difficult given that Luke had the keys) and that he was attempting to leave with people of whom they did not approve, in particular, Jason McGifford. As a result of that instruction, on 18 June 2022, when Harvey was attempting to take gate leave, he was detained by security guards employed by the hospital and was not allowed to leave.

[241] When he did use gate leave he, on various occasions, took that time to:

(a) meet with Mr Jellick;

(b) have an appointment with Pharmacis Canning;

(c) go to the Suncorp Bank where he attempted to withdraw money; and

(d) go to Mr McGifford's house.

[242] While the applicants disapproved of Harvey exercising his right to take gate leave, Dr Jones agreed that Harvey was doing no more than being independent and feeling that he did not have to report his every movement as long as he was allowed to go out.

[243] Dr Rosenfeld agreed that Harvey was right to be aggrieved if his family was working to prevent him going on gate leave. He observed:

> "in my 40 years of experience, I have not once, not on any occasions, had to schedule somebody like Mr Marrable to force him to remain in hospital against his will, and if he wanted to go out of the hospital and go back home and have care, then that's what would happen."

► Assessments in the hospital

[244] A Montreal Cognitive Assessment (MoCA) is a well-known tool for the detection of mild cognitive impairment. An assessment of Harvey, using MoCA and a functional test, was administered by Simone Nancarrow on 3 June 2022. The result was included in the Hospital notes:

> "OCCUPATIONAL THERAPY: Referral received for cognitive assessment. Montreal Cognitive Assessment (MOCA) completed 2/6/22 = 20/30 suggestive of mild cognitive impairment at a basic level. However, in conversation, Harvey was observed to be tangential and conflabulates [sic]. Short term memory for new information and skills appears significantly reduced.

> In functional kitchen tasks, Harvey required consistent prompts and close supervision to operate basic functions on a microwave and safely make a cup of tea. Concerns exist for Harvey's safety at home and supervision is highly recommended in high risk tasks such as cooking, medications, financial management and complex decision making. It is also recommended that Harvey's safety in driving is evaluated. Family reported this will be assessed at his GP on 6/6/22. The above concerns were raised with family and Harvey's treating doctor."

[245] Ms Nancarrow was not required for cross-examination. But the respondent submits that the outcome of the MoCA was unreliable because it was not administered in the most conducive circumstances. So much appears to have been agreed to by Dr Jones who, while he doesn't perform that test, said he would want it to be conducted in the best circumstances available. Luke was present during the test and, while he didn't remember what he said, is recorded as saying that Harvey's memory was poor, that he confabulates, and that he had become increasingly agitated. I do not accept that Luke would have used the word "confabulate" but I do accept that it is likely that he said something to the effect that Harvey was making things up.

[246] The remarks recorded in the hospital notes include that "supervision is highly recommended in high risk tasks such as … financial management." The respondent correctly observes that no financial issues were discussed between Ms Nancarrow and Dr Jones – the concern was limited to the extent that Harvey appeared to struggle with new information.

The medical evidence

[247] There was evidence in one form or another from five practitioners – Dr Jones and Dr Khateeb (Gold Coast University Hospital), Ms Anderson (a neuropsychologist), Dr Morris and Dr Rosenfeld (geriatricians). I have dealt with the evidence from Dr Jones and the notes made by Dr Khateeb.

- Ms Deborah Anderson

[248] Ms Anderson is a clinical neuropsychologist with over 20 years' experience. She was the first to assess Harvey. She met Harvey on 28 July 2022 and provided three reports to Pharmacis Canning, Harvey's then solicitors.

[249] Ms Anderson was provided with a history by Pharmacis Canning. The contents of the history were criticised by the applicants. In particular, they said that Ms Anderson was given to understand that there had been "no reported history of decline" of cognition and everyday function which was contrary to the evidence they gave. Ms Anderson conducted several tests and commented upon the assessments conducted early in the period of Harvey's hospitalisation. She commented upon the physical reasons for Harvey being treated in hospital and

referred to him as having had septicaemia. Harvey was not diagnosed as having either septicaemia or sepsis. The idea that he had that condition appears to have grown from discussions he had with Mr McGifford which were then passed on to Pharmacis Canning. Ms Anderson corrected that in her second report.

[250] Her view was that comprehensive neuropsychological assessments should ordinarily be undertaken when any acute illness has passed. In cross-examination, she accepted that once an infection is cured, but signs of confusion have not abated, then that can lend weight to a conclusion that there was some underlying cognitive or dementing illness. In other words, if any reversible causes of cognitive impairment can be excluded, then further investigation needs to be undertaken to determine whether there is another cause for cognitive impairment.

[251] In her first report, Ms Anderson concluded:

> "The results of the comprehensive cognitive assessment did not reveal any significant cognitive impairment that would prevent Mr Marrable from engaging in decision-making in a logical and appropriate manner. He may need additional assistance with recalling verbal information, but that would be the only limitation."

[252] Ms Anderson was cross-examined about Harvey's ability to make decisions in relation to financial affairs and, in the applicants' submissions, was criticised for not assessing his ability to sift through information and discard the incorrect parts. In answer to one question, she said:

> "… if he were given, for example, information – dot points, for example – he can work through them logically. … and come to a conclusion based on that information. The – so that – the mere not recalling every single detail is not, in and of itself, solely the – well, my understanding is that that's not the only determinant of making a decision. That we also have to be logical and reasonable, and if he is capable of being logical and reasonable, are there ways of assisting him in doing that? And so that's what I'm suggesting, that he is – because he is not presented with generalised dementia, which includes poor reasoning, inability to understand complex ideas, he's just presented with a memory problem. That – although it would be difficult, he retains in my – on my testing, the ability to be logical with information. And, therefore, it was my – my view that, with support, he could make decisions."

[253] Ms Anderson provided a second report at the request of Harvey's solicitors and after receiving information from Professor Morris' report. She said that her overall view was that Harvey understood the nature and effect of all decision-making and that, as had been his practice, he was willing to seek advice from trusted professionals and consider the consequences of decisions.

