IN THE COURT OF APPEAL [1997] QCA 036

SUPREME COURT OF QUEENSLAND

Appeal No. 203 of 1995

Brisbane

[Bridgewater & Ors. v. Leahy, York & Anor.]

BETWEEN:

DESLEY FAY BRIDGEWATER
JOAN MARGARET O'NEILL
JUNE LORRAINE ASHTON
SHIRLEY JOY LEAHY and
STELLA YORK
(Plaintiffs) Appellants

AND:

KEVIN LEAHY
(First Defendant) First Respondent

AND:

NEIL WILLIAM YORK and
BERYL ELIZABETH YORK
(Second Defendants) Second Respondents

Macrossan C.J.
Fitzgerald P.
Davies J.A.

Judgment delivered 14 March 1997

Separate reasons for judgment of each member of the Court; Macrossan C.J. and Davies J.A. concurring as to the orders made; Fitzgerald P. dissenting.

APPEAL DISMISSED WITH COSTS.

CATCHWORDS: **EQUITY - undue influence - Wills, Probate and Letters of Administration - validity of the deed of gift - whether such transaction should be set aside - undue influence and unconscionable conduct - the deceased allegedly of poor health (mentally and physically) at the material time - whether the appellants lacked standing to litigate -**

appropriate relief should the appellants succeed on appeal.

Counsel:	Mr. D. Fraser Q.C., with him Mr. T. Gibson for the appellants Mr. C. R. Job for the first respondent Mr. S. C. Williams Q.C., with him Mr. R. T. Whiteford for the second respondents
Solicitors:	Morrow and Associates for the appellants T. J. Gibson & Co. for the first respondent Heiser Bayly & Mortensen for the second respondents
Hearing Date:	7 May 1996

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REASONS FOR JUDGMENT - THE CHIEF JUSTICE

Judgment delivered 14 March 1997

I have read the reasons prepared by the President and Davies JA where a sufficient statement of the background circumstances appears.

The question on the appeal is whether, because of the actions of the respondent, Neil York ("Neil"), and his relationship with the deceased, the appellants are entitled to succeed in their claim for relief as it is now advanced. I am persuaded, for reasons including those stated by Davies JA, that the findings by the trial judge rejecting the claims against Neil of undue influence and unconscionability should not be interfered with. While accepting the significance of the matters stated by Davies JA in support of that conclusion, I wish to highlight a number of matters which may be regarded as having a particular relevance.

The appellants no longer challenge the Will of April 1985 containing the option to purchase that was subsequently exercised by Neil. When the deceased made the Will, he was a man of advancing years and he looked to the future with a plan in mind to keep the aggregation of properties together. While the price for which the option to purchase was to be exercised was advantageous to Neil, the option itself resulted from the deceased's plan. The price stated in the Will was influenced by a suggestion that had been made by Neil supporting the desirability of arranging adequate provision for the deceased's daughters. This suggestion caused the contemplated option price to be increased with the result that the residue dealt with by the Will would also be increased.

The plan enshrined in the Will was not kept secret from the appellants but it was adhered to by the deceased throughout the remaining few years of his life. No cancellation of this provision in the Will seems to have been urged by the appellants in the deceased's lifetime.

The subsequent suggestion that the deceased should sell to Neil some of the lands covered by the option in the Will came from Neil, and while it involved an acceleration of the plan expected to come into operation under the Will, it also provided for the payment of an additional sum beyond that which would otherwise be payable for the lands under the option on the death of the deceased. The

transactions resulting from this suggestion were carried into effect by the July 1988 transfers and Deed of Forgiveness. These were not, to begin with, revealed to the deceased's immediate family, but this was because of the deceased's desire to avoid "trouble" in the home. The transactions were fundamentally consistent with the deceased's plan for dealing with his lands, keeping them together in the hands of his nephew. Notwithstanding the ample opportunity for revision of this plan had he desired it, the deceased continued to adhere to it.

Neil was not a stranger to whom the deceased was unattached by blood ties but a nephew to whom he was close and a person who had contributed substantially and over a long period to the success of the partnership operation. The deceased and Neil, although close because of their business association and family connection, did not live in the same household. Therefore opportunities for Neil to exercise disproportionate influence arising from contiguity were, to that extent, restricted.

It cannot be regarded as impermissible for a person to desire to secure the advancement of a nephew, particularly perhaps in furtherance of an objective of ensuring the continuance of an operation in which he is involved and to implement the plan by favouring the nephew to some extent above others to whom he is more closely related. Something more than a preference of this kind would need to be shown to make the transaction unconscionable.

Notwithstanding the testator's age and increasing frailty, there was ample support for the trial judge's conclusion that the testator was not placed in any situation of special disability in his relationship with his nephew in which the latter, in the transactions in question, acted unconscionably. The transactions of July 1988 were not unfair or unjust from the deceased's point of view having in mind what he, for his own part, wanted to achieve. It should also be concluded that there was ample support for the finding that the transactions were not the result of undue influence. Both findings were positively grounded in the evidence led and did not depend upon decisions concerning presumptions or onus of proof.

The attempt by the appellants in mounting their case to separate for tactical reasons the two aspects of the July transactions, that is into transfers for full value and an associated gift of part of the consideration, should be rejected. To permit it and to grant relief upon the basis of it would be to treat the respondents unjustly and penalise them in a way that the circumstances did not justify. What was essentially intended by both the testator and Neil against the background of the Will provisions, was to proceed with the transfers for a consideration less than market value, but this relatively simple arrangement, for no demonstrably good reason, was dissected by the solicitor acting for them into two separate although associated aspects. To artificially reconstruct the testator's and Neil's plan and now tie Neil to a purchase at full value, would depart from what was intended and amount to an attempt by the back door to defeat the effect of the otherwise unchallenged option under the Will.

It is desirable to add that I agree that the matter of standing of the appellants to sue on their own behalf should not have been regarded as an obstacle if the merits had favoured their claims. For the reasons outlined by the President and Davies JA, this would have been a proper case for the grant of leave under s.49(2) of the Succession Act 1981.

The appeal should be dismissed with costs.

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REASONS FOR JUDGMENT - FITZGERALD P.

Judgment delivered 14 March 1997

This is an appeal against part of a judgment delivered in the Trial Division on 23 August 1995. The appellants are the widow and four daughters of the late William York, who died in Roma Hospital on

22 April 1989 of "old age". He was then 85 years old. He and his widow had been married for 53 years and, at the time of his death, his daughters' ages were, respectively, 50, 47, 45 and 44. He had been born in Wallumbilla, and lived there all his life. He was a grazier, as was his brother, Sam, and his nephew, Sam's son, Neil. Neil and his wife, Beryl, are respondents to this appeal. Another respondent, the executor of the deceased's will, the husband of one of his daughters, was given leave to withdraw, and I will refer to Neil and his wife as the respondents throughout this judgment.

The deceased's last will is dated 12 April 1985. It was admitted to probate, in common form, on 28 August 1989, and part of the judgment below in this proceeding, which is not under attack in this appeal, declared that the will dated 12 April 1985 was the last true will of the deceased, duly made and executed according to law, and ordered that a grant of probate thereof be issued in solemn form of law.

By his will, the deceased gave his house in May Street, Wallumbilla (a humble dwelling worth about $20,000), his car and his money in the bank (an amount probably somewhat in excess of $150,000) to his wife, Stella. By cl. 4 of the will, the residue went to his daughters in equal shares. The residuary estate consisted of the deceased's interest in a partnership known as "Mt. Leigh Pastoral Company" together with livestock and machinery and his interest in various areas of land, of some of which he was the sole owner and others of which he held as tenant in common with either his brother, Sam, or his nephew, Neil. However, a proviso to cl. 4 of the will gave Neil an option to purchase the residuary estate for $200,000 by notice in writing within 12 months of his death. It is not in dispute that the value of the residuary estate was very considerably in excess of $200,000.

Neil exercised the option on or about 24 May 1989 and, on 1 April 1990, paid the $200,000 to the deceased's executor. As a result, the deceased's four daughters will each receive no more than $50,000 from the deceased's estate.

