

IN THE SUPREME COURT

OF QUEENSLAND

No. 750 of 1995

[Sinnamon & Ors v. Proe]

BETWEEN:

IVAN BENJAMIN SINNAMON, ESTELLE JANE DRYNAN,
ROSS BRIAN TAYLOR & NORMAN JAMES HENRY

Plaintiffs

AND:

DAVID JAMES PROE

Defendant

JUDGMENT - THOMAS J.

Delivered: 4 September 1996

**CATCHWORDS: WILLS, PROBATE AND LETTERS OF ADMINISTRATION -
Making a will - Proof in Solemn form of will made by 93 year old testator -
Testamentary capacity - Lack of knowledge and approval - Undue influence.**

Counsel: Mr S. Williams QC with him Mr R. Whiteford for the Plaintiffs
Mr D. McGill with him Mr A Wilson for the Defendant

Solicitors: George Hatzis & Associates for the Plaintiffs
Biggs & Biggs Solicitors for the Defendants

Hearing dates: 29 July 1996 - 5 August 1996

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OUTLINE OF FACTS	5
The PT Will - 7 May 1993	12
Medical Assessments	19
The 18 June Will	22
Inter vivos Transfers	26
Observations on these wills	27
Events from August 1993	28
Incident of 6 September 1993	29
Sir Hercules' Birthday Party, November 1993	29
ISSUES	31
Testamentary Capacity	31
Knowledge and Understanding of the Wills	35
Undue Influence	37
CONCLUSION	44
APPENDICES	45 & 46

This is an action for proof in solemn form of the will of Sir Hercules Sinnamon executed on 18 June 1993. It will be referred to as "the 18 June will". The plaintiffs are the four executors, two of whom benefit directly and extensively by virtue of that will. The defendant David Proe is a minor beneficiary.

The issues raised against granting probate of the 18 June will are lack of testamentary capacity, lack of knowledge and approval of its contents and undue influence of two of the plaintiffs (Ivan Sinnamon and Norman Henry).

Mr Proe has propounded a will made only relatively shortly before the 18 June will, namely a will of 7 May 1993. During the proceedings that will has been referred to as "the PT will" presumably because Perpetual Trustees was included as an executor. Under the PT will Mr Proe and his siblings would be entitled to a slightly larger benefit. I have the distinct impression that Perpetual Trustees has had more input into the defence in this case than the Proes. Under the 18 June will, Perpetual Trustees is no longer an executor, and Ivan Sinnamon and Norman Henry would each obtain very substantial benefits which were not conferred by the PT will. The plaintiffs allege that the PT will is ineffective on the ground that it was revoked by a later valid will namely the 18 June will, and alternatively on the basis that its maker did not know and approve its contents. This latter argument raises the question of misunderstandings between Sir Hercules and those advising him at the time.

Sir Hercules Sinnamon was born on 13 November 1899 and died on 27 February 1994. The wills which he made since 1963, all of which have been referred to to some extent in these proceedings, include the following instruments:

- | | | | |
|----|------------------|-------------------|---------|
| | 1. | 5 December 1963 | Will |
| | 2. | 24 September 1968 | Will |
| | 3. | 28 November 1973 | Will |
| 4. | 23 November 1989 | Will | |
| | 5. | 11 December 1989 | Codicil |
| | 6. | 20 April 1990 | Will |
| | 7. | 1 May 1990 | Codicil |
| | 8. | 13 November 1990 | Will |

- | | | |
|-----|------------------|---------|
| 9. | 14 November 1990 | Codicil |
| 10. | 20 March 1991 | Will |
| 11. | 22 November 1991 | Will |
| 12. | 16 April 1993 | Codicil |
| 13. | 30 April 1993 | Will |
| 14. | 7 May 1993 | Will |
| 15. | 18 June 1993 | Will |

The instruments numbered 1, 2 and 3 were drawn by Perpetual Trustees (formerly Queensland Trustees). Those numbered 12, 13 and 14 were drawn by solicitors in circumstances in which a former manager of Perpetual Trustees (Mr Ball) was directly involved in the dealings that led to their creation.. All the other instruments were drawn by a Toogoolawah solicitor Mr Noel Williams, and by his successor in practice, Mr Brian Norman. Exhibit 2 attempts a precis of the dispositions made under the wills and codicils from 1989 but its description of the requests is not entirely accurate. It does however enable a broad picture to be obtained of the major changes made over the last twelve instruments. I have prepared a schedule (attached to these reasons) of the three most important wills in the present proceedings, namely those numbered 11, 14 and 15 above.

Sir Hercules Sinnamon remained a bachelor throughout his life and left no issue. He was one of eight children and at the time of his death was survived only by two brothers (Arthur and Ivan), one sister (Violet), and by the families of a deceased brother (Cecil) and of a deceased sister (Mabel). His sister Mabel had married Victor Proe but they both predeceased Sir Hercules. Their son Thomas James Proe also predeceased Sir Hercules, but his four children, David, Robert, Julie and John Proe are the grandchildren of Mabel Baker, and it is as one of her direct descendants that David Proe's entitlement exists. The relevant bequest is "to the children of my late sister Mabel Baker".

The Sinnamon family tree was presented as an exhibit, and a slightly adjusted form of this is also included as an appendix to these reasons. In all his wills, apart from dispositions for charitable purposes, Sir Hercules showed a continuing intention to benefit his siblings per stirpes. The only

non-family beneficiary was Norman Henry, who first appears as a beneficiary in 1989.

For most of his long life Sir Hercules was an employed accountant with National Mutual in Brisbane. He was interested in investments and acquired some valuable properties on the outskirts of Brisbane. Perhaps the most significant of these was the family property known as Glen Ross which he purchased from his father's estate in 1944. This property (now described as occupying about 200 acres) is situated in the developing area between Jindalee and Oxley with a frontage to Seventeen Mile Rocks Road, Goggs Road and Sinnamon Road.

Sir Hercules' knighthood, apparently conferred at about the same time as that of Sir Johannes Bjelke-Peterson, may be inferred to have been obtained at least in part upon the representation that the whole farm property would be donated to the State for a public purpose such as the maintenance of a model farm which future generations could visit, and for other purposes including the preservation of historic farm buildings on the site. Final arrangements were never made in these respects during his lifetime. The 18 June will excises a mere one hectare, containing the old farm buildings, and leaves it to the Minister for Education on conditions stated in the will. These conditions apparently are not satisfactory to the Minister.

At the time of the making of the 1993 wills that are in issue, Sir Hercules' estate was of very considerable value, and some evidence suggests that the farm property was then worth about \$6 million and that his other investments (the residue) were of a value of about \$12 million. However by the time of Sir Hercules' death (only eight months later) the estate had substantially disappeared, the residue now being, as I was informed by counsel, only \$1.4 million. It seems that extensive inter vivos dispositions were made by Sir Hercules and/or those who held his enduring powers of attorney (Ivan Sinnamon and Norman Henry) and that the proceeds were distributed by them to themselves and others in the proportions of the will that they seek to uphold. Also, within a few weeks of the 18 June will Sir Hercules had transferred to them, without consideration, the whole of

the farm property.

In this case there are very marked conflicts in the evidence, and much of it is quite irreconcilable. Some of the evidence is marred by preconceptions, family bitterness, recrimination and self-interest. A deal of it is obviously lacking in objectivity, and as reconciliation of it is impossible, it has been necessary for me to reject a good deal of evidence.

I indicate at this stage that I have not found it possible to accept in general the evidence of Mr Ivan Sinnamon, or that of his daughter and co-plaintiff Mrs Drynan. I am also unable to rely on the evidence of Mr Heck who is the son-in-law of Mr Norman Henry. Some of the evidence of these witnesses is inconsistent with that of other witnesses whom I find more reliable; some parts of their evidence are, I think, inherently unlikely in the circumstances that are shown to have existed; and there were more than usual signals in the witness-box of prejudice, resentment, poorly concealed emotion, and a lack of objectivity. My perceptions, and what I regard as the inherent probabilities will emerge during the recitation of facts which will now be presented.

It may be mentioned that Mr Norman Henry, against whom undue influence is alleged, did not choose to go into the witness-box.

OUTLINE OF FACTS

The two persons who had most contact with Sir Hercules over the last seven years of his life were his brother Ivan and an acquaintance Norman Henry. It is difficult to obtain any reliable insight into Sir Hercules' lifestyle over that period from the evidence of Ivan Sinnamon, and Mr Henry has not provided any evidence. The picture which I must therefore construct must be made up from particular incidents and virtual snapshots of Sir Hercules as described from time to time by the various witnesses.

Sir Hercules commenced work with National Mutual at age fifteen in the year 1914. He eventually qualified as an accountant and became a competent investor. When his father died in 1944 he was the purchaser of the Glen Ross property from his father's estate. When he retired in 1964, after fifty years' service with National Mutual, he retired to the Glen Ross property. He was probably not a particularly proficient dairy-farmer in his own right, and I accept that his brother Ivan Sinnamon provided valuable managerial assistance as and when requested, especially after the 1970s.

Between 1963 and 1973 he made three wills drawn by Queensland Trustees. These left his farm properties in the area for the benefit of his residuary beneficiaries (other members of the Sinnamon family in specified proportions). He directed his trustees to carry on the farms for at least two years after his death, and thereafter for a reasonable time in their own discretion. He excepted twenty acres which was to go to the Methodist Church. The 1973 will cancelled the gift to the church and instead left that twenty acres to the National Trust of Queensland "for historical purposes" with the *wish* that the property be maintained and run as a miniature dairy, and with a *request* that if practicable a direct descendant of his grandparents should reside on the property as caretaker and manager.