[254] Ms Anderson expressed significant disapproval of the way the "medical people" at the hospital had managed the situation. The following exchange with counsel is relevant:

> "Your view is simply that you've accepted that if there was no septicaemia that expressed - that explained the confusion, then they weren't wrong to jump to the - they weren't wrong to look for another underlying cause? There's nothing terrible about that? --- There's nothing terrible about that but what they needed to do was actually investigate it more thoroughly. He was difficult and uncooperative with some of the assessments in the hospital. There was little documented discussion of many of the factors that lead to triggering of the - the power of attorney and so it felt as if they jumped to a premature conclusion.
>
> Well, we're a couple of months down the track now and he's been extensively investigated. You don't doubt for a moment though, with the benefit of all those investigations, that he evidences some serious cognitive decline? --- No, he doesn't. He has a localised impairment of auditory verbal memory, but his intellect remains average, his executive functions so his higher-level reasoning and problem solving, remain intact."

[255] Another aspect which was explored in Ms Anderson's oral evidence was whether Harvey displayed signs of paranoia or suspicion. She was cross-examined in detail and at length and was asked to comment on a few circumstances which had been related by the applicants. Ms Anderson was willing to concede that some matters (for example, that his family was going behind his back with his long-standing solicitor to take advantage of him, or that a document known to have been signed by him was said by him to be a forgery) were suggestive of suspiciousness or reflecting an idea of conspiracy but that there was not enough to suggest paranoia.

[256] It was suggested to Ms Anderson that the way she had received information about the history of the matter and the instructions given to her by Pharmacis Canning "caused [her] to look at it with a certain approach that started with the assumption that it was a positive fact that he had capacity?" Her answer was, in part: "Yes, they might give me that information, but my job is to see, is there objective evidence on my testing and interviews; that – whether or not it supports their view is irrelevant." I accept that Ms Anderson did approach her task in the way suggested by the applicants and that the tone of the information supplied to her did not affect her conclusions.

- *Professor Philip Morris*

[257] Professor Morris is a consultant psychiatrist specialising in the psychiatry of older age. He was engaged by Pharmacis Canning. He provided three reports with respect to examinations of Harvey Marrable he conducted on 24 and 27 August 2022.

[258] The manner in which Professor Morris prepared his written reports and the detail which he gave was unsatisfactory in a number of respects. Large parts of his reports were ruled inadmissible and what was left contained little of the detail which he gave in his oral evidence. That placed Mr Dunning in the position of not being able to open his evidence until shortly before he was called. Professor Morris was criticised by Ms Treston for having kept no notes from his examination of Harvey. He explained this by saying that he made "notes into [his] brain". This is unsatisfactory. One of the things which an expert witness must do is furnish the trier of fact with criteria enabling evaluation of the validity of the expert's conclusion.[46] That principle requires an expert to explain the basis upon which an opinion has been reached. This will usually require reference to tests or some other accepted scientific method. So far as the matters to which a test is applied:

> "[64] The basal principle is that what an expert gives is an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based."[47]

[259] Professor Morris did not, in his written reports, comply fully with that requirement.

[260] After some argument, Mr Dunning applied to call further evidence-in-chief from Professor Morris. I allowed that but confined it to those parts of his reports which had been the subject of objection on the basis that the underlying facts had not been disclosed.

[261] Professor Morris gave evidence that he had a practice with respect to interviews which he applied when he interviewed Harvey. He said he'd been in the practice of psychogeriatrics for about the last 15 years and he had been asked many times to determine a person's capacity to either make a will or an enduring power of attorney. He has a set of questions that he developed from his experience but which also drew on information from other resources such as the New South Wales Capacity Toolkit and the Queensland Capacity Assessment Guidelines. He said he generally goes through the interview trying to maintain some sort of relationship with the individual and noting in his mind, as he went through the standard questions, whether they've answered correctly in the sense that they showed they understood what they're talking about. It was not his practice to write down or record what the other person says. In his evidence-in-chief, he related a substantial amount of detail with respect to the answers he said he received from Harvey. He was asked what Harvey had said about his business situation. He replied:

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46 *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [59].

47 *Makita,* per Heydon JA with whom Priestly and Powell JJA agreed. See also [85].

> "Well, I don't – can't remember all the details, but they're, broadly speaking, in the same ballpark as what was outlined in a document I got from your office which set out the various things that had happened to his businesses over a period of time when they were re – reformulated or re –restructured. But he told me that he had a business that he'd sold recently, which was the – I think the bakeries, and that the company that took it over was actually renting the properties where the bread was being made. So he actually kept ownership of the – the buildings and the – and the – sort of the – the factory, I suppose, or whatever it is, but the – but the company was renting that from him. He had a couple of resi – rural properties. He's had a number of residential properties. Some were in Mount Tamborine, some were at – there was a rural property at Currumbin. There – I think there was – I can't remember. There was a few other – 40 few other places on the Gold Coast where there were houses. So there was quite an extensive range of business activities where he was now not running his own bakery, but the bakery was being run by somebody else and he was getting rent from them renting the – the premises, and then he had these real estates, houses, units and – and – and farms."

[262] Professor Morris was then asked questions about Harvey's bank accounts – he recalled that there were about 20 or 30 business entities and that he didn't know whether Harvey had 20 or 30 bank accounts. He thought one of them might have been with the Bendigo Bank. Professor Morris recalled that he asked Harvey whether he had any money for emergencies, and Harvey told him that he had about $500,000 at home for emergencies. He then went through a number of other matters relating to his finances in the relationship with his grandchildren. He recalled Harvey saying that he had a concern about a $4.5 million tax liability.

[263] Professor Morris was cross-examined in some detail about the history of his recollection of what he had been told by Harvey. It was not until he gave his oral evidence that he provided the detail that was absent in his written reports. He accepted that he had not, up until a few days before giving evidence, recorded any of the answers which had been given by Harvey to him. I do not doubt that Professor Morris has through his years of experience developed the capacity to recall matters when prompted, but I do find it difficult to accept that he was able to recall the detail which was elicited from him in evidence. Rather, I think that, while what he said was his honest recollection, he may have combined what he did recall with what he had learnt from other sources.