Although the option was attacked at the trial of the present proceeding, it is no longer a matter of dispute. The present dispute relates to a further transaction entered into between the deceased and Neil on 19 July 1988, i.e., between the time when the deceased executed his will containing the option and the time when he died. That transaction involved contracts for the sale of some of the deceased's land interests, all of which were the subject of the option in his will, to Neil and his wife. The value of the property sold was $696,811, and the contracts provided for a total purchase price of that amount (subject, perhaps, to an error which is of no present significance). Only $150,000 was paid. A deed of gift executed by the deceased on the same day, 19 July 1988, forgave payment of the substantial balance of $546,811.

There would be little purpose in the appellants setting aside the entire transaction of 19 July 1988. Indeed, it would be disadvantageous to the appellants for that to occur. Neil would still be entitled to the property pursuant to his exercise of the option, but entitled to a refund of the $150,000 which he paid under the transaction of 19 July. Accordingly, in this Court, the appellants' only attack was upon the deed of gift (and associated contractual provisions). On the assumption that it was open to the appellants to isolate and attack only one part of the transaction of 19 July 1988 in that manner, their contention was that, by virtue of the contracts of sale signed that day, Neil and his wife are indebted to the deceased's estate for the balance purchase price, which was the amount forgiven by the deceased. Although counsel for the appellants hinted at the possible need for ancillary orders, for example, to take accounts in respect of the period since the land the subject of the 19 July 1988 transaction was

transferred to Neil and his wife, no more would be necessary than an order that the amount forgiven be paid to the estate with interest at an appropriate rate, which was the material relief sought in the appellants' final "Further Further Amended Statement of Claim".

Shortly stated, the basis of the appellant's claim to relief was that, contrary to the findings of the trial judge, Neil obtained the gift for himself and his wife by undue influence and/or acting unconscionably.

In addition to disputing the appellants' claim, the respondents submitted that the appellants lack standing in this litigation and that, in any event, there is no power to set aside only part of the transaction dated 19 July 1988, namely, the gift. It is convenient to deal first with the issue of standing, but to leave the question of the appellants' remedy until it is seen whether they are entitled to succeed on the merits of their claim.

As I understand the respondents' argument that the appellants lack standing, it is not disputed that, if the testator had a cause of action against the respondents to set aside the gift, that right survived his death: Succession Act 1981, sub-s. 66(1). However, the respondents' contention is that only the executor could commence and prosecute such an action after the testator's death, and that, although he refused to do so, as the appellants pleaded, the beneficiaries were not entitled to do so even though the relief sought by the appellants is that the money allegedly payable by the respondents be paid to the executor of the deceased's will, with the obvious intent that it be dealt with by him in accordance with that will.

The appellants should have obtained an order giving them leave to bring the action against the

respondents before doing so: Succession Act 1981, sub-s. 49(2); R.S.C. O.33 r. 9. However, if such an order is appropriate, leave can be granted nunc pro tunc. The purpose of the provisions necessitating leave is to facilitate the orderly and efficient administration of deceased and trust estates; the special factors which influenced the Full Court in Fitzpatrick v. Jackson [1989] 2 Qd.R. 542 are absent in a case such as this, which is closely analogous to the cases which permit an order nunc pro tunc when leave is required to proceed against bankrupts or corporations in liquidation or official management: see, for example, Murray v. United Pacific Transport Pty Ltd [1960] 1 Q.W.N. 20; Re Testro Bros Consolidated Ltd [1965] V.R. 18; Re Sydney Formworks Pty Ltd (In Liq.) (1965) 82 W.N. (Pt. 1) (N.S.W.) 558.

The Court has a discretion to grant or refuse leave: Re Neville; ex p The Official Receiver (1898) 19 N.S.W.R. 22 (Bankruptcy and Probate Cases). Although a narrower view has sometimes been adopted, as in Yeatman v. Yeatman [1877] 7 Ch.D. 210 and Meldrum and Scorer (1887) 56 L.T. 471, and seems to have been contemplated in Ramage v. Waclaw (1988) 12 N.S.W.L.R. 84, there is an extensive body of authority which favours the grant of leave to sue to interested beneficiaries if an executor fails to do so, joining the executor as a defendant: see Luke v. South Kensington Hotel Co. [1879] 11 Ch.D. 121; Gandy v. Gandy [1885] 30 Ch.D. 57; Howden v. Yorkshire Miners' Association [1904-1] All E.R. Rep. 602; In re Jordan; Hayward v. Hamilton [1904] 1 Ch. 260; Franklin v. Franklin (1915) W.N. 342; Australian Workers' Union v. Bowen (1946) 72 C.L.R. 575, 586; Re Atkinson [1971] V.R. 612; Lake v. Quinton (1973) 1 N.S.W.L.R. 111; 116; Hayim v. Citibank [1987] A.C. 731, 748; see also Connolly v. Macartney (1908) 7 C.L.R. 48 and Parker-Tweedale v. Dunbar Bank plc [No. 1] [1990] 2 All E.R. 577, 583.

I can perceive no reason to refuse leave in the present case if the appellants have a good claim. It is accordingly appropriate to proceed to consider the substantive merits of the parties' dispute.

The appellants submitted that the circumstances gave rise to a presumption that the gift resulted from undue influence and/or unconscionable behaviour by Neil and that, on the evidence, that presumption had not been rebutted; on the contrary, the evidence and the primary findings should have led to the conclusions asserted by the appellants. The respondents' contrary contention was that the appellants bore the onus of proof but that, in any event, the trial judge's findings entitled the respondents to succeed.

It is therefore necessary to consider the relationship between the deceased and Neil, and the events preceding and surrounding the execution of the deed of gift. The trial judge made detailed findings, noting that there was not a great deal of difference between the witnesses and "that the differences related more to questions of emphasis than markedly differing recollections on matters of abiding significance". In the circumstances, the appellants' case in this Court largely questioned only his Honour's conclusions. By way of preliminary, it should be noted that, as he told his wife and daughters, the deceased always regretted not having had a son, and he effectively treated Neil as if he were his own son.

It is convenient to quote extensively from what his Honour said:

> "Bill was a quiet, reserved man of limited education, who travelled only infrequently away from his home at Wallumbilla. His health was always frail, and deteriorated in his

> last 10 years, especially after his driver's licence was not renewed in February, 1988. He had a reasonable relationship with his daughters, although he really excluded both them, and Stella his wife, from his business affairs, and rather stolidly considered their true place to be 'in the home'. Bill's life revolved substantially about his interest in cattle, and the recreations of shooting and football.
>
> Bill and his younger brother Sam enjoyed a very successful business relationship over many years. The business of their first partnership, York Brothers, was breeding stud cattle and farming. As a youth, Bill's nephew Neil worked on Bill's and Sam's properties. Neil's relationship with Bill became very close over the years.
>
> In 1981, Bill, Sam and Neil formed a new partnership, 'Mt. Leigh Pastoral Co'. That partnership took over the assets of York Brothers, then valued at approximately $229,500 ... . Bill and Sam admitted Neil as an equal partner, even though Neil made no capital contribution of his own. Neil took over responsibility for the day to day management of the partnership business. He lived rent free on the property 'Wonga Park' which was the best of the partnership properties. Bill had previously looked after the paperwork. Neil assumed responsibility for that when he joined the partnership. As time went on, through the eighties, Bill's role reduced and Neil's increased.
>
> There is no doubt that Bill greatly admired Neil, and fully trusted him. For his part, Neil appreciated the high regard his uncle felt for him."

His Honour went on to discuss the deceased's "condition" when he executed his will; at trial, the appellants' case included an allegation that the deceased was, at that time, "in poor mental health". Although there was "no direct medical evidence about Bill's condition in April, 1985", his Honour referred to the evidence of the solicitor who prepared the will, who "said that Bill then appeared to him to know 'exactly what he wanted to do' ", and "evidence from other, lay witnesses of their observations of Bill at about that time". After discussing the evidence, his Honour specifically rejected the allegation that the deceased was in "poor mental health" at the time when he executed his will. His Honour went on to say:

> "He was certainly a physically frail 81 year old man, but nevertheless knowledgeable about his property and affairs generally, and not so enfeebled as to render him especially vulnerable to the influence of a person inclined to take unfair advantage of him."