In 1980 he asked Mr Ball (then the general manager of Queensland Trustees) to submit a nomination for him (Hercules Sinnamon) to be knighted. A major point to be made in the nomination form was that he would be leaving a fine property to the public in perpetuity. He mentioned what Mr Ball described as a "grand vision" to have the farm carried on as a model dairy so that city children could understand something of rural life by visiting the farm. In due course Mr Ball and Sir David Longland nominated him for an honour. The draft of the form, which was prepared by Hercules Sinnamon (as he then was) included the statement that "he has planned for his fine property to be converted to a pioneer village for the enjoyment of future generations". Some time after the forwarding of the nomination, presumably during the investigatory period, Sir

Johannes Bjelke-Peterson, David Longland and Mr Ball visited Hercules Sinnamon at Glen Ross and examined the property. The inspection was of the whole property, and Mr Ball had no doubt that the proposed gift was of the whole of that property.

In due course, in 1985, Sir Hercules was knighted and went to London to receive his honour.

It was probably in the following year 1986 when Mr Norman Henry first came upon the scene in the sense of performing services for Sir Hercules at his request. Very little is known about Mr Henry but it is agreed he was at that time approximately sixty years old. Sir Hercules was then eighty-seven. I infer that he became a visitor to the property and that he provided considerable domestic assistance eventually fulfilling Sir Hercules' daily needs, running his messages and perhaps assisting in business matters.

In 1989 Sir Hercules fractured his left hip and his mobility was restricted thereafter. Indeed this would seem to be the commencement of a significant decline, and of a need for considerably more assistance. This probably was the commencement of the daily extensive service of Mr Henry, upon whom Sir Hercules became dependent.

In October 1991, Sir Hercules gave enduring powers of attorney in favour of Ivan Sinnamon and Norman Henry.

By this time Sir Hercules had made fresh wills conferring substantial benefits upon Ivan Sinnamon and Mr Norman Henry. Between the end of 1989 and 22 November 1991 he had made eight wills or codicils drawn by solicitors Williams and Norman of Toogoolawah. Sir Hercules had been introduced to these solicitors by his brother Ivan, for whom Mr Noel Williams had acted for some time. The gist of these wills was to leave the farming lands (and some other lands as well) to Ivan Sinnamon and Norman Henry "on the condition that they shall continue to carry on the farming business as a going concern on the said property for as long as is practically possible during their lifetime". Some of the wills directed the excision of a strip of property about 82 or 90 metres wide over an area including the old farm buildings. This area was stated to be "approximately 20 acres" but the metes and bounds suggest it would be closer to 10 acres. This limited area was to be held for the Queensland Department of Education "as an education centre . . . in conjunction with the Pullenvale Field Study Centre" and it was to be named "The Sir Hercules Sinnamon Pioneer Farming Community".

The March 1991 will added the requirement that the dwelling "Glen Ross" be kept as a museum. The limited gift to the Minister for Education was deleted from the will of 7 October 1991 and the codicil of 22 November 1991, but was reinstated in the will of 20 December 1991.

A few months later Mr Henry started to find it too difficult to give Sir Hercules the daily help that he needed and he set in train the process of having Sir Hercules evaluated for reception to an appropriate nursing home. On 14 February 1992 Dr Daniels, a psycho-geriatrician visited Sir Hercules at Glen Ross. On the basis of observations, information obtained from Sir Hercules and information supplied by Mr Henry, including his inability to continue to provide assistance to Sir Hercules at the present level, Dr Daniels reached the opinion that Sir Hercules was incapable of handling his own affairs.

Dr Daniels inter alia noted:

"According to Norman Henry the patient has had quite a few transient ischaemic attacks over the last three months, and as a result of these had his periods of confusion. Approximately three months ago, he insisted on going to Canossa Hospital at Oxley to see an old female acquaintance who he said was aged sixteen years, and she was in fact eightyfive."

Dr Daniels also noted that "according to Norman Henry his cognitive functions vary considerably from day to day". Dr Daniels further noted (significantly in my opinion), "At present Sir Hercules can be easily manipulated by outsiders and has to be watched carefully". He observed that there would be some days during which he would be able to manage his affairs, but on other days he would not, and that variations of such skills from one day to the next, particularly having regard to the large value of the estate, meant that he was not capable of managing his affairs.

Dr Daniels specifically suggested that the proper procedure would be to apply to the Supreme Court for a protection order under the *Mental Health Act*, and strongly recommended that his recommendations be given thoughtful consideration.

Unfortunately those recommendations were not followed. Those who had his power of attorney retained it and he was admitted to Bethesda. Dr Daniels noted that there was clinical evidence of an organic brain syndrome which eventually might lead to a severe dementia. He saw no reason why Mr Ivan Sinnamon and Mr Norman Henry could not continue to manage the estate "under the guidance of the Public Trustee", but no such guidance was sought.

Sir Hercules was also assessed by Dr Berry before admission to the Bethesda Nursing Home at Corinda, which is run by the Wesley Central Mission. Dr Berry provides what may be described as a snapshot of Sir Hercules at the time of her examination on about 1 April 1992. It includes

"On examination, he was extremely deaf, reminisced ad nauseam in a very loud voice . . . his rational thinking showed poor judgment. Abstract thinking was poor . . ."

She considered that he had early Alzheimer's disease and displayed poor insight into his increasing physical frailty and "dependence on a carer who now feels it is beyond him". She stated that he required urgent nursing home placement, that it was hoped he would stay in the Wesley Hospital awaiting a bed, that his perception was that he was returning home and that he may have to be coerced. Dr Berry concluded that the testator's capacity to read and understand a will would certainly fluctuate from day to day, and would depend for example on the complexity of the will and the circumstances in which it was read over.

After a settling down period in Bethesda he related fairly well with the nurses and staff, although communication presented considerable difficulties. He was very very deaf and needed to use hearing-aids. Not surprisingly he was a better talker than listener, engaging in a good deal of reminiscence, although he also responded rationally upon day to day matters.

During his period in Bethesda Sir Hercules was often incontinent of urine and sometimes of faeces.

On 12 July 1992 there was a disturbing incident. A young man, apparently employed on the farm as a share-farmer brought his family to see Sir Hercules and invited him to come to the Brookfield Show. Sir Hercules accepted. When Norman Henry heard about the planned outing he abused Sister Elliott for permitting it to occur. She recalls him shaking with anger. She defended Sir Hercules' right to decide for himself. Norman Henry refused to accept this, indicating as the cause of his anger that he (Mr Henry) had had no prior knowledge of it. She was concerned at what might have happened to the young man's position after this. A nursing note of 16 July 1992 records Norm "very upset about Sir Herc going out with anyone other than family". Dr Labrom was involved, and seems to have supported the share-farmer's suggestion and Sir Herc's own right to decide if he wanted to go.

Mr Henry had also objected when Ivan Sinnamon and Estelle Drynan had made plans to take Sir Hercules to their home at Esk for Christmas in 1992.

It is difficult to derive a great deal of assistance from the nursing notes and from the supplementary evidence of a number of nurses and other persons (including Mr Radcliffe) who were called by respective parties concerning Sir Hercules' period in Bethesda (10 April 1992 until his death on 27 February 1994). The nurses learned how to handle him and to persuade him to accept his daily needs. Some of them described him as "very strong-willed" but I do not think that such evidence readily translates into the fields of testamentary capacity or undue influence at the hands of those who knew his affairs and upon whom he depended.

For example, Sister Elliott, who was one of those who had Sir Hercules' care until early May 1993, found communication with him "very difficult" because of his hearing impairment, and as a result that he did not always understand what was being said to him. She also considered that his comprehension was sometimes confused. Her communication with him tended to be "non-verbal". She considered him probably unaware of his deficits, instancing his belief that he could live at home. She also referred to him as "determined and strong-willed" but the only example she gave of this was that if he refused to eat a meal, he could not be persuaded to do so.

His main visitors were his brother Ivan, Ivan's daughter (Mrs Drynan) and a niece Eleanor Bardwell. But by far his most constant visitor was Norman Henry who visited him every day. He remained Sir Hercules' carer, arriving early in the morning, shaving him, talking to him, running messages for him, and apparently acting (as counsel for the plaintiffs described him) as a man-servant. It would seem that on average he spent several hours with Sir Hercules every day. Sister Young reported that she often heard money or the farm mentioned. She never saw an argument but "never saw much laughter either".

The PT Will - 7 May 1993

At the end of 1992, Sir Hercules decided to make contact with his former acquaintance at Queensland Trustees, Mr Ball. There is little doubt that his motivation was desire for another honour, this time an Australian honour. The suggestion that he sought to make contact with Mr Ball for the purpose of discussing or changing his will is in my view fatuous. Mr Ball had not been involved in the making of the earlier Queensland Trustees wills. His involvement had been as the nominator and orchestrator in a process of obtaining the knighthood. If Sir Hercules had wanted advice on changing his will he had only to write to Perpetual Trustees (if necessary through his niece Eleanor Bardwell) with a request that they send someone to him. His previous association with Mr Ball had been in relation to honours, not wills. I am confident that Sir Hercules' real purpose in attempting to make contact with Mr Ball at around Christmas-time in 1992 was to obtain his advice and assistance in obtaining a further honour.