[264] His evidence, though, was of assistance on those points upon which he was cross-examined as to his expert view of matters relevant to a diagnosis of dementia. Professor Morris gave evidence that Harvey had a "mild cognitive impairment amnestic type" rather than dementia.

[265] He was asked whether a person who forgot where a member of their family lived would be something that would be more worrying in terms of what it said about cognitive decline. He did not agree. He said it depends on the circumstances in the context. He was asked about a situation where a person was given notes and instructions when they went to do the banking but they forgot to complete what was on the instructions. He didn't agree with the proposal that that was evidence of a more serious level of forgetfulness because it depends on context.

[266] He was asked whether evidence of a number of falls that a person might have suffered was one of the things that could be considered in assessing dementia and he said that it depended on the medical circumstances as falls can be due to a range of different things.

[267] He did not accept that evidence of increasing tearfulness is consistent with cognitive decline, rather, he said, it is usually associated with depression. He also did not agree that suspicion and paranoia were frequent characteristic features of a dementing illness.

- *Professor Tuly Rosenfeld*

[268] Professor Rosenfeld is a consultant geriatrician and physician. He examined Harvey on 9 September 2022 and provided three reports. The second was given after he received some of the affidavit material, the third (in the form of a file note) after he had received all the affidavits and the transcript of Harvey's oral evidence.

[269] His first report was based upon his consultation with Harvey and upon a review of the medical records and other reports from the Gold Coast Private Hospital. He observed that the abnormalities reported after Harvey was tested in hospital were in the domain of short-term memory loss after distraction. He concluded that, at the time of that testing, Harvey was suffering from significant infection which had progressed notwithstanding oral antibiotics. An older person, with an underlying reduced reserve, can demonstrate reduced cognitive function and acute confusion due to such an infection. He said that Harvey suffered from an underlying brain disease and associated neurocognitive impairment and he was likely suffering the effects of delirium in late May and early June 2022 as a result of the infection for which he was being treated.

[270] Professor Rosenfeld concluded:

(a) at the time of his admission and treatment in June 2022, and on 8 June 2022, it was more likely than not that Harvey was unable to make complex financial decisions;

(b) by 27 June 2022, it was more likely than not that he was no longer suffering from an acute infection and his acute medical illness had largely or completely resolved and he therefore had sufficient insight and awareness to

make decisions about the appointment, including the revocation of an appointment, of an attorney under an EPOA;

(c) there was no reason to suppose that Harvey was not able to consider, and decide on, the appointment of such an attorney either on 15 August 2022 or at the date of his report, namely 27 September 2022;

(d) with respect to Harvey's capacity for financial matters, and assuming those matters are complex and have long-term implications, his short-term memory impairments were likely to impact adversely on his ability to properly consider and weigh alternative issues and considerations;

(e) he could not detect, in the documents, that Harvey suffered from a degree of impairment that left him liable to influence;

(f) he does have an impairment in his ability to communicate his decisions or reasoning in respect of financial matters;

(g) Harvey had the capacity to revoke an EPOA; and

(h) he had the ability to freely and voluntarily make decisions about revocation and appointment.

[271] Professor Rosenfeld was provided with further material in late September 2022. That material included the transfer documents and company minutes associated with the corporate restructure, and the affidavits of Mr McGifford, Mr Holmes and Mr Pharmacis. As a result of the consideration of the new material, he revised his opinion and formed the following conclusions:

(a) there was a history that was "clearly indicative of suspiciousness and paranoia";

(b) Harvey was more likely than not suffering with cognitive impairments, impaired recall and impaired ability to recall and hold in memory the complex understandings required to manage and make decisions about complex financial legal matters; and

(c) there was evidence of Harvey's emotional lability which was a characteristic feature of frontal lobe disease and functional impairment.

[272] He maintained his opinion that Harvey was not capable of dealing with complex financial matters which had long-term implications.

[273] But he revised his opinion with respect to the appointment or revocation of attorneys. He said:

> "9.11 In my opinion, based on the additional information I have been provided, the evidence indicating the evident suspicion and poisoning of his views about his medical care, the views of his previous financial and legal advisors,

> and his family, and contrary to my earlier report and opinions, that Mr Marrable is not properly able to make complex decisions regarding the revocation or appointment of his financial attorney(s) or health care, lifestyle and accommodation decision-makers."

[274] In cross-examination, Dr Rosenfeld was asked what were the things which he did not know at the time of his interview with Harvey, but which he learnt later, and which caused him to change his opinion about Harvey's capacity to make or revoke an EPOA. He said there were four:

(a) memory dysfunction;

(b) walking disorder;

(c) turning against his family; and

(d) impaired decision-making.

[275] Mr Dunning submitted that none of those matters provided a rational reason for Dr Rosenfeld's change of opinion and, therefore, his revised report should not be accepted.

[276] As to the first matter – memory dysfunction – Dr Rosenfeld said:

> "… you will agree with me you knew no more about memory dysfunction at the time of the second report than the first report, because you had all of the diagnostic tools?---Correct.
>
> Thank you. So we can discount that as an explanation for your changed opinion?---Well, it's a factor. It's not a – you don't discount it. If he can't remember, he can't remember, and he can't make proper judgments, as I've explained."

[277] He was not pursued on that point and he did not explain how it could be a factor which changed his opinion when it had not affected his earlier view.

[278] As to "walking difficulties", Harvey had told Dr Rosenfeld that he had fallen as a result of being pushed by the cow and that he had not suffered any other falls. The general practitioner notes to which Dr Rosenfeld had referred contained a record of falls and he concluded that that suggested physical impairment which, together with the neuropsychological assessment and the changes in the brain imaging, indicated the presence of brain disease. This was a topic about which, again, Dr Rosenfeld had full knowledge when he created his first report and he accepted that it was "not a rational reason to have changed [his] view."