The trial judge also rejected an allegation by the appellants that Neil had initiated the making of the will and found that "it was Bill who rang Neil and asked to be taken to Roma to make a new will. Neil consequently made the appointment, with Mr Taylor, who had previously acted for Bill. But when they got to Roma, Mr Taylor was too busy, so his partner, Alan Pack, took over. I accept that Mr Pack had not previously met either Bill or Neil."

His Honour then continued:

> "I also accept Alan Pack's and Neil's evidence that when Bill gave instructions to Alan Pack, Neil was not present. Significantly, Bill had had the wit to take a rates notice with him to Roma to help him identify with accuracy the land to be made the subject of the option.
>
> Before Bill went into the solicitors' offices, while on the footpath outside, he asked Neil what he should give to 'his girls', meaning apparently his daughters. Bill nominated $100,000. Neil responded that Bill should give them 'twice that much', provoking Bill's comment: 'I told mum you would be bloody fair". ... [Counsel for the appellants at trial] suggested that that illustrated Neil's influence, in that Bill adopted the precise figure suggested by Neil. But was Bill's will overborne?
>
> There had been no previous discussion about the possible content of the will, between Bill and Neil. Bill was by nature disinclined to discuss such matters with anyone. When Bill first raised the issue, on the footpath, Neil responded, but not - as I regard the exchange - with a view to influencing Bill, or exploiting any capacity for domination of Bill.
>
> Bill did not speak of the contents of the will until during the journey home, and then Bill simply told Neil what he had done. Bill did not raise the matter for Neil's comment. [Counsel for the appellants at trial] challenged this as improbable, and suggested that Bill would more likely have told Neil what he intended doing on the way to Roma. I do not however accept that contention, in view of what I have come to learn of Bill's approach to such affairs.
>
> It is also significant that Neil did not take Bill back when Bill executed the will.
>
> I accepted the evidence of Neil and Alan Pack as to the circumstances in which the will was prepared and executed, and I find that when Bill executed the will, he understood

> what he was doing and was acting voluntarily, not subject to the influence of any other person.
>
> ...
>
> There is no doubt in my mind that in view of the size of his estate, Bill could have treated Stella and his daughters more generously. That he did not do so is consistent, however, with the fairly ungenerous way he treated them throughout his life. ...
>
> Apart from those matters, the will did reflect, in a rational way, Bill's wish to achieve the goal, probably very important to him, of retaining the properties as an integrated farming enterprise. There is plenty of evidence warranting the inference that that was important to him. ... All of the partnership lands, the farming lands and the grazing lands, complemented each other, and it is natural that Bill would have wished to retain them as a unit, under reliable and experienced management. Bill felt that the place for Stella and his daughters was in the home, not on the land or engaged in business affairs ... .
>
> In light of Bill's enormous affection for Neil, Neil's life-long dedication to those particular properties, and Bill's determination to keep Neil in the partnership ..., it is hardly surprising that Bill would wish to pass the properties to Neil - especially regarding him, as he did, as the 'son' he always wanted but never had."

Later, after referring to the many circumstances which combined to compel care in the inquiry concerning possible impropriety with respect to the deceased's execution of his will, his Honour said:

> "I have necessarily, through the comprehensive evidence put before me, gone through a very detailed examination in my mind of the question of Bill's knowledge and approval of the contents of the will he made, in the course of considering this allegation of undue influence. Conscious of the many limbs of the [appellants'] challenge, I am in the end satisfied that Bill both knew and voluntarily approved of the contents of his will."

Later again, he added:

> "... Having considered the evidence, I am left with no residual suspicion about the option in the will, essentially because of these matters. Neil played no part in securing the option - it was Bill's own initiative; at the time Bill prepared and executed the will, he was rational mentally, and not relevantly disadvantaged by his physical debility; the granting of the option had a rational justification, in light of Bill's gratitude for Neil's past assistance and his probable wish to keep all of the properties together under the control of someone he considered reliable and experienced in managing them; although they were, as I feel, treated comparatively meanly, Stella and the daughters did receive more

> than nominal treatment in the disposition of the estate - Stella, who was 78 when Bill died, receiving property worth more than $170,000, and each of the daughters - independent, married adults - received $50,000. I have covered many other factual matters elsewhere in these reasons, and as may be accepted, have taken all of those matters into account. The matters I have just listed have however featured perhaps more prominently in my approach to the resolution of this particular issue."

Although, as earlier stated, the will is no longer challenged by the appellants, the circumstances preceding and attending the execution of the will and the contents of the will form an important part of the context in which the appellants' challenge to Deed of Gift (which was executed more than three years later), falls to be considered. In addition to the passages already quoted from the judgment in the course of considering the attack on the will at the trial, the trial judge mentioned the deceased's "mental health" in terms which are material with respect to the gift. Reference was made to the evidence of three of the appellants and two of the deceased's neighbours. One of the neighbours saw no sign of mental deterioration in the deceased at all, while another considered that "marked deterioration occurred after Bill's licence was not renewed in 1988 ...". Similarly, one of the deceased's daughter's (Shirley's) evidence was that "Bill's health did not substantially deteriorate until 1988 ...", while of the other daughters, Joan, "the daughter who saw Bill most", "spoke of Bill's appearing dazed and confused from time to time, but she put that as his condition as from late 1988 ...", and another daughter, Desley, "was quite satisfied about his mental condition in September 1988 ...".

His Honour returned to this subject in connection with the transaction entered into on 19 July 1988, stating as follows:

> "(b) Bill's condition
>
> (i) Generally, before 19 July, 1988. Probably from when Bill's driving licence was not renewed upon his 84th birthday in February, 1988, his condition deteriorated more rapidly (although Kevin Leahy [Shirley's husband] did not see it that way - ...).

> The recollection of the witnesses certainly varied. No doubt Bill had 'good days' and 'bad days', and that may explain the differing recollections. One should probably concentrate therefore on the evidence of his condition on 19 July, 1988. But I will nevertheless mention the following few aspects of the witnesses' evidence.
>
> I have already mentioned the daughter Desley's evidence that Bill appeared to be mentally competent in September 1988, and that Joan spoke of his being dazed and confused mainly from the latter part of that year. Mr Seawright saw no sign of mental deterioration, although Mr Maunder noted marked deterioration from the time of the loss of licence in February, 1988. I would however interpret Mr Maunder's evidence as meaning that Bill's position waxed and waned. Bill's failing to identify people may be consistent with fading eyesight: Joan, who knew him well, suggested that that was the explanation ... . Bill's failure to acknowledge Sergeant Lane by name may well have been explained by antipathy because of the police officer's refusal to renew the much valued licence, ...
>
> I conclude that Bill's condition did probably wax and wane, leaving open the possibility that 19 July, 1988 was a 'good' day. That conclusion is also generally consistent with my assessment of the evidence on those matters from other witnesses, Shirley and Kevin Leahy, Mr Inch and Mr Watkins."

His Honour then went on to consider the deceased's mental condition on the critical day and stated:

> "(ii) <u>19 July, 1988</u>
>
> The [appellants] stress Bill's having been in bed with the flu for the previous week. But as Mr Maunder said, if Bill got sick he tended to 'chuck in the sponge' and 'go to bed' ... . It is therefore not clear just how sick Bill still was on 19 July. There is no evidence that a doctor had been called. When Joan saw him before he left with Neil, his wife Stella was helping him dress, but this was an ordinary feature of their life together ... .
>
> Before Bill and Sam signed the transfers and the deed on 19 July, Alan Pack had them examined by Dr Hatcher. Dr Hatcher's report, confirming them to be of sound mind and capable of making decisions about their personal affairs, is ex. 54. It may have been a brief examination - some 10 minutes - and it is true that the doctor did not previously know Bill, but I am satisfied that he was properly briefed about the relevant issue by Mr Pack, and that he sufficiently explored with Bill the question of his relevant capacities. I accepted Dr Hatcher's evidence: it was of considerable significance to my resolution of this issue.
>
> I mentioned that Alan Pack and Neil also felt that Bill knew what he was doing.
>
> I am satisfied, in principal reliance on the evidence of Dr Hatcher, but also in the context of the other evidence as to Bill's condition, that this was 'a good day', and that

> Bill had the capacity then to know what he was doing and to make informed decisions about the disposition of his property."