Sir Hercules sent Mr Ball a card (written for him by someone else) with the words "I would be overjoyed to see you if you could possibly call any day. Best wishes and kind regards, Herc". Mr Ball did not immediately respond, and in February 1993 Sir Hercules asked his niece Eleanor Bardwell to write a letter to Queensland Trustees (by this time Perpetual Trustees) to help trace "the former manager". On that occasion it seems likely that he could not recall Mr Ball's name. Mr Henry discovered that a request had been made by Sir Hercules to contact Perpetual Trustees, though how he found out is not known. Mr Henry seems to have assumed that any contact with Perpetual Trustees presented a potential for changing the existing will. He telephoned the then manager of Perpetual Trustees (Mr Barnett), adopting an aggressive stance. He stated that the will held by Perpetual Trustees had been superseded by a later one which appointed him (Mr Henry) an executor; that he (Mr Henry) was Sir Hercules' attorney; that Sir Hercules was in a nursing home, was very frail and that he did not have the capacity to deal with issues such as the nature of wills and

other business issues; and that given Sir Hercules' state of health, any visit from a representative of the company would not be welcome. Mr Barnett, I infer, was somewhat stirred up by this warning.

Mr Ball eventually responded to Sir Hercules' message *having first spoken with Mr Barnett*, visiting Sir Hercules at Bethesda on 16 April 1993. Mr Ball thought that Sir Hercules was bright and pleased to see him, and they discussed a number of topics. According to Mr Ball, Sir Hercules then produced a copy of his then latest will expressing concern about it and Mr Ball noted that Sir Hercules had apparently written a question-mark against clause 2(c) (which is the clause which leaves the farm to Ivan Sinnamon and Norman Henry).

According to Mr Ball's evidence he said that this seemed to be contrary to Sir Herc's grand plan and reminded him of the visit of Sir Joh Bjelke-Peterson and Sir David Longland, and subsequently the Minister of Parks (Mr Ivan Gibbs). Sir Hercules said "they" (presumably his solicitors) "told me I couldn't keep it in perpetuity". Mr Ball stated that he thought he could, and that if he wanted to be independently advised he would get a solicitor for him.

Mr Ball who is a prolific diary-maker, gave extensive evidence about this and other interviews with Sir Hercules. He attributes to Sir Hercules a number of unfavourable statements about Mr Norman Henry, including that he would have to be a "lunatic" to leave the Sinnamon heritage to someone like Norman Henry who was not family and whom he had known for about five years. He also attributes to Sir Hercules certain statements about the circumstances in which he was taken to Toogoolawah to sign a subsequent will. Such statements are receivable only as evidence of the state of mind of the testator at that particular time (Hughes v. National Trustees Executors and Agency Co of Australasia Ltd (1979-1980) 143 CLR 134, 149-150) and I shall in general make only passing reference to statements of this kind. Evidence from a number of other sources shows that Sir Hercules by this time had succumbed to the not uncommon habit of the very elderly who suffer from dementia of speaking ill of those who are not present.

Mr Ball moved very quickly. That same day after Sir Hercules accepted Mr Ball's recommendation of Corrs Chambers Westgarth as appropriate solicitors, he made contact with Mr Abernathy of that firm. It was decided to draw up a codicil forthwith, the purpose being euphemistically described as "to cover Herc's concerns for the weekend". The codicil was signed the same day between 5 p.m. and 7 p.m. This revoked the old clause 2(c) which had left the farm to Ivan Sinnamon and Norman Henry along with the \$1 million in ESANDA which that will had directed to be made available to Ivan Sinnamon and Norman Henry for the purpose of running the farm, and replaced it with a clause requiring the trustees to hold the same upon trust for the purpose of continuing the farming activities and to allow the public general access to the farm "for the general charitable purpose of educating the public . . .". During the next meeting between Mr Ball, Mr Abernathy and Sir Hercules, instructions were given that Perpetual Trustees be appointed as the trustee that would have perpetual trusteeship of the farm.

Despite the bulk of Mr Ball's notes and evidence, I have the impression that only half the story has been told. The assistance that Mr Ball offered Sir Hercules in obtaining an Order of Australia during this series of visits was hardly mentioned in evidence in chief, first receiving mention during evidence of the occasion when Sir Hercules signed the final PT will on 7 May. Mr Ball's evidence of that occasion includes a mention that he would come back with the papers for the Order of Australia after he had had a holiday. Mr Ball in fact called back with such papers on 26 May 1993. There is no mention of this subject matter in any of the diary notes. Mr Ball admitted that there had been a conversation about this "on the previous time" which I interpret as meaning one or more of his earlier visits. Whatever the occasion or occasions, Mr Ball's evidence is that Sir Hercules asked him to prepare some papers for the Order of Australia, upon which Mr Ball said "Who is it for?". Sir Hercules said "Me. Didn't I tell you?". Mr Ball replied "No" and he claims to have been surprised. That seems a little disingenuous because Sir Hercules was hardly likely to be looking for

honours for anyone else. After making a racially offensive comment Sir Hercules stated that he should be awarded some Order of Australia in addition to his imperial honour. Mr Ball then "took instructions" from him.

The desire for this honour was no passing fancy on Sir Hercules' part. The objective evidence suggests that it was foremost in his mind over an extended period. He wrote personal letters in his own hand to Mr Ball on the subject on 12 June, 24 June, 4 August and 5 September 1993.

I have the impression that the relevance of the obtaining of the honour has been considerably understated in Mr Ball's evidence. This particular point was not adversarially tested. Indeed Mr Williams QC on behalf of the plaintiff found it convenient to avoid any issue that might suggest Sir Hercules was easily influenced or that he was anything other than a competent, independent person.

The picture painted by Mr Ball of testamentary capacity and independent mind between 16 April and 7 May suits the plaintiffs who have the advantage of the slightly later will, as it tends to rebut the grounds upon which that later will is challenged.

In the event all I can do is indicate that I have serious reservations about the evidence of Mr Ball in these respects, and am satisfied that Sir Hercules' primary purpose in making contact with Mr Ball was to obtain his assistance in obtaining an honour. Whichever subject was raised first, it was inevitable that Sir Hercules' failure to carry out what Mr Ball described as "the grand plan" would come out. There was certainly a time, as Mr Ball describes, when the will of December 1991 was produced to Mr Ball. Whether that was the very first topic of the meeting does not matter. When he did so Mr Ball's response was "What happened to your grand plan?". Mr Ball was plainly disturbed either at the morality of the situation or at the apparent waste of the extensive effort in research in which he had participated with respect to it. (Transcript p 265, ll 32-56.) Mr Ball's understanding, prior to visiting Sir Hercules on 16 April, and thereafter, was that Sir Hercules intended to give for public purposes his entire farm property in perpetuity.

Mr Ball's diary notes are a subjective interpretation of what occurred. I cannot avoid noting the enthusiasm of Mr Ball for his task on this and other occasions when he pursued his objective of restoring what he believed to be the former position, including his visits on 28 April and 30 April 1993. The solicitors visited Sir Hercules consecutively on 28 April, 30 April, 5 May and 7 May 1993, also making copious diary notes. The purpose of the visits seems to have been to attempt to overcome the communication gap and to attempt to ensure that what they drew was in accordance with Sir Hercules' intentions. Despite their earnest endeavours, I am by no means satisfied that they succeeded.

The provisions, both in the former will and in the replacement documents were by no means simple. The land willed to Ivan Sinnamon and Norman Henry in 1991 set out twelve property descriptions of the land collectively described as "the farm", but that description included some property which was not part of the farm. It was also expressed in real property descriptions which had been superseded. Mr Abernathy endeavoured to update the real property descriptions and to delete from the descriptions of the farm the additional lots which had formerly been included. Underlying the whole exercise was Mr Ball's belief that Sir Hercules must have intended to give the whole farm for public purposes, without adverting to the underlying ambiguity in the term "the farm". There is considerable evidence suggesting that by the time of Mr Ball's arrival Sir Hercules had contemplated a more limited area as that upon which his public bounty should operate. The ideas which seem to have commended themselves to him include a museum in one of the farm buildings, and a "pioneer farming community" which would operate in a miniature way either on lot 12 (which was about 10 acres) or on an excised portion of lot 12 consisting of about 2½ acres.

It is likely that Sir Hercules had no adequate answer to Mr Ball's robust assertion that what he was doing was contrary to his previous "grand plan". I accept that Mr Ball reached the view that Sir Hercules agreed with him and that intended all the farm to be held in perpetuity "in order to preserve

the farm as a model of what dairy-farming can be so that city children particularly would visit and see and get a taste of country life". But I am not satisfied that Sir Hercules understood it in this way.

In discussing this plan with Sir Hercules, Mr Ball called the property "the farm" without distinguishing between the "pioneer farming community" area and the balance lands. When Mr Abernathy arrived later that afternoon with the codicil, he wrongly advised Sir Hercules that the effect of the codicil was that, if it became impossible to continue dairying on the balance lands, they would "fall back into the remainder of the estate". This advice was incorrect, because, given the general charitable purpose, upon supervening impossibility, the farm would need to be applied cy pres, and would not revert to the estate.