[279] As to "turning against his family", the following exchange is relevant:

> " … The third matter was the turning against his family and his friends, and the principal reason for that was the fact that they were

> trying to work together to get him to go into a nursing home, and you will agree with me, from the material, he had a right to be aggrieved about the attempts to put him into a nursing home; correct?---Yes.
>
> And the sorts of facilities that were being talked about were ones that were completely inappropriate?---Yes.
>
> All right?---Without the understanding as to why they were so concerned.
>
> All right. **So you'll agree with me that provided no rational reason to change your view**, because, when you actually look at the hospital records, him being urged to go into a nursing home is a matter that he would rightly have been concerned about?---**Yes, that's right**."
>
> (emphasis added)

[280] The fourth thing that Dr Rosenfeld said contributed to his change of opinion was that Harvey's decision-making was impaired. His opinion about that issue was explored in detail and the views he held and expressed can best be conveyed by reference to specific parts of the transcript of his evidence.

[281] In his evidence-in-chief, Dr Rosenfeld was asked about the conclusions he had drawn from the affidavits provided to him that Harvey's behaviour was "clearly indicative of suspiciousness and paranoia". In his second report he had said: "This form of thinking, worsened by misunderstanding and misinterpretation of events, is a frequent characteristic of demented illness." He was asked whether there was a definition that is well understood in relation to paranoia. He said:

> "Well, paranoid thinking would describe an individual who has beliefs about other people's [indistinct] which beliefs that believe they're threatening or offensive to them or distrusting. You have a distrust of their motives, and the key to the – the idea that it's paranoid thinking would be that that wasn't based on the actual facts or the situation that you were drawing your conclusions from, so many people that I see, a large proportion of them, because they can't remember – recall the reasoning and the – the – the purpose of me seeing them, they will even refuse to see me because they don't understand what it is that I'm doing."

[282] He went on to say:

> "The problem is that people suffering from dementing illness, their judgement is impaired, and they're not able to see that the people around them are actually trying to – to help them and, rather, they concoct all sorts of paranoid and suspicious and distrustful feelings that the reason, for example, they've been put into residential care is to try and control them when, in fact, it's really there to provide them with the care that they require. So paranoid and distrustful behaviour

> are so – are very common in what I see all the time with people with cognitive impairment."

[283] In cross-examination, he was asked:

> "What I'm interested in is what – is for just you to explain to me – I think you used the word "concoct" in your evidence in-chief. I want you to explain to me what you would describe as the – Harvey's perception that his family and doctors had concocted things for him to go into a nursing home?--- I don't know if – if concocted is right view. It was the family who voiced their concerns to the medical team, and the medical team then recommended that he should be in residential care, and the idea that he gets support at home came after that. I think that was the second option, and so I think the original – I – I don't know where – I don't recall where the actual – where the original plan for him to go into residential care was – where – who and where that was made. It stemmed from the family's views that were cha – that were given to the medical team who then confirmed the cognitive and functional problem and then the recommendation that he wasn't safe to go home."

[284] Dr Rosenfeld went on to say that Harvey was not being irrational, rather that:

> "the thinking that he made was not based on … all the information, the judgements that were made by Allied health and the doctor, and the history of his failing in his own ability to care for himself, and so he could not – he could not see that concern, so I don't call that – I've never used the word irrational. It's not irrational. It's just that his decision-making was not based around the concerns that everybody else there seemed to have about him."

[285] He then agreed that if a person's attorney wrongly wanted to put him into a nursing home, then that would be a rational reason for a person with capacity to form an adverse view of his existing attorneys.

[286] He was then asked what it was that he said showed that Harvey had formed adverse views about his immediate family in circumstances where he should not have formed those views. Dr Rosenfeld appeared to struggle with this concept and it took some time to elicit responsive answers from him, but it seems that he proceeded on the basis that:

(a) the medical advice was that Harvey should go into a nursing home,

(b) when the family told Harvey that, he blamed his family (and the doctors) for that medical advice, and

(c) Harvey lacked capacity to understand the reasoning used by the doctors and his family to recommend that he be in a "carer situation."

[287] Dr Rosenfeld has proceeded on an erroneous assumption. He later agreed, in cross-examination, that there was no evidence that there was medical advice that a nursing

home was necessary. Rather, the hospital notes show that it was the family which wanted Harvey to go to a nursing home. One of the hospital notes recorded:

> "Pt was meant to discharge today but granddaughter did not want Pt to go home due to his dementia and wants Pt to go to a nursing home. Pt was quite distressed and not happy due to not being able to be discharged."

[288] He accepted that that note was not consistent with the hospital having said that Harvey needed to go to a nursing home, but rather it was his granddaughter's insistence. He said:

> "So it's very clear that the whole way this was managed made poor old Mr Marrable - the whole situation escalated in his mind, and as we discussed before, it's very clear that that - the whole way this was managed would have made him very upset, and it did."
>
> "… with great respect to the hospital, it's very unfortunate that Mr Marrable found himself in such an unprofessional situation. There was no clarity around what anyone wanted. It was left to the family. This is, again, the reason, I think, that Mr Marrable suffered these - this angst, and the whole thing was escalated by the family being, effectively, left to make the decision."

[289] The nature of Harvey's concerns was explored with these questions:

> "Now, you'll agree with me, won't you, that Harvey did have a basis to be concerned about his family's desire for him to go into a nursing home?---I've already explained that his – he has definitely very major … reasons to be aggrieved with her wishes to put him into not only a nursing home, look, at the last one you pointed to is a dementia unit no – no less.
>
> Yeah?---I mean, that is – can I just say that is just amazing that she was so badly informed. He wasn't suitable for a dementia unit.
>
> Well, can you tell me - - -?---Totally – totally unsuitable.
>
> …
>
> Correct. You would agree that it would be brutal to do to Harvey to put him into a dementia unit?---No, not brutal; it would have been completely inappropriate, and any nursing home worth their salt would have seen him and said immediately that this is completely inappropriate.
>
> All right?---For him to go into a dementia unit designed specifically for people with the behavioural and psychological disorders of dementia.
>
> Okay?---He doesn't have that."