It is convenient to go back, first to record his Honour's understanding of the appellants' challenge to the July 1988 transaction at trial, and secondly to record what his Honour said of the background facts.

Dealing with the first of those matters, he stated:

> "In para. 13 of the statement of claim, the [appellants] allege that the transfers of land from Bill to Neil and Beryl on 19 July, 1988 and the deed of forgiveness also executed on that date were induced by undue influence or unconscionable conduct on the part of Neil and Alan Pack. In essence, the particulars are these: Alan Pack acted for Bill in preparing the transfers and the deed, and did not advise him to seek independent advice, although he (Pack) was subject to a conflict of interest; Pack witnessed the transfers in the deed; Neil exerted influence over Bill in partnership affairs; the transfers acknowledged the payment of the entire 'consideration', but it was not in fact paid; the transfers were made forthwith, although payment of the balance owing was not secured; and the transfers and the deed were shams, prepared with undue haste at the behest of the second [respondents], and without independent advice to Bill.
>
> Those particulars are pleaded against the background of para. 12 of the statement of claim which alleges that at the time of execution of the transfers and deed, the second [respondents] appreciated, in essence: Bill's age - then 84 years; that Bill's mental health and eyesight were poor; that Bill consequently did not appreciate what he was doing, and the extent of his property; that Bill's memory was defective and untrustworthy; that Neil was conducting the partnership affairs to Bill's total exclusion (because of his forgetfulness, impaired mental health and inability to involve himself efficiently); and that Neil and Sam did not, as co-transferors, agree to forgive the unpaid consideration."

Turning to the facts, his Honour had the following to say as to the "Background":

> "I accept Neil's evidence that after selling his Injune property, he had $150,000 available to him, and so approached Bill in late 1987 or early 1988 and asked whether Bill would be interested in selling Neil his interest in the land south of the railway line. (That land may readily be seen depicted on the plan ex. 1.) Neil suggested a price of $150,000. I mention [counsel for the appellants at trial's] contention that Neil thereby in a sense 'deceived' Bill, by not offering more, on the basis that he could have borrowed additional moneys. I do not however see that as a matter of great significance in the end. The other view is that by offering $150,000, albeit much less than the value of the land, Neil was merely 'floating' a possibility which Bill may or may

not have accepted.)

> Bill did however agree to the proposal, saying that he had better do it 'before someone causes bloody trouble' ..., or as he put it during cross-examination: 'I had better do that just in case them bastards cause trouble.' ... .
>
> Sam had agreed to give Neil his interest in the lands as co-owner. Neil had the land valued by Mr Watkins, for stamp duty purposes, on the advice of the solicitor Mr Pack.
>
> Mr Pack drew up the contracts, in which he applied the values to the respective properties as the prices, and the relevant stamp duty declarations and transfers, and a deed of forgiveness, covering the difference between the value of the properties as assessed by Mr Watkins and the $150,000 to be paid by Neil. Neil paid the $150,000, and transfers into his and Beryl's names were effected and registered. All of the relevant documentation had been signed by Bill, Sam, Neil and Beryl in Roma on 19 July, 1988."

The trial judge then proceeded to a discussion of the documentation executed on 19 July, 1988, which he said had "unusual aspects", and the conduct of the solicitor, Mr Pack. His Honour considered that the transactions could have been effected much more simply, and that the documentation was, in a number of aspects, inaccurate; as his Honour noted, "... the transfers acknowledge payments made on 19 July which were not made, and the contracts nominated 9 September, 1988 as a settlement date, although the transfers really took effect immediately subject only to the consent of the Lands Administration Commission in respect of the leasehold property".

In dealing with a contention that the transaction had been "'dressed up' artificially, to give ... an appearance of authenticity intended to deter further inquiries", his Honour said that he "found Mr Pack's explanation of some of these features unsatisfactory, but I nevertheless do not impute improper motives to him, and I am satisfied that Neil had left the documentation entirely to him".

His Honour went on:

> "There were other substantial criticisms levelled at Alan Pack: as to his inability to substantiate his claim that the 9 September settlement date was extended by agreement; as to why the transfers were not concluded in early August, 1988 as could have been done; as to why he did not ensure Neil's payment of $150,000 until 28 November, 1988, after his meeting with the Leahys; as to why he acted for both Neil, Sam and Bill without alerting them to the desirability of their seeking independent advice where he, Pack, was plainly subject to conflicts of interest; as to why he focused, through Dr Hatcher, on Bill's mental condition (from the medical point of view), ignoring the possibilities of undue influence or unconscionable conduct. Again, I have to say that I found his responses to at least some of those challenges unsatisfactory.
>
> But in the end, I was not prepared to infer dishonesty or impropriety against Mr Pack. I take the view, rather, that he did not structure the transaction, or implement it, with the sort of close attention to detail one might reasonably have expected of a solicitor handling such a transaction. He did not turn his mind with sufficient acuity to some of the issues involved. But with particular relation to the question of independent advice, I am not prepared to conclude that had such advice been given, the result would have been any different.
>
> (d) Independent advice
> The question whether Mr Pack should have counselled Bill to seek independent legal advice warrants elaboration. In acting for both Bill and Neil, Mr Pack was subject to conflicting interests, even though he claimed he was not ... .
>
> On the one hand, Neil's interest was to secure a very substantial block of property for what was, on any view, a very low consideration. Bill's differing interest, on a purely rational level, was to secure adequate return for that property. Bill was in my view content to take the $150,000 because of other considerations. But a rational analysis does plainly point up that conflict.
>
> Adding in other objectively discernible factors - Bill's age (then 84), Bill's obvious physical debility, Bill's probable mental decline (ordinarily associated with such advancing years), and the high likelihood of dismay in Bill's immediate family at his being prepared to part with such valuable property for such disproportionately small return - a prudent solicitor should actively have canvassed with Bill the issue of his taking independent advice from another solicitor who was not also acting for Neil. Mr Pack claimed in his evidence that the only potential problem was capacity ..., thereby justifying his recourse to Dr Hatcher, but the potential challenge was broader than that.
>
> Why did Mr Pack not refer Bill to another solicitor for indisputably independent advice in these circumstances? Essentially, I believe, because he feared that he would thereby offend Bill. As he put it ..., 'if you refer any one of your clients to another firm of

practitioners within the town ... you are likely to offend that particular family member, if you drafted them off as opposed to the other.' This comes perilously close to self interest. In Ponder v. Burmeister (1909) SASR 62, 89 a solicitor confronted with a similar problem said that his client 'might have been offended and ... gone some where else with his business'. Way CJ rightly condemned that as a 'miserable plea of self-interest'. Mr Pack claimed that 'the usual thing to do', in order to gain 'a little bit of protection' in such cases, was 'to send (the client) to the medical practitioner' ... . When challenged, he suggested that a requirement for reference to another solicitor failed to take account of 'the way that country practices work in regard to family transactions'.

I doubt that cases of this special complexion would arise so frequently as to render the ordinary prudent requirement unduly burdensome. It is at least disappointing that Mr Pack did not satisfy that requirement here. But that does not ultimately benefit the [appellants] in the resolution of the case, because I nevertheless accept Mr Pack's evidence that he personally was satisfied with the apparent bona fides of the intended transaction ... and accepting Dr Hatcher's evidence, I conclude that the doctor's examination of Bill gives sufficient independent assurance of Bill's capacity and independence in the matter. I am also satisfied that had Bill been independently advised by another lawyer, the end result would likely have been the same."

"Bill gave differing accounts to his daughters of what he had done that day. On 20 July, he told Joan that he had gone to the bank. On that day or the next, he told Shirley that he had been to Roma to do his tax. In December, he told Desley that he had sold land to a fertilizer company.

There is a possible explanation for those misstatements. Joan said that Bill sensed that she was 'checking up on him' and probably for that reason 'deflected' her question ... . Shirley did not accept that that was what Bill was doing in her case. As to the statement to Desley, it is true that by December, Bill had granted an option to Queensland Fertilizers Limited over some land. But all of the misstatements (notwithstanding Shirley's view) are consistent with Bill's well established disinclination to discuss his business affairs with his daughters. They do not to my mind warrant the inference that he was mentally confused about what he had done.