Each subsequent document proceeded on the premise in the codicil that there should be created a trust in perpetuity of the whole farm. This much is conceded by Mr Ball. I do not consider that any of the subsequent attempts to explain the new wills to Sir Hercules adequately corrected the errors already mentioned. During the long discussion of 5 May 1993 the lawyers and Sir Hercules were plainly not ad idem as to the property that was referred to. It seems to me that Sir Hercules probably used the term "the farm" on a number of occasions during this penultimate conference to mean the pioneer farming community area. It was a feature of the new PT will that the balance farm area would not be run by the government, but, inevitably upon the death of the natural trustees, would be run by Perpetual Trustees. When Sir Hercules asked who would pay to set "the farm" up and who would run it, the response was that it would be the Minister. Later in the same interview Sir Hercules indicated "that in relation to the running of the property . . . it would be silly if the Minister was going to be growing sugar on the property". The solicitors at that stage thought that he was confusing the community museum with other property which was to be run as a farm. One of the solicitors raised the question what Sir Hercules would want done with the farm if it could not continue forever for any reason. The question was never answered because the discussion changed

to one about the level of the rates, and the question was not persisted with.

At the end of the discussion the solicitors agreed to come back on Friday "with a new will incorporating the matters discussed".

It may well be that Sir Hercules understood the distinction between the pioneer farming community area and the farm as a whole, but his responses from time to time were inappropriate and reveal a confusion between the farm (as a whole) and the pioneer community's operation area. Generally speaking the lawyers seem to have used the term to mean the balance of the property. Evidence of subsequent statements to other persons such as Mr K. Webb, Mr Ross and Mrs V. Webb suggest that some confusion remained in Sir Hercules' mind on later occasions as to what he had done.

As the evidence ranges over many years, it is perhaps not surprising that different intentions emerged at different times. I am concerned with the mind of a very elderly man who, if he had testamentary capacity at all possessed it only marginally, discussing a proposed new will, which was by no means a simple one. He was confronted by Mr Ball (who was always of the view that Sir Hercules wanted to tie up the whole farm in perpetuity for public purposes) and solicitors, introduced to the matter by Mr Ball, who seem to have interpreted Sir Hercules' intimations of public purposes for a limited area to be intentions with respect to the whole farm.

If Sir Hercules desired to keep the farm in the Sinnamon family (except for the small excised portion with the old buildings), the PT wills defeated this, as in the very short-term future the farm would be solely in the control of Perpetual Trustees. I am not affirmatively satisfied that Sir Hercules understood that the will of 7 May 1993 (the PT will) would dispose of his property in this way.

Medical Assessments

Corrs Chambers and Westgarth took the precaution of obtaining the services of Dr Daniels and Sir

Hercules' general practitioner Dr Labrom to assess him on the occasion of his making the will of 7 May 1993. Dr Daniels recorded that Sir Hercules did not recognise him (but did not think that surprising) and that he was mixed up as to his date of birth.

Dr Daniels concluded on this occasion that the testator had testamentary capacity. Curiously some of the reasoning upon which Dr Daniels reached this conclusion confirms Sir Hercules' misunderstanding of the position. He records, "He knew that he had made a bequest to the Minister for Education for land at Sinnamon Park worth over \$6 million". That of course is not the case, and reveals ignorance of the Perpetual Trustee function. It should have been regarded as a negative factor, not a positive one. He also records, "The reason he wanted to change his 1991 will was that a bequest was made in his 1993 will because of a certain person being in the 1991 will, that on reflection he was unhappy with a 'bequest' and he wanted it deleted".

Dr Daniels seems to have assumed these statements to be accurate and therefore to support his testamentary capacity. He further asserts that "he is quite aware of the value of his property and the value of his estate", claiming it to be between \$10 million and \$15 million excluding the value of the dairy-farm. Whether that was accurate or not is not shown by the evidence, as the executors and those who have exercised his power of attorney did not favour the court with any evidence of value or dealings. But it seems reasonable to assume that the solicitors, who were present, gave Dr Daniels to understand that this was so, and as such it has been used as supporting the view that he had some idea of the value of his estate. He recorded a further statement by Sir Hercules that Norman Henry "wants \$2 million left to him" to compensate him for work in looking after Sir Hercules when he was ill, and that this had caused Sir Hercules a great deal of concern. When it is remembered that the effect of this particular will was to deprive Mr Henry of a half interest in the farm, a half interest in another valuable property and to reduce the residuary entitlement of Mr Henry and his wife from fifteen percent to one percent, the comment raises more concern than

comfort as to Sir Hercules' comprehension and understanding of the will which he then signed.

Dr Daniels went on to comment, "He is unsure of the contents of the previous will, that is the 1991 will, and I got the impression that the testator became a little mixed up regarding the 1993 will and the 1991 will". Despite this Dr Daniels opined that this did not affect his testamentary capacity "over all".

Dr Labrom also attended, and confirmed that the solicitors read out the will word by word and that on occasions Sir Hercules made changes that he thought were appropriate. He said he had the impression that Sir Hercules understood the will, and believed that anyone who could sit for an hour and a half going through word for word a complicated will had a capacity to understand what he was talking about. There is once again a circularity in that reasoning.

In addition to the two medical witnesses, both solicitors (Mr Abernathy and Ms Bourke) considered that Sir Hercules had sufficient mental capacity to make a will and that he understood the will which they presented to him. I am not satisfied however that they fully comprehended the cross-purposes that existed in relation to "the farm", and regard their assessments of capacity as of limited value.

Two medical experts were called who expressed hypothetical opinions. Each of them relied upon the medical evidence of Dr Labrom, Dr Daniels and Dr Berry and upon the medical notes. One of the main points addressed by them was whether there was any good reason to suppose that Sir Hercules' testamentary capacity on 18 June was any different from that of 7 May. Dr Hirschfeld was strongly of the view that no relevant medical event occurred in the interim which would produce a different level of testamentary capacity, and that if he was capable on 7 May he was also capable on 18 June. Dr Grant was considerably more reserved, both as to the starting point and as to the validity of projecting it forwards. He considered that after February 1992 there was diagnosed dementia, and that he would have had virtually no cerebral reserves. Such a person may experience marked fluctuations in his mental status within short periods of time. He states:

"Sir Hercules was an old man with a diagnosis of dementia due to arterial disease who was deaf, frail and physically dependant. He was frequently anxious. He was thus a very vulnerable person, easily frightened or influenced, especially by someone with whom he was in a dependent relationship. Cognitive deficits and memory problems would make him more vulnerable to influence. Being so old and deaf would also make him more prone to paranoid thinking."

He opines, and I accept this, that his cognitive status was at best borderline. He expresses some reservations about Dr Daniels' opinion, stating that it is open to serious question on two grounds. The first points out the existence of memory problems and the confusion about different wills, and I accept this criticism. The other is that Dr Daniels fails to take into account "the issue of undue influence". In this respect Dr Grant's choice of language was unfortunate. If, as I suspect, he had in mind the absence of cerebral reserves and the inability of a person to resist the ideation of whoever he happens to be with at the time, it is a relevant point, and one which Dr Daniels failed to discuss. If however Dr Grant is straying into the separate subject of undue influence then his discussion reveals an error. Counsel did not cross-examine on this point beyond getting him to reaffirm the statement in his report critical of Dr Daniels. I see no reason to assume that Dr Grant has made a fundamental error, and if his report is interpreted in the way I have first mentioned, it is unexceptionable.

Dr Grant thought it would be going too far to say that Sir Hercules' status on 18 June 1993 would probably be the same as that on 7 May. He considered that he would need to be assessed on each particular day at this stage in his life in order to form an opinion on testamentary capacity. He considered that someone so easily influenced as Sir Hercules might change his opinion from day to day depending upon the person he was with or the pressure he was under.

The 18 June Will

During the period when the PT will was being prepared Ivan Sinnamon was absent in Western Australia visiting his son's property. On his return to Esk, probably on 16 June 1993 he found a

letter from Sir Hercules stating that he wanted to see Ivan and that it had to do with his will. The following day he drove to Brisbane and was shown the new PT will. Ivan Sinnamon's evidence was conspicuously self-righteous, but he could not conceal his passionate disapproval of the PT will. Indeed, he had branded the earlier Queensland Trustees will of 1973 as the most iniquitous thing he had ever seen, although on analysis the iniquity is hard to see. Plainly he and Mr Henry were involved between 1989 and 1991 in the process by which Sir Hercules revoked the "iniquitous" Queensland Trustees will and made new wills with substantial dispositions in favour of Ivan Sinnamon and Mr Henry. (See the eight wills or codicils made between 23 November 1989 and 22 November 1991.)

That situation, which was no doubt satisfactory to Ivan Sinnamon and Mr Henry, as represented by the 22 November 1991 will, remained in place until it was rudely disturbed by Mr Ball's visit and the ensuing PT will. Not surprisingly Ivan Sinnamon also regarded that will as "iniquitous". It is in my view impossible for Ivan Sinnamon to have concealed his opinion or his outrage from his brother. The speed and manner in which the position was rectified is itself interesting, and gives cause for some concern. Although Ivan Sinnamon initially "swore to God" that Sir Hercules did not discuss with him any changes that should be made to the will, that is plainly erroneous. His later evidence, and other evidence including that of Mr Norman demonstrates clearly that Ivan was the person who later on that same day made contact with Mr Brian Norman (his own and Sir Hercules' solicitor) and gave instructions for the drawing of a new will, and in particular what was to go into that will. Essentially Ivan Sinnamon told Mr Norman that Sir Hercules wanted a will in the same terms as the one which had previously been prepared for him, and that the percentages in the residuary clauses were to be changed as well. The particulars of the changes were that the Proe family share of residue was to be reduced from fifteen percent to five percent, Arthur Sinnamon's share was to be increased from fifteen to twenty percent and Ivan Sinnamon's share from twenty-

five percent to thirty percent.