[290] He amplified the basis of his understanding and the consequences of a proposition that Harvey be placed in a dementia unit in this way:

> "So when you read that at the time of preparing your report you assumed, as you've just told me then, that somehow Kate had been badly advised by some medical person to put him into a dementia unit?---Well, either that or she like many other people made their own assumptions that all old people go into dementia units in nursing homes. And that's exactly not the act – exactly incorrect thing to do for a man like Mr Marrable, and therein goes what I've said all along that everything was that was done just aggravated and magnified his aggrievement with the whole process and – and – it's just – it's just extraordinary, quite frankly, that he could be in that situation where people were sitting there talking about putting him in a dementia unit. He would never have been accepted for a dementia unit. He was a guy who could give a story. He could talk your pants off. He was such a clever fellow. He's a nice person. He wouldn't have lasted three minutes in a dementia unit because he would have got into a fight with the other dementia patients who would have been aggravated and agitated by his presence. And so, either his daughter – daughter and granddaughter was so poorly informed, and clearly, she was, or she was jumping to her own conclusions about the care."

[291] Dr Rosenfeld agreed that Harvey had "reasons to be aggrieved … about the way the whole matter had been handled." He agreed that residential care and, particularly, a dementia ward, would be inappropriate and that, if his family had sought that he be placed there then it would be "very reasonable" for Harvey to be dissatisfied with his family. He said that Harvey's behaviour would not have been an exercise in poor judgement:

> "It was a very reasonable thought that he – he made, and the more they insisted and – and told security guards, for instance[indistinct] and the other [indistinct] told security guards not to let him out, all that sort of stuff that went on just aggravated and made his – his views much stronger, and I can absolutely ex – his behaviour into his – his – his [indistinct] towards what that – what was going on around him was perfectly reasonable."

[292] In addition to the comments referred to above, Dr Rosenfeld said that if Luke was offering criticisms of Harvey during the assessment undertaken by Ms Nancarrow then that would be suboptimal as it would tend to feed his views and feeling of mistrust.

[293] Finally on this point, Dr Rosenfeld was critical (although he softened the blow at the end of his remarks) of the general manner in which Harvey had been treated in the hospital. He said:

> "I – I think I said that the whole manner in which he was managed in hospital and people talking about him and telling him what he was going to do, I – I have made comment about the fact that all those factors are likely to have turned his views against them. I thought that's what I said, and I thought that's come through clearly is that

> the manner in which the doctors interviewed him, the may – way in which the doctors told him what was – what they were going to do to him, etcetera, was very likely to have resulted in exactly what happened, that is, that he turned – took – took offence, used – took those things to heart and – and viewed the fact that they turned against him. It was done in a manner – including what you've just pointed out – it was done in a manner that I think was quite unprofessional, but I'm not making a critical point."

[294] There are a number of matters which conduce to the view that Harvey's behaviour and attitude exhibited while he was in hospital was justified. The assessment made about Harvey's capacity while he was in hospital occurred during a time of uncertainty and heightened emotions:

(a) Kate, Luke and Helen say that they were told (by Paige) that Harvey would need 24-hour care. There is no evidence of that and it is inconsistent with a meeting attended by Kate, Luke, Helen and hospital representatives where they were told that Harvey was "probably not quite at that point just yet";

(b) there is no record in the hospital notes to the effect that Harvey would require 24-hour care;

(c) on 9 June 2022, Luke, Helen and Harvey were arguing about Harvey's living arrangement when one of them said that he should be placed in a nursing home;

(d) other hospital notes record that the "family" had decided on 13 June 2022 to discharge Harvey with private carers at his home but he was not informed of that until 14 June 2022; and

(e) the assessment that Harvey had lost capacity for financial affairs occurred in these circumstances.

[295] Other matters of which Harvey later became aware and which would have contributed to his increasing distrust include:

(a) following the assessment, Kate, Luke and Helen took control of Harvey's bank accounts and decided to withdraw from the Kerry crop farm purchase. Harvey was not told about that;

(b) on 6 July 2022, Kate and Luke engaged their current solicitors, informed them that Harvey was no longer a director of the various companies, and executed a revocation of the power of attorney that would otherwise have allowed Harvey to unwind the reconstruction so far as it allowed for Kate and Luke to have greater involvement in the business; and

(c) Kate, Luke and Helen instructed their solicitors to refuse Harvey's request for an independent opinion as to his capacity.

[296] Harvey had reason to distrust the assessment that had been made of him by Dr Khateeb. It is clear from the notes that Harvey did not respect Dr Khateeb and Dr Khateeb, not unnaturally, did not want to engage with him again. It is not a matter of deciding whether one or the other was at fault – the point is that the attitude expressed by Harvey did not provide the basis for the formation of a disinterested opinion.

[297] A substantial criticism, by the respondent, of Dr Rosenfeld's revised opinion concerned his views on Harvey's ability to deal with financial matters and his "impaired decision making". Dr Rosenfeld relied upon Mr Holmes' affidavit and accepted that Harvey could not recall the significant decisions made about the business a year ago and that Harvey created "elaborate situations to explain why people are picking on you or taking advantage of you: that's called paranoia."

[298] Dr Rosenfeld was cross-examined about his understanding of the restructure. He did not refer to the minutes of any of the meetings to assist his understanding of what had occurred. Therefore, he was unable to test the accuracy of Harvey's account. He did refer to Harvey's express concern about his tax liability. He said that the issues around the tax bill were contained in Mr Holmes' affidavit and that:

> "there was a tax – a tax accounting for the transfer of properties and that he had approved that – those transfers and that he could not recall that he had been told and agreed to that – the creation of those tax bills."

[299] He agreed that his line of reasoning was that: "if he couldn't understand why there was a large tax bill in his name, somehow he must have misunderstood or forgotten the transaction."