It is convenient in this context to mention Beryl York's statement, in response to a question from Shirley, shortly after 19 June, that on that day they had taken Bill to Roma to see a solicitor about the sale of some property to a fertilizer company. That was untrue. That it was said by Beryl - who did not give evidence - is obviously consistent with her wishing to conceal from Shirley the true reason for the trip to Roma. I infer that Beryl, and no doubt Neil also, recognized the prospect of trouble from Bill's daughters if the truth came out. That is an unfortunate circumstance, but it does not warrant the conclusion that Neil and Beryl were 'up to no good'. It is equally consistent with their realizing that they had been treated disproportionately generously,

and naturally wishing to keep their benefit secure, determining to keep the details from those who might be expected to seek to upset it.

(f) Meeting on 24 November, 1988

On 24 November, 1988 Kevin and Shirley Leahy took Bill to see Alan Pack. Although the Leahys were interested in securing a power of attorney, and obtained a report from Dr Carlisle ... as to Bill's condition, Mr Pack approached the matter on the basis that Bill's purpose was the revision of his 1985 will, desirable because of the property transactions earlier that year in July.

There was some difference between the accounts of the Leahys on the one hand, and Mr Pack on the other. Mr Pack's account was aided by his diary memorandum, ... In the end I did not regard the differences between the accounts as particularly significant.

Indeed, I did not draw great significance from the evidence of the meeting with relation to the overall resolution of the case. I do however take [counsel for the respondents'] point that what transpired did suggest Bill's determination to hold, in an informed way, to the dispositions which he had made and the will which he had executed.

3. Undue influence

The [appellants] contend that Neil improperly used his ascendancy over Bill for his (Neil's) own benefit, so that Bill's acts, in agreeing to those transfers and the deed, were not his free voluntary acts (cf. Commonwealth Bank v. Amadio (1982-3) 151 CLR 447, 474-5).

Undue influence should be presumed, [counsel for the appellants at trial] submitted, because of Neil's relationship with Bill. The relationship between Bill and Neil was not sufficient to raise a presumption of undue influence. I accept Desley's description of Bill as a 'very independent man' ... . Mr Maunder said that he had an 'opinion of his own' ... . According to Joan, he 'made his own decisions and stuck' to them ... . There was obviously a lot of other evidence bearing on this matter. Bill was extremely fond of Neil, certainly, but I do not conclude that that degenerated into utter, unquestioning reliance or dependence.

In fact, there was no undue influence exerted by Neil upon Bill to induce these transactions. I note at once that they helped to achieve Bill's general intention that Neil should acquire all of the properties, a matter to which I referred earlier. The transactions were generally consistent with the intent of the 1985 will. According to Joan, Bill went off 'quite happily' with Neil on the relevant day, 19 June ... . Mr Pack's evidence is inconsistent with Bill's being subject to improper influence. So is Dr Hatcher's. If, as alleged, Mr Pack was party to the alleged impropriety, it does seem odd that he would have taken the precaution of having Bill examined by Dr Hatcher.

> There is the added circumstance that when Bill returned to see Alan Pack on 28 July, 1988, in the absence of Neil, he was not repenting of the transaction nine days earlier, but, as if in possible extension of that transaction, was actively considering whether he should charge Neil for the balance of his interest in the partnership or give it to him for nothing ... .
>
> The allegation of undue influence was not made out.
>
> 4. Unconscionability
> This concept is explained in Amadio, and, more recently, Louth v. Diprose (1992) 175 CLR 621, 626-7. From what I have said already, it will be apparent that I do not regard Bill as having been in a position of 'special disability' vis-a-vis Neil, in July, 1988, and so that doctrine does not apply."

The trial judge's conclusion in relation to undue influence was plainly correct. There is no basis for a conclusion that the deceased was overborne by Neil or that the gift to Neil and his wife did not result from the deceased's independent and voluntary decision. It does not follow that it was not unconscionable for Neil to request, and, for him and his wife to accept and retain, the gift: see Commercial Bank of Australia v. Amadio (1983) 151 C.L.R. 447, e.g. at p. 461 per Mason J., and p. 474 per Deane J.; Louth v. Diprose (1992) 175 C.L.R. 621, 632.

The trial judge had advantages over this Court in assessing the "characters and capacities" of the persons involved (Wilton v. Farnworth (1948) 74 C.L.R. 646, 654 per Rich J., cited Louth v. Diprose (1992) 175 C.L.R. 621, 633 per Deane J.), and his Honour's judgment contains careful analysis and generally persuasive reasoning. However, subject to one matter, the disposition of this appeal in favour of the appellants would not involve interference with findings of credibility or primary fact; the resolution of the appeal substantially depends on the conclusions ultimately drawn from those findings. While deference should nonetheless be accorded to his Honour's views, it is also important to note that the appellants' unconscionability claim was dismissed solely on the basis that the deceased was not "in a position of 'special disability' vis-a-vis Neil, in July, 1988, ...".

That finding effectively disposed of not merely the issue concerning which party bore the onus of proof in relation to unconscionability but the entire foundation for the appellants' unconscionability claim. I propose to deal with the issue of "special disadvantage" in the course of discussing unconscionability generally. It was for the appellants to prove that the deceased was in a position of special disadvantage vis-a-vis Neil, and it is convenient to record immediately that, in my opinion, in the present case it does not matter whether it was for the appellants to prove that Neil impermissibly took advantage of his relationship with the deceased or for the respondent to prove that Neil did not do so.

The exact date when Neil approached the deceased and asked him to sell him the land the subject of the 19 July 1988 transaction was not established; his Honour referred to it as "late 1987 or early 1988". The deceased had his 84th birthday in February 1988 and his health, which was "always frail" and had been deteriorating for a decade, worsened significantly from that time on. His mental condition also grew worse following a refusal at that time to renew his driver's licence, with "good days and bad days". I do not think that it matters whether 19 July 1988 - or the date when Neil requested the deceased to sell him the land or any other day in the period - was a "good day" or a "bad day"; Neil knew, on the assumptions most favourable to the respondents, that the deceased was, throughout the period February to August 1988, old, frail if not ill, and susceptible to requests from Neil, for whom, in the words of the trial judge, he had "enormous affection". As Neil knew, his relationship to the deceased was akin to that of an admired and trusted adult son.

There is, of course, nothing either wrong or unusual in a gift by one spouse to another or between parent

and child or even more distant relatives; while the gift is explicable by reference to the relationship, it will, nonetheless, financially disadvantage the donor and benefit the donee. That is true of the deceased's transaction with Neil and his wife on 19 July 1988; it involved the gift by the deceased to Neil and his wife of a large sum which represented a substantial portion (by value) of the deceased's assets.

Further, the gift which the deceased made to Neil and his wife cannot be explained by reference to the deceased's "... goal, probably very important to him, of retaining the properties of an integrated farming enterprise ... under reliable and experienced management", or on any other basis except the relationship between the deceased and Neil; that relationship was patently the dominant reason why the deceased agreed to the transaction of 19 July 1988, including the gift to Neil and his wife, just as it had earlier caused the deceased to prefer Neil over the deceased's wife and children in his will.

Finally, the gift was then made in secrecy from the appellants, the members of the deceased's immediate family, without the benefit of any independent advice, by documentation which was misleading in respects which might have proved important if the deceased had died before the transaction was completed, and later was concealed, in at least one instance by falsehood and, overall, by silence. The trial judge found that the deceased desired secrecy, but so did the respondents, and there is no reason why the Court should not accept as correct their belief, which is an obvious inference, that disclosure of their benefit might cause them to lose it: cf. Gould v. Vaggelas (1985) 157 C.L.R. 215, 236-239, 250-253.

Three matters which influenced the trial judge in favour of the respondents, although in some respects

separate considerations, tend to intersect and overlap; shortly stated, after observing Neil give evidence, his Honour found that he had acted bona fide; further, in his Honour's opinion, the transaction and the accompanying secrecy were what the deceased wanted, lest his family "cause trouble" - whether while he was alive or after his death - and independent advice to the deceased would not have produced a different result: his Honour accepted that the deceased was a "very independent man".