Of course the revocation of the latest PT will effected even more substantial changes to the then status quo.

On the following morning (18 June) Mr Norman had his secretary bring up the 1991 will on the office computer. The above changes were effected and a new will was prepared ready for signature.

He and his secretary called at Ivan Sinnamon's home and the three of them drove to Bethesda. The secretary (Mrs Utz) remained in the car. Ivan went inside alone, and sometime later emerged wheeling Sir Hercules outside to a bench under a tree. Sir Hercules and Mr Norman then sat on the bench and Ivan walked a short distance down the street which he described as fifty yards "so nobody could accuse me of trying to influence him". Considering the unusual circumstances, the diary notes made by Mr Norman of relevant attendances are quite unsatisfactory.

Ivan had taken Sir Hercules' copy of the PT will from him the previous day and had given it to Mr Norman. Ivan denied reading that will, but I cannot accept this, and consider it highly probable that he did. Mr Norman probably had it with him when he spoke with Sir Hercules on 18 June.

I accept that Sir Hercules told Mr Norman (with reference to the PT will) that he had "made a mistake". He asked Mr Norman to explain what would happen with the farm. Mr Norman told him that it meant that the trustees would look after the farm forever and that when the natural persons died Perpetual Trustees would run the farm. At this Sir Hercules became angry and said that no one other than his own family was going to look after the farm. (It may be noted in passing that Mr Norman Henry was not "family".) Sir Hercules then asked whether Mr Norman had brought a new will and was informed that he had.

At one stage Sir Hercules commented that he had been "forced" to make the will of 7 May. That may be construed as the statement of a person who felt he had to make an excuse. It is also evidence of Sir Hercules' propensity at that time of his life to do what he thought those present

wanted, and to be critical of absentees.

Mrs Utz observed the proceedings from the car. She cannot recall Sir Hercules ever having a will in his hand at any time. I accept Mrs Utz's evidence to the effect that Brian Norman seemed to be talking most of the time with the will in his hand, and that Sir Hercules appeared to be listening most of the time. I am not affirmatively satisfied that Sir Hercules on this occasion was handed the new will or that he read it for himself.

I have accepted some but not all of Mr Norman's evidence. With some exceptions, I have accepted what is in his diary note; and again with the exceptions indicated in these reasons, I am not prepared to act on his oral elaborations of the event.

I accept that Mr Norman read over the various clauses to him and responded to any questions that were asked. I also accept that at one stage in the discussion Sir Hercules became troubled by the question whether he should leave one of the executors (Mr Ross Taylor) a legacy of \$15,000. It should be noted that another provision in the will leaves .75 percent of residue as a legacy to each of the executors (including Mr Taylor) in lieu of commission (see exhibit 5, clause 2(h)(i) and (ii)). Sir Hercules wanted Ivan's advice before making this proposed change to the will. Ivan was called and Sir Hercules asked him about it. Ivan's evidence is that Sir Hercules said, "Look, the Perpetual Trustees cut \$10,000 of a bequest out to Ross Taylor in their will. Do you think I should reinstate that?" upon which Ivan said, "Herc it's your will, you do what you think is correct". Assuming that Sir Hercules made such a statement, it demonstrates confusion on his part, because the PT will did not cut Ross Taylor out of his \$15,000 legacy. The effect of Sir Hercules' proposed change was to delete it, not reinstate it. In the event I accept that when Ivan raised no objection to Sir Hercules making a change in relation to this legacy, Sir Hercules gave an instruction which led to Mr Norman ruling through the lines in question.

This particular incident was relied upon by counsel for the plaintiff as evidence of independent

decision-making and capacity to understand on the part of Sir Hercules. However in view of the circumstances just described, at best I do not think that it indicates anything more than a comprehension of a minor detail, and it would seem more likely that that comprehension, in the context of a wider picture, was defective. Further, his conduct supports the inference that he felt he had to obtain Ivan's approval before making any change.

That was the only change made to the will which Mr Norman had drawn on instructions given to him by Ivan Sinnamon. According to Ivan Sinnamon the instructions he gave over the telephone to Brian Norman for the will were "the only message that I ever delivered". That however is contradicted by Mr Norman who gave evidence with respect to previous wills (presumably the 1989-1991 wills) that it was "the usual practice" that instructions be received in this way because of Sir Hercules hearing difficulty and the impossibility of conversing with him on the telephone.

After reading the will, Mr Norman summoned Mrs Utz who joined him and Sir Hercules for the purpose of witnessing the will. They conversed in a light-hearted way for a few minutes, but Ivan then appeared and indicated that he would "like to go soon". Sir Hercules then commenced signing the will and it was duly witnessed. Sir Hercules was taken back inside and the three visitors departed with the will of 18 June.

Inter vivos Transfers

Only a few weeks later (5 July 1993) Sir Hercules was taken from Bethesda by Norman Henry in a car to meet Ivan Sinnamon at Toogoolawah. Sir Hercules was then taken into Mr Norman's office and signed a transfer (and contract with nil consideration) effecting a transfer of the farm to Ivan Sinnamon and Norman Henry.

Details of subsequent transfers of the assets of Sir Hercules' estate were not given in evidence, but it seems that the great majority of the assets have been sold and that the proceeds have been distributed according to the percentages designated for the residuary beneficiaries in the 18 June

will, with a significant exception in relation to the Proe family. These sales and distributions are said to have proceeded initially from an oral instruction given by Sir Hercules to Ivan - "Clean up my estate as far as you can go". On 5 July Mr Norman made a diary note of an oral instruction by Sir Hercules (in the presence of Ivan Sinnamon and Norman Henry) to the effect that the rest of his property was to be distributed according to the will, but that he "didn't want the Proe children included in any distribution of property prior to his death". This was interpreted as a direction to deprive them of any benefit in properties sold before Sir Hercules' death. By diminishing the residue in this way, those responsible have been able to diminish the fund to which the Proe children's five percent entitlement will eventually apply.

During opening I was informed by counsel for the plaintiff that the residue now stands at a value of only about \$1.4 million, and that the ten percent which the Proes stand to gain by reinstating the PT will would not exceed \$140,000.

Observations on these wills

It seems to me that during the last ten years of Sir Hercules' life he vacillated considerably as to what should be done in the future with his farm. In 1980 he had written "It is my desire, if possible, to retain the balance of my father's and Uncle Ben's farms as they are". On the one hand there was a desire to have the family farm kept as it was for ever, and on the other a realisation that development had overtaken it and that the rising rates made preservation of it as a farm not economically feasible. He also had a desire to reward Ivan Sinnamon and Norman Henry for their assistance.

This ambivalence seems to have been reactivated by Mr Ball's intervention in 1993, and by then it was insoluble. One swing back to the preservation of the farm as a public heritage memorial occurred in the PT will, thus divesting Ivan and Norman Henry of their expectation. That change of course had nothing to do with the Proes and they were neither benefited nor disadvantaged by the

change. It is curious then that they were punished when the "restoration" occurred on 18 June. It is difficult to think that Sir Hercules was not influenced in this somewhat surprising interference with the Proes' share by the obvious anti-Proe sentiment of Ivan Sinnamon.

One might similarly ask with respect to the PT will why Norman Henry was so severely disadvantaged. It is of course possible that these were Sir Hercules' own sentiments at the time, but an extraordinary amount of anti-Norman sentiment is recorded by Mr Ball in his notes. The source of that apparently temporary anti-Norman sentiment cannot safely be found. It might be thought however that the PT will was a curiously unrealistic document, the main effect of which was to provide a potentially lucrative and permanent source of income to Perpetual Trustees and to cut down the provision in favour of Mr Henry to a less than reasonable level. That will also reduced Ivan Sinnamon's entitlements, but he retained a relatively generous bequest of residue, while Mr Henry did not.

Events from August 1993

In August 1993 the description of Sir Hercules, through the eyes of Sister Broad is that his hearing was "terrible" but that she could communicate with him on a basic level, mainly by the use of body language and gestures; that he generally spoke in a loud voice, was not tolerant with staff, did not suffer fools gladly and was used to having his own way. She did not think he had an insight into his condition or that he realised how he was deteriorating.

On 24 August it is noted that he suffered from a post-viral depression. In August/September he commenced receiving visits from members of the Webb family. Mrs Webb's evidence is that soon after these visits commenced Sir Hercules made constant reference to Ivan Sinnamon and Norman Henry as "rogues", stating that "we'll take them to court", that they had taken everything from him, that they had taken his will and would not let him see a copy of it and that Norm Henry was not

getting his farm. His belief at that stage, from statements made to Adrian Webb was that he had made a "unique" will that the farm would go on in perpetuity, and that the front part was for the Education Department. Two or three weeks after the commencement of visits, probably in September 1993, Sir Hercules told Adrian Webb that "they" had taken his money and his will, and would not let him see a copy of his will. It was suggested that he ask Normie, and that he would give him a copy of the will. Sir Hercules said "No he won't. It's wrong, it's wrong". He thought at that stage that someone with the Christian name Fraser had made his will. His state of mind then and for an extended period was that he had made a unique will with the farm going on in perpetuity.