[300] He went on to say:

> "I don't understand the basis of his financial affairs and tax bills, but if his accountant had explained to him that the transactions would encounter a big tax bill, and if the accountant then indicated that he had [indistinct] that he had agreed to that, then that's the basis on which my views were created."

[301] Dr Rosenfeld readily agreed that he did not understand the components or effect of the restructure. And he cannot be criticised for that. But it makes it very difficult for his evidence to be accepted – namely that Harvey had forgotten the details – when that could not be tested given Dr Rosenfeld's lack of understanding of those details. Further, Dr Rosenfeld had not discussed this with Harvey because he only became aware of these matters after he had had his only interview with him. It was impossible, then, for him to adequately test Harvey's account of the changes to his

business both because Dr Rosenfeld did not understand them and because he only became aware of these changes after he had seen Harvey.

Was Harvey susceptible to influence?

[302] The applicants' argument on this point was not so much that Harvey was susceptible to influence but that Mr McGifford had "a considerable capacity to influence the views held by Mr Marrable". That, the applicants say, "makes an elderly man, with cognitive impairment and memory failing, extremely vulnerable."

[303] This issue is relevant to the prerequisite for capacity in s 41(1)(a) of the Act, namely that the principal must be "capable of making the enduring power of attorney freely and voluntarily".

[304] The applicants have a dislike of Mr McGifford which is not difficult to understand. To them he was an interfering busybody who was stoking Harvey's feelings of ill will towards them. His behaviour (considered below) was, at times, inappropriate and interventionist. They submit that "all the material demonstrates the pervasive presence of Mr McGifford in Mr Marrable's life in the last 12 months."

[305] In order to deal with this contention, it is necessary to go into a little detail.

[306] At various points Mr McGifford portrayed himself as someone who had known Harvey, and been a part of his life, for a long time. Some statements by Harvey can be understood as affirming that.

[307] Jason McGifford first met Harvey in 1981 when he was 12 and worked in the bakery after school on two days a week. In 1985 he started a baker's apprenticeship and left the bakery in July 1990. From then until 2018 he saw Harvey on a very low number of occasions and most of those encounters were fortuitous. He had little other than incidental contact until June 2019 when he invited Harvey and his wife to come to his house. There was then no evidence of contact until Christmas Day 2021. To say, as Mr McGifford does in one of his affidavits, that he and Harvey had a friendship spanning a period of 40 years greatly exaggerates the true position.

[308] Mr McGifford has become closer to Harvey in the last few years. Harvey spent Christmas 2021 and Easter 2022 with Mr McGifford and his family. This was well before Harvey's admission to hospital. Mr McGifford has won Harvey's trust but, in doing so, he has exacerbated Harvey's mistrust of Luke, Kate and Helen. He has also portrayed himself to others as having a longer and closer relationship with Harvey than is the truth.

[309] When Harvey was in the hospital, Mr McGifford did provide him with companionship and did accompany him on gate leave for various purposes. The applicants say that his conduct should be regarded, at least, as suspicious. He surreptitiously filmed or audio recorded private discussions held by Harvey with his

family and with hospital staff. He accompanied Harvey to his bank when he sought to withdraw money but he did not record those kinds of matters. His actions caused him to be distrusted by Harvey's family. Harvey's wife, Judy, said that she could not trust Mr McGifford "as far as she could throw him" and did not trust him in relation to Harvey's finances. Her attitude led her to decline to accept a joint appointment with Mr McGifford as Harvey's attorney.

[310] I do not doubt that Harvey did rely on Mr McGifford during Harvey's hospitalisation. And that Mr McGifford's behaviour at various times was resented by the applicants. But merely being influenced by someone does not mean that a person is not capable of making an EPOA freely and voluntarily. While the criticism of Mr McGifford's behaviour may be justified and some of his actions may be unworthy, unless his behaviour led to Harvey making decisions about his EPOAs which were not free and voluntary then they are of little moment.

[311] The applicants, in general, could not understand why Harvey would seek companionship with a person who was 32 years younger. They infer a sinister motive – Luke said that Mr McGifford was "as close to a conman as you probably get." The applicants, in their evidence, asserted various examples of improper influence including the allegation that Mr McGifford was trying to "set Harvey up with his [Mr McGifford's] mother". This was another example of the bitterness which existed on the part of the applicants towards Mr McGifford.

[312] Underlying much of the criticism of Mr McGifford by the applicants is the belief that Mr McGifford was intending to take advantage of Harvey or become, in some way, a beneficiary of his financial success. If that had been Mr McGifford's intention then he would not have, as he eventually did, agreed to be one of Harvey's attorneys. That position is hedged about with many prohibitions designed to prevent an attorney from obtaining a financial advantage through that position.

[313] The maker of an EPOA may rely on others for legal, financial and personal advice both before and after making the EPOA. Reliance is not the same as influence which overrides a free and voluntary act. I do not accept Professor Rosenfeld's view that "all sorts of indications I've taken from all over the place that really indicate that Mr
Marrable was very susceptible to other people helping him with his life, and he still is, and he will be …" He was pressed on that point and gave a very vague response. He did say that Harvey required other people to assist him with various things. That is not disputed. But it is not a sign, let alone proof, that Harvey's decisions were not made freely or voluntarily.

Did Harvey suffer from dementia at the relevant times?

[314] Dr Jones and Dr Khateeb diagnosed Harvey as having dementia when he was in hospital. Dr Jones' opinion was based on Dr Khateeb's report.

[315] Dr Rosenfeld said he was not "suitable for a dementia unit", "it would have been completely inappropriate" for him to be put into a dementia unit, the assumption that all old people go into dementia units is "exactly [the] incorrect thing to do for a man like Mr Marrable", and "he would never have been accepted for a dementia unit." He said that Harvey did not have "the behavioural and psychological disorders of dementia".

[316] Professor Morris diagnosed Harvey with "mild cognitive impairment amnestic type" rather than dementia.