Superficially, another substantial point in favour of the respondents is the option in the deceased's will, under which Neil might, in due course, have become entitled to acquire the property the subject of the 19 July 1988 transaction, together with other property, at an undervalue, with the price payable unaffected by the transaction of 19 July 1988; looked at in this light, that transaction might be thought to have disadvantaged the respondents and benefited the appellants and, insofar as he received part of the value of his property in his lifetime, the deceased. However, as the respondents must have realised, there was no certainty that the option in favour of Neil in the deceased's will would not be altered or challenged; the deceased might change his mind and his will, either because Neil fell from favour, or through influence from other family members, advice from friends or some professional source, or perhaps merely on an old man's whim, however capricious; or the option might face legal challenge and fail. Such risks could be avoided, or at least reduced, by an immediate acquisition of the property by Neil and his wife, and, significantly, the 19 July 1988 transaction was initiated and the price to be paid for the deceased's property, and thus the size of the gift, was suggested by Neil, not the deceased, who immediately agreed, apparently without any need for discussion, plainly indicating the nature of their relationship. His Honour found that Neil and Beryl were aware "... that they had been treated disproportionately generously ...". Although he was speaking of their subsequent concealment of their

benefit "... naturally seeking to keep their benefit secure ...", such insight would not have arisen only after 19 July 1988 but would inevitably have preceded and accompanied the transaction of that date. Again, there is no reason why the belief of Neil and his wife that the 19 July 1988 transaction was to their benefit despite the option in Neil's favour in the deceased's will should not be acted on by the Court: cf. Gould. Further, the comments which follow concerning the trial judge's findings with respect to the deceased's independence are substantially applicable also to his finding with respect to the deceased's desire for secrecy.

The trial judge's description of the deceased as a "very independent man" and his view that Neil did not, and implicitly perhaps could not, persuade the deceased to make the gift which he did to Neil and his wife against the deceased's will provides no answer in the present circumstances in which the relationship between the deceased and Neil made persuasion unnecessary; the deceased's attachment to Neil at the time was such that all he had to do was ask for the deceased's property at a considerable undervalue, i.e., for a substantial gift. In any event, the lack of persuasion - in the absence of a need for persuasion - by Neil does not, without more, mean that the appellants have not shown that the transaction of 19 July 1988 was unconscionable.

The trial judge's finding which, in my opinion, is potentially most helpful to the respondents is that Neil acted bona fide, by which his Honour might even have meant that Neil was unaware that his conduct was unconscionable. The existence of the option in his favour in the deceased's will might have contributed to such an attitude, even if Neil's request for the 19 July 1988 transaction was aimed at forestalling any future problems in relation to the option which might arise.

However, since Neil knew of all the material circumstances and intended to obtain a benefit for himself and his wife, any lack of awareness on his part that it was unconscionable to obtain, and with his wife accept and retain, that benefit would not mean the gift which they received from the deceased was not voidable: see Amadio at p. 474 per Deane J.; see also per Mason J. at pp.466-467.

As earlier noted, the respondents argued that, in this event, the appellants' only choice was to affirm or avoid the entire transaction of 19 July 1988; as also stated, rescission of the entire transaction would be detrimental to the appellants, who submitted that they were entitled to an order setting aside only that part of the transaction which involved the gift from the deceased to Neil and his wife.

If, before his death, the deceased had repented of the 19 July 1988 transaction, the entire transaction could have been rescinded and the parties restored to their original positions by a retransfer of his property to the deceased and a repayment by him of the part purchase price he had received from Neil and his wife, with any necessary associated accounting, (cf. A.H. McDonald & Co. Pty Ltd v. Wells (1931) 45 C.L.R. 506), or the provisions of the contract providing for the gift by the deceased to Neil and his wife could have been severed from the remainder of the contract and set aside, together with the deed of gift, leaving a contractual obligation on Neil and his wife to pay the balance purchase price for the property which had been transferred to them by the deceased (contrast Manual v. Phillips and Moss (1907) 5 C.L.R. 298)). The appropriate course would have been that which achieved practical justice for both parties: Vadasz v. Pioneer Concrete (S.A.) Pty Ltd (1995) 130 A.L.R. 570, 575-579. The hypothesis on which this question is based is artificial; his relationship with Neil made a change of

mind by the deceased highly improbable, especially in the absence of family pressure and/or independent advice, which could not occur because the 19 July 1988 transaction was kept secret. One can also only speculate as to whether, if he changed his mind with respect to the 19 July 1988 transaction, the deceased would or might also have altered his will, either deleting the option in Neil's favour, or increasing the price payable if the option was exercised. The clear probability is that, absent some intervention by immediate family or independent adviser, the option in the will would have remained unchanged if the transaction of 19 July 1988 had not been entered into, just as it did after that transaction had been entered and performed.

Be that as it may, I am of the view that it would have been open to the deceased to elect not to rescind the 19 July 1988 transaction but to avoid only the contractual provisions providing for a gift to Neil and his wife and to have the deed of gift set aside, with the respondents required to pay the balance purchase price. If they were required to pay the deceased the property's true value, it would not have been practical justice between the parties for the respondents to have been permitted to say that they did not want the property, but would take their chances on Neil retaining the option under the deceased's will.

The practical justice to be accorded to the present disputants in accordance with Vadasz seems to me to favour the appellants at least as strongly. Neil's unconscionable conduct in taking advantage of the deceased was kept secret until after the deceased died. The Court's equitable jurisdiction should not be exercised against the appellants on the basis of assumptions favourable to the respondents concerning what would have occurred if Neil's unconscionable conduct, and the resulting benefit to the respondents, had been disclosed prior to the deceased's death.

In summary, in my opinion, practical justice between the parties requires that the appellants should be granted the relief sought.

I would order that the appellants have retrospective leave to bring this action, allow the appeal, and order the respondents to pay to the executor of the deceased's estate the sum forgiven by the deceased by the deed of gift dated 19 July 1988 with interest at a rate to be agreed or fixed by the Court. Orders should also be made setting aside the deed of gift and associated contractual provisions, and that the respondents (other than the executor of the deceased's estate) pay the appellants their costs, including reserved costs, of the proceedings, including this appeal.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Appeal No. 203 of 1995

Brisbane

Before Macrossan C.J.
Fitzgerald P.

Davies J.A.

[Bridgewater & Ors. v. Leahy, York & Anor.]

BETWEEN:

DESLEY FAY BRIDGEWATER
JOAN MARGARET O'NEILL
JUNE LORRAINE ASHTON
SHIRLEY JOY LEAHY and
STELLA YORK

(Plaintiffs) Appellants

AND:

KEVIN LEAHY

(First Defendant) First Respondent

AND:

NEIL WILLIAM YORK and
BERYL ELIZABETH YORK

(Second Defendants) Second Respondents

REASONS FOR JUDGMENT - DAVIES J.A.

Judgment delivered 14 March 1997

1. Undisputed facts

William York ("Bill") was a grazier near Wallumbilla. For many years, he conducted a successful partnership with his younger brother, Samuel York ("Sam"). The firm, known as York Brothers, acquired substantial land holdings over the years, and it appears that Bill was responsible for its financial management. Bill had four daughters, none of whom was ever employed by York Brothers for any substantial period. In contrast, all three of Sam's sons worked for the firm. The eldest two, Phillip and Kenny, worked for the firm between 1950 and 1968, at very low wages. In 1955 or 1956,

York Brothers purchased a property known as Heldon Park, which Phillip and Kenny eventually took over. Sam's youngest son, Neil York ("Neil") commenced working for York Brothers in 1962, immediately after he left school. He was also paid a very low wage, although this increased after he married in 1968. At that time, he moved to Wanga Park, a property owned by the firm.

In 1981, York Brothers effectively ceased business, and the Mt. Leigh Pastoral Company came into existence. It appears to have been informally agreed that Bill, Sam and Neil held equal shares in that partnership, although Neil did not make any capital contribution. As both Bill and Sam were quite elderly when the Mt. Leigh Pastoral Company was formed, the majority of the physical work was done by Neil, and he also took over the accounts and breeding records from Bill at this time. Bill and Neil had considerable affection for each other, and Bill respected his nephew's skill in managing the business.