Incident of 6 September 1993

It will be recalled that Sir Hercules wrote four letters to Mr Ball about efforts to obtain an Australian honour, the last of which was dated 5 September. During this period however, the estate was being distributed by Williams and Norman who wrote to Corrs Chambers Westgarth demanding any deeds and documents in their possession, enclosing an authority signed by Ivan Sinnamon and Norman Henry. Corrs responded by asking for a copy of the power of attorney and a declaration of non-revocation. Mr Norman responded that he had instructions from Sir Hercules and from the attorneys but refused to provide copies. Against this background Mr Ball phoned Bethesda to arrange to visit Sir Hercules personally. The Bethesda nursing notes for this day (Sister Grant) include the following:

"When told of approaching visit, Herc became suspicious and requested staff not to go too far away from him and to intervene if he was requested to sign anything. Two men duly arrived, one elderly and one with a briefcase. Staff member accompanied them to Herc. They continued to claim to be friends. When staff member left the room she heard the matter of a will brought up and Herc became angry and after a short time they left. Herc then requested staff to send a message to Norm Henry and suggest he call in this p.m."

The evidence of Mr Ball and Mr Abernathy confirms that Sir Hercules was on this occasion agitated

and eventually stated that the matter was "out of his hands".

Sir Hercules' Birthday Party, November 1993

It was the custom for Sir Hercules, even after entering Bethesda, to attend a birthday party each year at Sinnamon Village to which his relatives and the inmates of Sinnamon Village would be invited. It was also his habit to make an address to the assembly. Mrs Drynan and Mr Heck claim that he publicly stated that he had given away his farm to Ivan and Norm and that he did not want to hear any more fuss or bother about it. However I accept that another family member, Mrs Ross, was present on this occasion, and she could recall no such statement. She believed she would recall such a statement had it been made. Such a statement would in any event be consistent with one made under continuing influence of the transferees, and acceptance of the evidence would in any event be a two-edged factor. On balance I am not affirmatively satisfied that such a statement was made by Sir Hercules on that occasion.

On a later occasion, after the Webb family had been surprised to receive large money payments they reminded him of the fact that his estate was being distributed. Sir Hercules stated that "they" were "really wild" with him for signing the will, and said that it would be contested, so they would have to start distributing from the estate, mentioning a court case in America where the entire estate had been used up in legal costs. When asked who he was referring to, he said Normie and Ivan.

Sir Hercules wrote a letter to Violet Webb in his own hand on 29 December 1993. That of course is evidence in its own right a statement of a deceased witness, but apart from demonstrating a confused mind, the only relevant assertion in it is that "Ivan promised to help me with the conclusion of my estate and I understand that he is busily engaged with that duty although he has not any time to write or call upon me".

In January 1994 he spoke about his will to members of the Webb family in terms inconsistent with the will of 18 June. However by this time his health had deteriorated still further, and I do not think

that any useful evidence of his state of mind can be derived from any statements made later than Christmas 1993.

At Christmas 1993 he suffered dehydration during a heatwave, and was taken in due course to hospital. Those who saw him after that time noticed a marked deterioration both physically and mentally. He never recovered, and he died on 27 February 1994.

For practically every available conclusion in this case there is countervailing evidence capable of pointing to a different conclusion. I have indicated as far as possible the evidence that I find acceptable. It may be added that I find the evidence given by Eleanor Bardwell and by the members of the Webb family to be generally acceptable. These reasons, although lengthy, record only a small proportion of the points that can be made in favour of one view or another of the facts. I have so far set out what I regard as the main points but acknowledge that much more might be regarded as relevant. Some further facts will be included in discussion of the issues to which I now turn.

ISSUES

Testamentary Capacity

Not surprisingly, in view of the short time between the execution of the two wills, neither counsel for the plaintiff nor counsel for the defendant were particularly vigorous in suggesting lack of testamentary capacity on either 7 May or 18 June. Symbiotically, counsel for both plaintiff and defendant drew strength for the particular will they wished to support from the carefully gathered evidence of testamentary capacity in relation to the PT will of 7 May. Counsel for the plaintiff relied on this as a starting point for the validity of the 18 June will. However I have considerable reservations about that evidence. Dr Daniels was the specialist, and Dr Labrom, whilst reaching the same conclusion, does not add any additional dimension to the reasoning. The doctors "sat in" with Sir Hercules, Mr Ball, and two respectable solicitors while the will was read. Dr Labrom "had the impression that . . . he understood the will" but the only supporting particular were themselves impressions, namely that he asked some relevant questions and appeared to be "mentally agile". He agreed that Sir Hercules' condition was such that it is very difficult to say whether or not on a particular day he had mental capacity unless he was examined on that day. This comment is relied on by the defendant with respect to the will of 18 June because no medical assessment was made of him on that occasion. However the starting question remains whether it is shown that Sir Hercules possessed testamentary capacity on 7 May 1993.

Unfortunately Dr Daniels died before the hearing, and no cross-examination was possible. With respect, I find the reasoning in his report concerning 7 May 1993 to be unconvincing. The more specific observations recorded in the report reveal some confusion and misunderstanding.

The foregoing discussion has referred to Sir Hercules' confusion, lack of comprehension, and a propensity to do what he thought those present would want at material times. Also the extent to

which Norman Henry's benefits were cut down in the PT will are worthy of note, and may be thought somewhat curious.

Despite some unflattering comments about Mr Henry, Sir Hercules still considered him entitled to fair reward. On 7 May, at one stage he observed that he did not want Norman Henry "to get more than \$2 million". Later he said that the benefits to be received by Norman Henry "were not to exceed \$1 million" and that was expressly included in the will as a direction. There is something of an absurdity in that direction, in that, on the footing being discussed by the solicitors that the residuary estate was \$10 million, Mr Henry would only receive \$75,000 (which in any event would be remuneration for work as an executor), and he and his wife would receive an additional \$100,000 under the residuary bequest in clause 5(e)(ii)(F). In other words, even assuming the estate was much larger than the posited figure, Mr Henry would have no chance of reaching more than a small fraction of the million dollar figure. No doubt the solicitors explained the range of Mr Henry's possible benefits as being between \$175,000 and \$250,000 depending upon the value of the residue, but Sir Hercules insisted upon the insertion of the million dollar maximum figure. This again in my view is evidence of extreme ambivalence, confusion or lack of true comprehension. The residual estate would need to be worth over \$100 million before the instruction would be meaningful.

I have set out earlier in these reasons what I regard as a misunderstanding that was able to survive five conferences. There are also numerous instances of confusion and what might be regarded as inappropriate response from a man, who when in possession of his faculties, was a capable and particularly articulate businessman.

In answering the question of testamentary capacity or no, it is relevant to consider whether the will in question was simple or complex. Each of the wills in question was of the latter kind. In the light of the multiple previous wills, made when Sir Hercules was probably more mentally capable, his adoption in 1993 of the previously rejected donation of the whole farm for the benefit of city

dwellers, and the virtual cutting out of Mr Norman Henry are hard to comprehend. Except for the occasional defamatory references to Mr Henry, there is evidence of a continuing desire to see that he was properly repaid for the very extensive services that he rendered, and it is difficult to think that the PT will does this. This was one point upon which the whole Sinnamon family (including Sir Hercules) seems to have been agreed, namely that Mr Henry deserved fair consideration for his services. Perhaps the insertions of the "million dollar maximum" provision in the will were cosmetic and helped confirm the illusion that Mr Henry might get some figure approaching that sum.

Just as the PT will wrought radical changes to a fairly well-established pattern of disposition up to the end of 1991, the final will of 18 June 1993 not only destroyed the PT will, but also introduced for the first time some prima facie invidious distinctions between the per stirpes dispositions. I refer to the reduction of the Proe family from fifteen percent to five percent, and the sharing of that portion between Arthur and Ivan. Of course these uncharacteristic results may be the result of influence of other persons, and that will be addressed under the heading "undue influence". At present I am concerned with the question of testamentary capacity.

It will be remembered that from at least as early as Sir Hercules' admission to Bethesda in 1992 he had been incapable of managing his own affairs. A distinction is rightly drawn between that incapacity and an incapacity to make a will, but in my view the former overlaps with and goes more than a short distance towards establishing the latter.

A court may be assisted by the observations of the attesting witnesses on the question of competency, but at the end of the day it is the court that must judge this question from the facts that are stated, and not from the opinions of such persons (Bailey v. Bailey (1924) 34 CLR 558, 571-572). The court also should respect the opinions of experts, but on a question such as testamentary capacity it is the conscience of the court that must determine whether a testator retains mental

powers to the requisite extent (Worth v. Clasohm (1952) 86 CLR 439, 452-453; compare O'Connell v. Shortland (1989) 51 SASR 337, 353). Indeed "This is eminently a practical question, one in which the good sense of men in the world is called into action, . . . It does not depend solely on scientific or legal definition" (Boughton v. Knight (1873) LR 3 P and D 64, 67). It is with some reluctance that I find myself unable to accept the conclusions of the two medical witnesses who saw Sir Hercules on the occasion of his signing the will of 7 May 1993, but I do not find their reasoning convincing. Indeed, it is clear that despite five conferences and good intentions on the part of all concerned, it was not possible to give Sir Hercules an adequate comprehension of what was being proposed or of the respects in which the 1991 will would be altered.

In the end I am not affirmatively satisfied that the testator possessed testamentary capacity on 7 May.