[317] For the reasons given above, I do not attach much weight to Dr Khateeb's opinion. On the other hand, the two geriatricians who gave evidence held similar opinions and I prefer their diagnoses. Harvey did not have dementia.

Did Harvey lose capacity?

[318] The applicants argue that Harvey lost capacity on 8 June 2022 and did not recover it. They base that contention on the following:

(a) Dr Jones opined that he had lost capacity;

(b) Professor Morris appeared to accept that he had suffered from "a transient condition that impaired his capacity". He did, though, say that that condition had resolved;

(c) Mr Pharmacis gave instructions to Ms Anderson (which she set out in her report) that: "Harvey instructs the blood infection resulted in the temporary loss of his capacity. The septicaemia was treated, and our client regained his capacity …";

(d) Mr Pharmacis sent correspondence on behalf of Harvey which contained admissions of a temporary loss of capacity in terms similar to those described in the instructions to Ms Anderson; and

(e) in a meeting with the directors of Homestyle (the purchaser of Gold Coast Bakery) Mr Pharmacis told those people that Harvey had had a temporary loss of capacity caused by a blood infection.

[319] The applicants argue that the loss of capacity was not temporary and that, among other things, there was no infective process affecting incapacity at the time of Dr Jones' assessment such that "recovery" could be expected. For the reasons I have already given I prefer the analysis of Professor Morris. The other matters relied upon by the applicants relate to Harvey's performance in giving evidence which, as I have held, is not relevant to the issues I need to decide.

[320] Dr Jones' opinion was confined to the time at which he gave the diagnosis. He accepted that he did not "recognise the correctness or otherwise of that diagnosis

after that date". In one of Dr Rosenfeld's reports he noted that Dr Jones had failed to indicate the nature and severity of the conditions that led to the functional and cognitive defects, and that he had not indicated whether those conditions have led to a temporary or permanent impairment.

[321] It is, I think, appropriate to record that Dr Jones' view of capacity was shaped by his approach to the assessment of Harvey's capacity. He saw the capacity to make decisions about financial and personal matters as a collective because he did not consider capacity to be capable of separate analysis and result. He thought that "distinctions between elements of someone's cognition such as, for example, capacity to make a choice about a lifestyle such as where one resides would, to [his] mind, overlap extensively with capacity to make financial decisions because both would be intertwined." He did not attempt to assess Harvey's capacity for financial matters and his view of "capacity" was not consistent with the manner in which it is dealt with in the Act.

[322] The gist of the applicants' submissions revolves around Harvey's ability (or lack thereof) to recall the details of the restructure. They submit that: "this is the benchmark by which Mr Marrable's present ability to understand his financial circumstances ought to be measured." They go on to submit that:

> "Mr Marrable is now unable to recall the restructure of his assets in 2021 … That he cannot do so is conclusive as to his impaired capacity for complex financial matters. Without the benefit of an understanding of why he effected a restructure of his assets in 2021, Mr Marrable does not possess the requisite understanding to make decisions about whether he should unwind that transaction. He is not able to judge whether the costs (in the sense of taxes and duties) which he will incur are wisely expended."

[323] I reject that argument. Capacity, or the lack thereof, is to be determined by reference to the provisions of s 41 of the Act. The error which underlies the argument advanced by the applicants is condensed in this submission:

> "While it is true that Mr Marrable has the benefit of a statutory presumption of capacity, had Mr Marrable had any true understanding of the transactions, or why he carried them out, the court would rightly have expected him to give evidence of it."

[324] That, with respect, reverses the onus and attaches the decision to an irrelevant time, namely the hearing in this court.

[325] I am satisfied that the condition which required Harvey to be hospitalised also caused him to be temporarily unable to engage in the decision making necessary to revoke an EPOA. I am also satisfied that that temporary condition had resolved by the time Harvey consulted Mr Pharmacis.

[326] I turn now to the issues which need resolution.

Have the applicants rebutted the presumption that Harvey had the capacity to revoke his EPOAs on 27 and 28 June 2022?

[327] The applicants contend that there is "no evidence that Mr Marrable understood any of the matters contained in section 41(2) of the POA Act in relation to the enduring power of attorney which he was revoking" and "the available evidence supports a finding, at the very least, that Mr Marrable did not understand when the powers which he granted to Luke, Kate and Helen commenced or ceased."

[328] I have found that, by the time Harvey consulted Mr Pharmacis, any temporary incapacity had concluded. It follows, then, that on this application it is unnecessary for evidence to be advanced that Harvey understood the matters contained in s 41(2) of the Act. It is presumed.

[329] The following, though, is relevant to the argument advanced by the applicants.

[330] By 14 June 2022, Harvey was concerned that he needed to have a licence in order to drive, and that he was "halfway through buying a property for $2.5 million … and I am now in this situation that … it's taken out of my hands." He was able to discuss this with Helen and Luke and make the point that he was using his money, that it was not done as a family, and that it was done on his decision. He also expressed the clear wish: "well, let's put it this way, I do not wish to lose my freedom and so I do not therefore wish to go into a nursing home where my freedom is restricted." He also understood that his decision-making was restricted by the activation of the EPOA. When he was told that he could go home, after speaking to Jennifer Irwin [from Home Instead] and after "you've worked out a plan that everybody's agreeable with", then he said: "well, that's going to be my problem, because I only need a disagreement with one of them and I might as well … throw my hat out the window and follow it."

[331] Harvey had an understanding, at a practical level, of the effects of the EPOAs being activated.

[332] He consulted Mr Pharmacis on 27 June 2022. The meeting took about five hours and was attended, at various times, by Mr Pharmacis, Mr Hayes, Mr Blond, Mr McGifford and Harvey.

[333] Mr Pharmacis had a limited knowledge of the intricacies of the Act. He consulted Mr Hayes who is an accredited specialist solicitor in this field. Mr Hayes did not make contemporaneous notes of the telephone consultation on that day. That consultation took about half an hour and, according to notes made by Mr Hayes nearly three months later, he was told by Mr Pharmacis:

(a) that Harvey had engaged him to terminate the personal EPOA; and

(b) that Harvey didn't want his attorneys to continue to have a say as to where he lived or to be involved in his personal decisions.