In 1985, Bill decided to make a new Will, and requested that Neil make an appointment with a solicitor for that purpose. Neil made the appointment with Mr. Taylor, a solicitor who had previously acted for Bill, but Bill in fact gave instructions for his Will to Alan Pack, Mr. Taylor's partner who took over in Mr. Taylor's absence. According to the terms of that Will, executed on 12 April 1985, Bill appointed Kevin Leahy, his son-in law, to be his executor. He made a specific bequest to his wife Stella York, and made his four daughters residuary beneficiaries in equal shares. The Will also contained an option for Neil to purchase both Bill's interest in the Mt. Leigh Pastoral Company and his interest in certain specified land for $200,000, far less than the property was worth.

In early 1988, Neil asked whether Bill would be interested in selling Neil some (but not all) of the interests in land the subject of the option in the 1985 Will. Neil suggested that he buy this for $150,000, and Bill agreed. The parties instructed Alan Pack who had Dr. Hatcher examine both Bill and Sam, who was also transferring some land to Neil, and obtained a medical certificate from Dr. Hatcher dated 19 July 1988 stating that Bill was of sound mind and capable of making a decision about his financial affairs. The transaction was documented as a sale of Bill's interests to Neil and his wife Beryl, under three separate contracts, all dated 19 July 1988. The total value of the interests sold under the three contracts was $696,811 but by a Deed of Gift also dated 19 July 1988, Bill forgave payment of $546,811 of the purchase price. The $150,000 remaining to be paid was paid on 28 November 1988 and the interests were transferred to Neil and Beryl.

Bill died on 22 April 1989 of old age. He was then 85. He was survived by his wife of 53 years and his four daughters aged 50, 47, 45 and 44. Neil exercised the option contained in the Will on 24 May 1989.

2. Proceedings at first instance

The appellants (plaintiffs at first instance) are Stella York, Bill's widow, and Bill's four daughters, Desley Bridgewater, Joan O'Neill, June Ashton and Shirley Leahy. The first respondent (first defendant below) is Kevin Leahy, the executor of Bill's estate and husband of Shirley Leahy. The second respondents (second defendants) are Neil and Beryl York.

At first instance, the appellants' action involved two elements:

(a) a challenge to the essential validity of the Will executed on 12 April 1985. The statement of claim challenged the Will on three grounds; first that the entire Will should be set aside because of

testamentary incapacity, secondly that the option granted to Neil should be set aside because it had been obtained by an exercise of undue influence over Bill by Neil and thirdly, that the Court should not admit probate to the option because of the "unrighteousness of the transaction".

At trial, the appellants appear to have concentrated on the second element of the challenge to the Will, namely whether Bill granted the option because of an exercise of undue influence by Neil.

(b) The second part of the appellants' case was that the execution of the contracts of sale and/or the Deed of Gift dated 19 July 1988 was obtained by Neil's undue influence or unconscionable conduct. The remedies sought in relation to these inter vivos transactions were:

- a declaration that the transfers were procured by undue influence or unconscionable conduct and an order that the second defendants re-convey the property the subject of the transfers; or
- alternatively, a declaration that the Deed of Forgiveness of debt was procured by undue influence or unconscionable conduct and is of no effect; or
- alternatively, a declaration that the Deed of Forgiveness of debt is void and of no effect; or
- alternatively, an order that the second defendants pay the first defendant the balance of the purchase price.

de Jersey J. found against the appellants on both grounds. The appellants appealed only against that part of the Judge's judgment dismissing the claim in respect of the inter vivos transactions.

3. The issues on appeal

There are three main issues in the appeal. The first is the appellants' standing to sue, the second is whether the transaction of 19 July 1988 was procured by undue influence and the third is whether it was procured by unconscionable conduct. A further question will arise as to the relief to which the appellants are entitled if they are otherwise successful. The first of these questions may be determined

immediately for it involves consideration of few further facts. The second and third require consideration of a number of further facts but I propose first to state the elements of each of those causes of action so far as they may be applicable to the facts of this case.

(a) The applicants' standing

Any cause of action in respect of the inter vivos transactions vested in Bill at his death survived for the benefit of his estate pursuant to s.66 of the Succession Act 1981. However s.49(2)[1] of that Act provides, in effect, that no person other than the personal representative of a deceased person shall have the power to bring actions in relation to the estate of a deceased person without the consent of the Court. Such consent has never been obtained. The appellants sought it from this Court. No criteria are stated in the section or elsewhere in the Act for the exercise of the discretion thus conferred on the Court.

There is no evidence, one way or the other, as to whether, before this action was instituted, the executor, the first respondent, was invited to commence it and declined to do so. But plainly there would have been impediments to his doing so. Having proved the Will in common form he could hardly, in the circumstances, have challenged its validity. Moreover it was never in the interests of the estate, or the appellants, to set aside the whole of the inter vivos transaction because that would have left it and them worse off financially than they now are. However he could have instituted an action seeking, as they now appear to seek, to set aside only the Deed of Forgiveness of debt.

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[1] See also O.3 r.9 RSC.

The only evidence as to the executor's intentions in the matter are that, at the beginning of the trial, his counsel, in seeking leave to withdraw, told the Court that his client had received a letter from the plaintiffs' solicitors asking him to confirm that he would not conduct the action as pleaded and would not sue on his own behalf; and he confirmed that that was so. That may be somewhat ambiguous but may, I think, be taken as a statement that he was not prepared to sue even to seek to have the Deed of Forgiveness of debt set aside.

The question is whether, in those circumstances, the appellants should now have consent to bring that part of the action the subject of this appeal. The appellants' standing was challenged below but the learned trial Judge found it unnecessary to determine that question, no doubt because of the conclusion which he reached on the substantive issues. For the same reason it may be unnecessary to do so in this Court. However the question is of some importance and therefore, in my view, should be decided.

Prior to the enactment of s.49 it was said that, in a case in which the executor declined to sue on behalf of the estate to recover assets a beneficiary may sue upon establishing special circumstances[2]. It was not entirely clear what constituted special circumstances although that seems to have been satisfied where, as well, it could be shown that the action was one which it would have been proper for the executor to bring[3].

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[2] See Ramage v. Waclaw (1988) 12 N.S.W.L.R. 84 and the authorities there referred to.

[3] Stainton v. Carron Co. (1854) 18 Beav. 146 at 159; 52 E.R. 58 at 62; Yeatman v. Yeatman

(1877) 7 Ch.D. 210 at 216; Howden v. Yorkshire Miners' Association [1903] 1 K.B. 308 at 328-9; Re Atkinson deceased [1971] V.R. 612 at 617. See also Commissioner of Stamp Duties (Qld) v. Livingston [1965] A.C. 694 at 714.

In the present case the division of opinion on this Court demonstrates that this was a case in which it would have been proper for the executor to sue and consequently was one in which, before the enactment of s.49, the appellants could have sued. Whatever the legislature's reason was for conferring the discretion on the court by s.49(2) to allow persons other than the personal representative to sue, it is unlikely that it intended that beneficiaries should be prevented from suing where the executor has declined to commence an action for the benefit of the estate which it was proper for him to bring. It follows that, had the application been made before the commencement of these proceedings, the Court would have given its consent to the appellants to bring it. It was not suggested that any injustice would flow from making such an order now if it would have been appropriate before the proceedings were instituted. Accordingly I would grant that consent nunc pro tunc.

(b) Undue influence

The learned trial Judge held that the relationship between Bill and Neil was not sufficient to raise a presumption of undue influence; and that in fact there was no undue influence exerted by Neil upon Bill to induce the inter vivos transactions. Both findings were findings of fact based on credibility of witnesses but both were attacked by the appellants. Unless the learned trial Judge's finding of fact that no undue influence was exerted was erroneous it would be unnecessary to consider the first finding[4].

(c) Unconscionable conduct

Relief in respect of unconscionable conduct may be granted where:

(1) one party to a transaction is under a special disability in dealing with the other with the

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[4] Whereat & Anor. v. Duff (1973) 47 A.L.J.R. 540 at 541, 542 per Barwick C.J.; 542 per Gibbs J.; 542 per Stephen J.; see also 542 per Walsh and Mason JJ.

consequence that there is an absence of any reasonable degree of equality between them; and

(2) that disability is sufficiently evident to the stronger party to make it prima facie unfair or unconscientious that he procure (or accept) the weaker party's assent to the impugned transaction in the circumstances in which he procured (or accepted) it[5].