This removes the basic premise upon which the plaintiff depended for a finding of capacity with respect to the 18 June will. On this occasion Sir Hercules had far less opportunity to understand what was proposed than he did with respect to the PT will. There was no preparation, and a document was produced to him as a *fait accompli*. Despite my acceptance of Mr Norman's reading of that document to him and responding to questions, I am not satisfied that he had the capacity to know and understand the nature of the act and its effect; the extent of the property of which he was disposing; and the claims to which he ought to give effect (Banks v. Goodfellow [1870] LR 5 QB 549, 565). In short I am not satisfied that Sir Hercules possessed testamentary capacity on the occasion of 16 June.

Mention may also be made of the events of 5 July 1993 when the first *inter vivos* transfer was made. Evidence of subsequent statement to other persons including the Webbs suggests that he did not know what he did on that day. On later occasions Sir Hercules revealed that he did not know that he had disposed of his farm property. The incident of 5 July was very close in point of time to

the will of 18 June and it affords further evidence supporting a lack of capacity at that time. Certainly no relevant medical occurrence is recorded as having occurred between 18 June and 5 July.

Knowledge and Understanding of the Wills

The facts set out at pp 12 to 19 demonstrate a probability of a fundamental misconception by Sir Hercules in the disposition of the major item of his property. There is also reason to doubt his knowledge and understanding of other provisions, but in any event the principal error was fundamental and in my view must lead to a finding that he is not shown to have known and understood the contents of that will. I am referring to the actual provisions in the will, not to their legal effect. His mistake was a mistake of fact, not of law.

The circumstances are also such as to excite the vigilance of the court.

"(If there are circumstances surrounding the execution which rouse the suspicion and vigilance of the court, or if the capacity of the testator at the time of execution were doubtful, the court will not rest satisfied with such prima facie presumption of knowledge and approval as arises from mere proof of the execution of the paper by a testator of sound mind, and the party propounding it must satisfy the tribunal affirmatively that the testator did really know and approve of the contents of the will in question before it can be admitted to probate . . ."

(Mortimer on Probate, 2nd edn p.85).

Some further factors relevant to this question have already been canvassed in the preceding discussion of testamentary capacity.

If I am wrong in concluding that the testator lacked testamentary capacity, I would be of the view, rather more firmly than upon the former question, that Sir Hercules did not know and approve the contents of the PT will at the time when he signed it.

So far as the 18 June will is concerned, Sir Hercules' conduct on this occasion appears to have been little more than passive assent. He did not detect spelling, typographical or numerical errors as he had sometimes done on former occasions. The only active conduct concerns the deletion of the

bequest to Mr Taylor, upon which he asked for his brother Ivan to be called to give him advice about whether or not to make that change.

The 18 June was relatively complicated. The hasty nature of the visit, the absence of personal instructions from the testator to the solicitor, the presentation of an already prepared document, Sir Hercules' lack of mental reserves, his hearing difficulties (including the fact that on 18 June the hearing-aid was buzzing), and the evidence that attempts to link the draft will to the earlier alleged wishes of the testator is hopelessly unsatisfactory. Indeed, as will emerge, I am of the view that Sir Hercules' will was completely overborne by this stage by his brother Ivan and Norman Henry and that he knew that he had to change his will back to something of which they approved. But leaving aside the question of undue influence, and even assuming that Sir Hercules did have the capacity to make a will (albeit marginal) I consider that having regard to his diminished faculties the exercise was too rushed to be effective as giving effect to decisions of his own choice. He may well have understood some of it but I cannot say what parts. I conclude that it is not shown that Sir Hercules knew and approved the contents of the will of 18 June.

Undue Influence

If the above conclusions are correct, it is unnecessary to deal with this issue. I shall however indicate my findings on the assumption that the testator had sufficient testamentary capacity to make each of the last two wills. The persons against whom undue influence is alleged are Ivan Sinnamon and Norman Henry.

The testator was dependent upon his brother Ivan and upon Norman Henry both with respect to his business affairs and in his personal needs. Those persons held his power of attorney from October 1991. He was the owner of very extensive investments, although their full extent and nature cannot be told because the plaintiffs have not favoured the Court with any relevant details.

Mr Henry provided valuable service that no one else could provide, and he had a strong moral entitlement to favourable consideration in Sir Hercules' will. No one doubts this. The point with which I am concerned is whether it should be inferred that he took unfair advantage of his proximity and the undoubted dependence that Sir Hercules had upon him to overbear Sir Hercules' will for his own advantage.

The evidence shows Ivan Sinnamon to have had a strong personality and to have been accustomed to exercising control. Ivan also revealed a capacity for strong judgment upon others, and it must be said, for malice towards other members of his family with whom he had disagreements.

At all relevant times both Ivan Sinnamon and Norman Henry were undoubtedly in a position to exert effective pressure upon Sir Hercules to change his will.

I accept Dr Grant's opinion that at material times Sir Hercules suffered from dementia, and that he was deaf, frail, physically dependent and frequently anxious. He was "a very vulnerable person, easily frightened or influenced, especially by someone with whom he was in a dependent relationship. Cognitive deficits and memory problems would make him more vulnerable to influence.". The apparent decisions of such a person will very much depend upon the person present at the time or who happens to have influenced them last.

The 18 June will was a hasty exercise to reverse what was obviously seen as an iniquity (namely the PT will). The capacity for undue influence is undoubted. The true issue is whether it may safely be inferred that it was exercised.

The fact that Ivan Sinnamon and Norman Henry exercised this power can, in my view, reasonably be inferred from the following circumstances.

- (a) In almost all respects the change from the previous will was a change in favour of these two persons. The appended table containing the main dispositions in the three principal wills in this case namely those of 20 December 1991, 7 May 1993 and 18 June 1993 illustrates this. The

extraordinary changes wrought by the PT will on the earlier provisions are immediately apparent. So too are the changes effected by the 18 June will which not only restored former provisions but damaged the Proes. The only person who gains by the 18 June will, other than Ivan Sinnamon and Norman Henry, is Arthur Sinnamon who receives two percent more of the residue.

(b) Ivan Sinnamon regarded the PT will as iniquitous and it is a reasonable inference that he let his feelings be known to the testator.

(c) It seems more than coincidence that the will of 18 June gives effect to anti-Proe sentiment. The considerable prejudice felt by Ivan Sinnamon and his daughter Mrs Drynan towards the Proes is clearly demonstrated by the evidence. Ivan Sinnamon suggested in evidence that Sir Hercules had stated some reasons for cutting out the Proes, including the fact that too much Queensland money had already been paid to this Victorian family. It seems that none of Sir Hercules' money had gone to persons in that State during his lifetime. The most that can be said is that he may have paid the fare of a member of the Proe family who may have accompanied him to London when he went to accept his knighthood in 1985. It is quite possible that these sentiments, attributed to Sir Hercules, are really the sentiments of others and not his. In the end, it is relevant simply to note the fact that the changes respecting the Proes in the 18 June will happen to coincide with what may be regarded as Ivan's sentiments.

(d) The circumstances of Ivan's communication of instructions for the will of 18 June have been sufficiently described.

(e) The passive conduct of Sir Hercules during the will explanation on the bench on 18 June is in marked contrast to his more active style on other occasions. There is a lack of the usual assertiveness. Very little in the way of specific information came from him on that occasion. With respect to the only change that he suggested might be made to it, he was not prepared to authorise it until his brother Ivan had been summoned and had given his consent. The whole exercise appears to have been orchestrated by Ivan. His short-term physical retreat of 50 yards could not realistically have caused his influence to cease.

(f) The circumstances surrounding the transfer of the farm and other land to Ivan Sinnamon

and Norman Henry on 5 July are themselves suggestive of undue influence in a closely related transaction. Evidence of undue influence in other similar transactions may be taken into account (Boyse v. Rossborough [1843-60] All E.R. 610, 615).

The nursing notes for 5 and 6 July 1993 show that on 5 July Sir Hercules was out of the ward in company with Norm Henry for the day, that on the following morning he was "exhausted" and that extra prompting and orientation was necessary. From that time forward he often spoke as if he still owned the land. On this particular point I accept the evidence of Mr Radcliffe who often spoke with Sir Hercules after July. Mr Radcliffe was surprised at the suggestion made to him in the witness-box that Sir Hercules did not still own the farm. The testator seems to have had little subsequent awareness of the events of 5 July, and this suggests that what he did on that day represented the will of others.

(g) There is a good deal of evidence that reveals Mr Henry as exercising control over the actions of the testator and of preventing other persons from having contact with him.

(i) In about February 1993, when Sir Hercules asked Eleanor Bardwell to write the letter that attempted to locate Mr Ball to ask him to visit, he instructed her to post it and "not show it to Norm". However this only shows that the testator did not want him to find out about his efforts to make contact with the ex-manager of Queensland Trustees.

(ii) In July 1992 there was the disturbing incident (described on page 10) revealing Mr Henry's anger at the well-meaning attempt of a young sharefarmer to spend a day with Sir Hercules.

(iii) The nursing notes for 21 August 1992 show that after initially agreeing for a reporter to interview Sir Hercules Mr Norman "requested that any further interviewing be done through him".

(iv) On 25 February 1993 Mr Henry, upon learning of the possibility of a visit to Sir Hercules by someone connected with Permanent Trustees, responded aggressively. Among his statements to Mr Barnett is the assertion that Sir Hercules "didn't have capacity to deal

with issues such as the nature of wills and other business issues". That is an admission that in his view Sir Hercules lacked testamentary capacity at a very material time earlier than the will that he propounds. This is perhaps even stronger than the bleak picture he had earlier given Dr Daniels (just before admission to Bethesda) concerning Sir Hercules' cognitive functions and periods of confusion and hallucinations. I infer that Mr Norman was almost certainly the source of this information.