[334] Mr Hayes spoke to Harvey who explained that he had recently admitted himself to hospital. He told Mr Hayes who his health attorneys were and said that Kate, Luke and Helen had raised issues with the hospital concerning his capacity and opposed his discharge because they had the view that he could not look after himself in his own home. Harvey said words to the effect that he wanted to be discharged so that he could go to his own home and that he no longer trusted his attorneys to make personal health decisions on his behalf as they were opposing his clearly expressed wishes. Discussion was had about the provisions of the Act and Mr Hayes read out the matters in s 41(2).

[335] Mr Pharmacis said that he spoke to Harvey before the conversation with Mr Hayes and that Harvey understood that "by revoking the enduring power of attorney [he] would be free to make his own decisions and manage his own affairs." He said that he had explained that "by revoking … he would be able to look after himself" or "give someone else that power if he didn't have capacity."

[336] Mr Pharmacis prepared a revocation document in a standard Form 6. It records, among other things, Mr Pharmacis' confirmation that Harvey appeared to have the capacity to make an EPOA. Mr Pharmacis confirmed that he believed that Harvey had the requisite capacity to sign the revocation.

[337] I am satisfied that Harvey:

(a) had the capacity to revoke the Personal EPOA;

(b) was aware of the consequences of the Personal EPOA having been activated while he was in hospital;

(c) wished to retain control of decisions concerning his accommodation; and

(d) had lost faith in Kate, Luke and Helen.

[338] Harvey returned to Mr Pharmacis' offices on 28 June 2022. He was accompanied by Mr McGifford. Christine Smith, an employee of the practice, was to see him. She had been told by Mr Pharmacis that Harvey was attending for the purpose of revoking his Financial EPOA but was not told anything about the meeting held on 27 June 2022. Her evidence was that she did not have a copy of the Financial EPOA during the consultation. That seems unlikely, given that Harvey had obtained a copy of that EPOA earlier that day from Mr Holmes. Ms Smith's recollection of that meeting was tenuous at best. She went through the motions by asking Harvey why he had come to see her. He said that he wanted to sign documents removing his attorneys as he no longer wished for them to be able to act on his behalf. She says she then explained how an EPOA worked and how a revocation worked.

[339] Harvey asked Ms Smith why he had to sign this document when he had signed on the day before. She told him that the revocation he was signing on this day was for financial matters whereas he had signed a revocation for personal matters the day before. She said that Harvey nodded and said that that made sense to him.

[340] There is no evidence to suggest that the capacity which Harvey had on 27 June 2022 had dissipated by 28 June 2022. The revocation is valid.

[341] Upon the revocation of the Personal and Financial EPOAs the applicants ceased to have an interest in these matters. It is sufficient to declare that the revocations were validly made, but I will deal briefly with the events which followed.

Have the applicants rebutted the presumption that Harvey had the capacity to make the 12 August EPOAs; and, have the applicants rebutted the presumption that Harvey had the capacity to make the 15 August EPOAs?

[342] Mr Pharmacis received Ms Anderson's report on 5 August in which she opined that Harvey had the capacity to make and revoke an enduring Power of Attorney. He then consulted with another solicitor and formed the view that "the safest approach was to reissue, based on the new medical report that we'd received." His intention in relation to making the further revocations was to bring them as close in time to Ms Anderson's report as he could. The applicants criticised Mr Pharmacis' omission to ask Harvey any questions about the terms of the EPOAs he was revoking. While it would be in keeping with sound practice to ask relevant questions of a person proposing to revoke or make an EPOA, the receipt of a recent professional opinion that the principal had the necessary capacity relieves a solicitor of the full extent of that burden.

[343] Mr Pharmacis took Harvey through the Form 6 revocation document including the matters in Part 2 – Statement of Understanding. Harvey also signed new enduring instruments appointing new financial attorneys and new health attorneys.

[344] Harvey had told Mr Pharmacis that he wanted to appoint new attorneys after he was discharged from hospital but, on Mr Pharmacis' advice, delayed until the receipt of Ms Anderson's report. Harvey had given consideration to a number of people who might be appointed as his financial attorneys.

[345] On the afternoon of 12 August 2022, Harvey executed new EPOAs and appointed Judy Marrable, Erin Falvey and Jason McGifford as his financial attorneys, and Judy Marrable and Brooke McGifford as his health attorneys.

[346] Mr Pharmacis advised Harvey that the appointment of Judy Marrable and Erin Falvey could be "controversial" as Judy Marrable was married to but separated from Harvey and that Erin Falvey was in her 80s. Harvey did not accept that advice. He expressed confidence in both of them and proceeded as he wished to proceed.

[347] On 15 August 2022, Harvey signed an EPOA appointing Philip Murphy and Brooke McGifford as his attorneys for personal matters, and Jason McGifford and Philip Murphy has his attorneys for financial matters. He was asked when giving evidence what prompted him to appoint Mr McGifford and Mr Murphy as his attorneys and he said that he saw qualities in them of honesty, integrity and responsibility.

[348] The appointments made in August took effect immediately, that is, they were not triggered by a lack of capacity. Harvey was aware of that and expressed his wish for that to occur.

[349] Harvey had the capacity to make these appointments – not just because of the presumption afforded him under the Act. He demonstrated that he was making the appointments freely and voluntarily and, in his discussions with Mr Pharmacis, demonstrated that he understood the nature and effect of the documents.

Conclusions

[350] On or about 8 June 2022, Harvey Marrable temporarily lost the capacity to make decisions for personal and financial matters. The 9 December EPOAs commenced at that time.

[351] On or shortly before 27 June 2022, Harvey Marrable regained the capacity to make decisions for personal and financial matters.

[352] The 9 December EPOAs were validly revoked on 27 and 28 June 2022.

[353] I will hear the parties on the appropriate form of orders and costs.