The essence of the special disability is that the weaker party "cannot make a judgment as to what is in his own interests"[6] or "is unable to judge for himself"[7]. Where, as in this case, the stronger party is said to have unconscientiously procured the transaction, that procurement must be seen to be an exploitation by the stronger party of the other's position of disadvantage[8].

Here the learned trial Judge concluded expressly that Bill was not in a position of special disability vis-à-vis Neil in July 1988. He did not expressly conclude that there was no exploitative

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[5] Commercial Bank of Australia Ltd. v. Amadio (1983) 151 C.L.R. 447 at 474 per Deane J., 468 per Wilson J.; Louth v. Diprose (1992) 175 C.L.R. 621 at 637 per Deane J., 643 per Dawson, Gaudron and McHugh JJ.

[6] Per Mason J. in Commercial Bank of Australia Limited at 467. See also Louth at 626 per Mason C.J.; 628-9 per Brennan J.

[7] McTiernan J. in Blomley v. Ryan (1956) 99 C.L.R. 362 at 392 quoted with approval by Deane J. in Commercial Bank of Australia Limited at 477.

[8] See for example Louth at 626 per Mason C.J.; 630 per Brennan J.; 638 per Deane J.

conduct by Neil. It may be necessary to consider whether that was implicit in his Honour's findings.

4. Some further factual conclusions

(a) The position of this Court

It need hardly be said that findings of fact by a trial judge depending to any substantial degree on the credibility of witnesses, must stand unless it can be shown that the Judge has failed to use or has palpably misused his or her advantage or has acted on evidence which was inconsistent with facts incontrovertibly established by the evidence or which was glaringly improbable[9]. But in a case such as this where character assumes a significance of its own the learned trial Judge's conclusions have an additional dimension[10]. It is true that in this case his Honour did not have the advantage of seeing and hearing the evidence of both parties to the impugned transaction but he did have the advantage, which this Court lacks, of seeing and hearing the evidence of the party said to have exploited the situation of disadvantage of the other and to form a view as to his character and of seeing and hearing a number of witnesses who gave evidence of the capacity and character of Bill.

Before turning to some further conclusions, the absence of any evidence from Bill's widow to whom he had been married for 53 years and with whom he was living at all relevant times should be noted. She was a plaintiff in the action. No explanation was given for her failure to give evidence. If anyone had noticed any deterioration in his mental condition or such a dependence on Neil as to cause him to disregard his own interests one would think it would have been she. No-one saw him more frequently.

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[9] See for example Devries v. Australian National Railways Commission (1993) 177 C.L.R. 472.

[10] Louth at 633 per Deane J.; 640, 641 per Dawson, Gaudron and McHugh JJ.

(b) The further conclusions

The conclusions, and the findings of fact which led to them, which the learned trial Judge reached in respect of the appellants' challenge to the Will, which they now no longer contest, have an important bearing on his conclusions, which the appellants still challenge, with respect to the inter vivos transactions. It may now be accepted that when Bill executed his Will in April 1985 he knew "exactly what he wanted to do", was "knowledgable about his property and affairs generally" and was not "vulnerable to the influence of a person inclined to take unfair advantage of him"; and that he was "acting voluntarily not subject to the influence of any other person".

Those conclusions and findings are relevant to the conclusions now challenged. By his Will, Bill had made a gift to Neil which was much more generous to him, and ungenerous to the appellants, than that which he made by the inter vivos transactions. The latter included only part of the property included in the option in the Will and the difference in value between the property included in each far exceeded the difference in consideration as was demonstrated by the exercise of the option by Neil, after Bill's death, notwithstanding the completion of the inter vivos transactions.

It is true that there was always the risk that Bill would change his Will to Neil's disadvantage. But on the trial Judge's findings that seemed very slight. Bill had regretted not having had a son and thought that women should not be involved in business; both he and Sam apparently wished to ensure that their business continued as a whole after they died and presumably saw that leaving it to Neil was the best way of ensuring that; and Bill and Neil had a close friendship and mutual respect. If, as I think, the risk was so slight there does not seem to have been any real benefit to be gained by Neil from the inter vivos transactions.

It was therefore appropriate for his Honour to assess Neil's character, and consequently the

likelihood that he would exert undue influence over Bill or engage in unconscientious conduct towards him, in the light of the conclusion that, quite independently, Bill had already committed himself to making a much more generous gift to Neil, albeit to take effect in the plainly not too distant future.

The impetus for the inter vivos transactions, his Honour accepted, was Neil's obtaining $150,000 from the sale of property in late 1987 or early 1988. He approached Bill and asked him if he would sell him, Neil, specified property, part of that included in the option, for $150,000. Bill accepted.

Bill's awareness of what he was doing, and that the option contained in his Will might cause family dissention is shown by his statement to Neil at the time he accepted Neil's offer that he had better do it "before someone causes bloody trouble". And that statement indicates, on the view open to his Honour, that Bill was determined to give effect to his intention, evident in the Will option, that Neil should have his grazing interests. That this transaction took place at the same time as one in which Sam transferred his interests in the same property to Neil tends to support this conclusion.

It is in this context, and of his Honour's general acceptance of Neil's evidence, that the events of 19 July 1988 should be viewed.

Notwithstanding that Dr. Hatcher's examination of Bill was fairly short and he was not told the full circumstances of the transaction (he did not know, for example, of the forgiveness of debt) the learned trial Judge was entitled to conclude, in my view, that that examination, supported as it was by the evidence of Neil and Mr. Pack, satisfied him of Bill's capacity and independence in the matter. His Honour also expressed satisfaction that had Bill been independently advised by another lawyer the end result would likely have been the same. No doubt his Honour derived support for that conclusion from the conclusions to which I have earlier referred with respect to the Will and the relationship between

these transactions and the option granted in the Will, and by Bill's subsequent adherence to the Will and the inter vivos transactions.

Bill returned to see Mr. Pack on 28 July 1988. Far from repenting of the transaction of 19 July, he discussed whether he should charge Neil for the balance of his interest in the partnership or give it to him.

On 24 November 1988 Bill returned to see Mr. Pack with Mr. and Mrs. Leahy. His Honour did not resolve all differences in recollection between Mr. and Mrs. Leahy on the one hand and Mr. Pack on the other as to what took place at that meeting. But he did accept that what transpired suggested Bill's determination to hold, in an informed way, to the dispositions which he had made and to the Will he had executed.

This and other evidence which the learned trial Judge accepted supports his Honour's conclusion that, whatever failing Bill may have had in 1988 he remained independent at the time of this transaction.

It is true that, after the transaction, both Bill and Beryl, Neil's wife, were evasive or even untruthful to the appellants about what occurred on 19 July. But that is quite explicable by a desire, on both parts, to avoid family unpleasantness.

5. The application of the above principles to these facts

It is plain that on these facts the learned trial Judge's finding that no undue influence was exerted cannot be disturbed. As his Honour noted, the transactions were consistent with Bill's general intention, evident in the Will option, that Neil should acquire all of his properties at a generous price amounting to a substantial gift. The finding was also consistent with the evidence of Mr. Pack, Dr. Hatcher and

Neil all of whom his Honour generally accepted.

Also on those facts the learned trial Judge was justified in concluding that, at the relevant time, Bill was not under a special disability in dealing with Neil. Far from showing that he was unable to make a judgment as to what was in his own interests, he was pursuing a course consistent with that on which he had commenced in 1985 when he executed his Will and, it would seem, for the same reasons. That is supported by the evidence of Neil, by that of Mr. Pack and Dr. Hatcher as to events on 19 July and by the evidence of Mr. Pack as to events on 28 July and 24 November.

If it matters I would also conclude that it was implicit in the learned trial Judge's findings of fact that neither in making the offer to Bill nor in anything he subsequently did was there any exploitative conduct on Neil's part to procure the inter vivos transactions or their general effect.

6. Conclusion

It follows from what I have said that I would dismiss the appeal. It is therefore unnecessary for me to express any view on whether, if the appellants had been otherwise successful, they would have been entitled to the only relief which they now seek, that is, setting aside the Deed of Gift thereby requiring the respondents to complete the purchase for full consideration.

The appeal should be dismissed with costs.