(v) In August 1993 (not long after the 18 June will had restored Mr Henry to a very favourable position) Sister Broad, with Sir Hercules' permission made an appointment for a reporter to visit Sir Hercules. When Mr Henry was advised he became very angry and stated that "people weren't to come and see Herc without his saying so". He subsequently told the reporter that he did not want him to see Sir Hercules and instead gave him his book (written in 1980). He was told by Mr Henry to be very careful about what he reported in relation to Sir Hercules' property and that he did not want any reporting on financial aspects. Mr Henry required the reporter to read out parts of the story he proposed to print. The reporter was eventually permitted an interview with Sir Hercules in which he discussed his early years, during which the reporter found him "to be very old and hard to understand".

(vi) When Sir Hercules still lived at Glen Ross but was obviously in need of more care, Eleanor Bardwell, on two separate occasions told Ivan Sinnamon that she knew a suitable woman who was prepared to live in at Glen Ross or to live in the little house next door and supervise and provide assistance for Sir Hercules. On each occasion Ivan Sinnamon summarily rejected the suggestion.

(vii) Ivan also instructed his brother Arnold to advise Eleanor Bardwell to stay away from Sir Hercules. She (whose evidence I accept) wrote to Ivan about this, and kept visiting. Ivan resented Mrs Bardwell's religion and her dress, describing her as a hippie, but it is difficult to think that his attempted insulation of Sir Hercules from her was solely motivated by that consideration.

(viii) Mr Abernathy also confirms that on 28 April Sir Hercules was concerned as to how

he could pay Mr Abernathy's fees because Normie controlled his cheque-books. On 28 April 1993 Sir Hercules mentioned to Mr Ball a fear that Norman Henry would find out about the will if he were to receive an account or if he paid the solicitor's fees by cheque. He also alleged that Mr Henry was preventing him from getting a copy of his earlier will, claiming that "Norm intercepts my mail" and "he wants my farm".

Allegations against Norman Henry on 28 April included false pretences in relation to the 1991 will, interception of his mail, consciously keeping him from his business documents, and that Norm Henry wanted the farm for himself. He also on a number of occasions told Mr Abernathy that his previous will had been signed "under false pretences", describing Norman Henry taking him on a drive to visit his brother at Esk, but meeting his brother at a solicitor's office instead, signing a will without being given opportunity to read it, and not being permitted to see a copy for some time.

This evidence is of limited value and is explicable in different ways. But it supports a fear and distrust of Mr Henry by the testator at a material time.

(h) Some retrospective inferences are possible from Sir Hercules' subsequent behaviour. The following may be instanced.

(i) On 6 September he seems to have regarded himself as being under standing instructions not to sign anything. He rejected the requests of Mr Ball and Mr Abernathy for assistance in resisting Brian Norman's demand for all relevant documents, commenting that it was "out of his hands". After Mr Ball and Mr Abernathy left, he asked Sister Broad to send for Norman Henry to reassure Mr Henry that he had not signed anything. This is original evidence of the testator's conduct as well as his state of mind.

(ii) He observed at that time (August/September 1993) that "they" would not let him read his will. Mr Webb said "Just ask Normie. He'll let you read it". Sir Hercules replied "He won't. It's wrong; it's wrong." That of course is only state of mind evidence but it does not support a strong or independent mind only about two months previously. He went on to indicate a belief that "we have to distribute now, otherwise the will will be contested

and used up in legal costs". That reflects his then state of mind in relation to future inter vivos transfers.

(iii) Sir Hercules' references after June 1993 to Ivan and Norman as rogues are at least consistent with a resentment at being dominated by them, a resentment to which he was only capable of giving expression in their absence. This circumstance is of course also explicable by a natural tendency to which I have earlier referred, and standing alone is equivocal. But in a circumstantial case, many of the circumstances will necessarily be equivocal.

(i) Various submissions were made with respect to Sir Hercules' own letter of 12 June 1993. My view is that it is the product of a failing mind. It contains too many ambiguities and uncertainties to enable confident conclusions to be drawn. It is a letter to Mr Ball, responding to some information sent to him by Mr Ball about his application for an honour. With the letter Sir Hercules enclosed a \$100 note, saying in the letter "The enclosed note is to help compensate you for valuable time and trouble". Sir Hercules possessed the endearing habit of pressing bank notes (usually \$20 notes) upon those who visited him at the home. The letter continues, "Please do NOT BE HURT BUT I HAVE KNOWN YOU MANY YEARS NOW and it is a pity I was forced to go elsewhere because of other transactions. This is why between you and I I still await the solicitor's account". The most likely inference as to the highlighted passage is an apology for his earlier abandonment of the earlier Queensland Trustees wills in making those of 1989 to 1991. On behalf of the plaintiff it was submitted that it was an oblique way of indicating that he had changed his mind and that he was going to make a fresh will. That is a possibility but I consider it far too tenuous. He seems to be referring to the past. If he is, as the plaintiff contends, referring to the present situation, the words "was forced to go elsewhere" are possibly suggestive of influence being applied. On the whole I do not think that any safe inference can be drawn from this letter except as to the jumbled state of the testator's mind.

(j) The probability is that undue influence was exerted by Ivan Sinnamon and Norman Henry some time after 26 May, because on that occasion there is evidence that he still appeared satisfied with the PT will. There is also evidence suggesting that influence probably had not occurred before 4 June because the affidavit of Arthur Sinnamon, who visited Sir Hercules on that date recalls a

conversation (while Norman Henry was temporarily absent) suggesting an intention to benefit Mr Henry to the extent of \$125,000, which seems very close to the benefit that Mr Henry would become entitled to under the PT will.

Ivan Sinnamon found out about the PT will on 16 June.

Norman Henry also found out at some stage, as is shown by his statement to Mrs Bardwell that the will had been changed, "but not to worry, it would be changed back again". I infer that this happened before 18 June.

(k) Inferences adverse to Mr Henry may be drawn with greater comfort because of his unexplained failure to give evidence.

CONCLUSION

When all the evidence is considered, there is very little that seems right with respect to either of these wills, or of the circumstances in which they were made. They are the products of extreme ambivalence in a failing mind which had insufficient resistance to those who happened to be with Sir Hercules at the time to exercise his own will or make his own decision. My conclusions are that at the material times Sir Hercules lacked testamentary capacity; he did not know and understand to a sufficient extent the contents of the wills that he made; and with respect to the will of 18 June, it was not the product of his own will, but rather of those who were in a position to influence him and who I infer did prevail over him to the extent that the provisions were theirs rather than those of Sir Hercules.

Subject Matter	Will of 20.12.91	Will of 7.5.93	Will of 18.6.93
Executors	Ivan Sinnamon, Estelle Drynan, Ross Taylor, Norman Henry	Perpetual Trustees, Ivan Sinnamon, Estelle Drynan, Norman Henry	Ivan Sinnamon, Estelle Drynan, Ross Taylor, Norman Henry
Excised area for Minister of Education	Approx. 2½ acres to be excised and transferred to Minister for Education for heritage purposes and on conditions	Approx. 2½ acres to be excised and transferred to Minister for Education for heritage purposes and on conditions	Approx. 2½ acres to be excised and transferred to Minister for Education for heritage purposes and on conditions
Balance farm	Ivan Sinnamon and Norman Henry, to carry on farming for as long a practically possible during their lifetime	Trustees to hold in perpetuity to continue farming to allow public access to educate public as to nature of model farm. (General charitable intent declared)	To Ivan Sinnamon and Norman Henry to carry on farming for as long as practically possible during their lifetime
Money set aside for running costs of farm	<p>\$1 million ESANDA stock be transferred to Ivan Sinnamon and Norman Henry to use it and its income for the farm</p> <p>Further, income on \$500,000 set aside for running costs or improvements on farm, and failing such use, to designated charities</p>	<p>Set aside \$1 million ESANDA stock and \$500,000 - "the farm capital".</p> <p>Power to trustees to use income <u>and capital</u> for farm activities and improvements and, failing such use, excess income to go to designated charities, <u>but not more than \$20,000 to be paid annually to all or any of the designated charities</u></p>	<p>\$1 million ESANDA stock be transferred to Ivan Sinnamon and Norman Henry to use it and its income for the farm</p> <p>Further, income on \$500,000 set aside for running costs or improvements on farm, and failing such use, to designated charities</p>
Residue	Ivan Sinnamon 25% Arthur Sinnamon 15% Violet Webb 15% Children of Cecil 15% Children of Mabel Baker 15% Norman & Phyllis Henry 15%	Ivan Sinnamon 27% Arthur Sinnamon 18% Violet Webb 18% Children of Cecil 18% Children of Mabel Baker 18% Norman & Phyllis Henry 1%	Ivan Sinnamon 30% Arthur Sinnamon 20% Violet Webb 15% Children of Cecil 15% Children of Mabel Baker 5% Norman & Phyllis Henry 15%
Other benefits	.75% residue to each executor (as a legacy) \$15,000 to Ross Taylor	.75% residue to Ivan Sinnamon, Estelle Drynan and Norman Henry (as a legacy) \$15,000 to Ross Taylor	.75% residue to each executor (as a legacy) . . .

