SUPREME COURT OF QUEENSLAND

CITATION:	*Pinter v Pinter & Anor* [2016] QSC 314
PARTIES:	**GIULIANO PINTER** (plaintiff) **v** **MARCELLO LUCIANO PINTER in his own capacity and as Executor of the late Giacomina Pinter (deceased)** (first defendant) **MARISA PINTER** (second defendant)
FILE NO:	SC No 8285 of 2013
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	23, 24, 25 and 26 February 2016, 2 March 2016
JUDGE:	Douglas J
ORDER:	**On the undertaking by the defendants by their counsel to pay the plaintiff the sum of $2,500 on or before 12 January 2017:** **1. The plaintiff's claim is dismissed.** **2. Order the plaintiff to pay the defendants' costs of the action including reserved costs, if any, on the standard basis up to and including 12 August 2014 and on the indemnity basis thereafter.** **3. Order that caveat 715296821 be removed from lot 26 on RP 174076.**
CATCHWORDS:	EQUITY – GENERAL PRINCIPLES – UNDUE INFLUENCE AND DURESS – PRESUMPTION OF UNDUE INFLUENCE FROM RELATIONSHIP OF PARTIES – where a husband and wife, Eduardo Pinter and Giacomina Pinter (the parents), had two children: Marcello Pinter (first defendant) and Giuliano Pinter (plaintiff) – where

the parents sold a block of flats that they owned at Mooloolaba to the first defendant and his wife, Marisa Pinter (second defendant), in exchange for a half interest in a new house that was to be constructed by the defendants in Robertson and in which the parents and the defendants were to live – where the parents lived in the house and were cared for by the defendants for a number of years before they needed nursing home care – where the parents each executed an enduring power of attorney appointing each other and the plaintiff and the first defendant as attorneys – where Giacomina executed the transfer of the Mooloolaba flats in her own right and in her capacity as attorney for Eduardo – where the plaintiff alleges that Giacomina lacked capacity at the time she signed the transfer as she was aged approximately 75 years of age and suffering from dementia and impaired cognition – whether there was a statutory presumption under s 87 of the *Powers of Attorney Act 1998* (Qld) that Giacomina was induced to enter the transaction by the first defendant's undue influence

EQUITY – GENERAL PRINCIPLES – UNDUE INFLUENCE AND DURESS – ACTUAL UNDUE INFLUENCE – where the parents' solicitor was acting for the parents as well as the defendants in the transaction – where the parents were friends of the solicitor over many years – where there was no suggestion that the solicitor preferred the defendants' interests to those of the parents – where the parents met with a financial adviser – where the parents obtained substantial consideration from the defendants for the transfer of the Mooloolaba property – whether there has been shown to be actual undue influence in the transaction

EQUITY – GENERAL PRINCIPLES – EQUITABLE REMEDIES – RESCISSION – UNDUE INFLUENCE OR DURESS – where the parents received care provided by the defendants during their later years that is not measurable simply in monetary terms – where the defendants were not conscious wrongdoers – where it would be practically impossible to rescind or unwind the transaction in such a way as to do equity to all the parties – whether there should be an exercise of discretion to unwind the transaction

ESTOPPEL – GENERALLY – where the plaintiff claimed that he had an agreement with the first defendant that the Mooloolaba property was transferred to the first defendant on the understanding that it would form part of Giacomina's estate, passing equally to the plaintiff and first defendant upon her death – where the second defendant was not said to have

been a party to the agreement – where Giacomina's will left her estate equally to the plaintiff and the first defendant – where the plaintiff claimed that the rental proceeds from the Mooloolaba property would be used to provide care needs for the parents – where the defendants claimed that one reason for the transfer of the Mooloolaba property was to allow the parents to obtain Commonwealth pensions and this object would have been defeated if the parents were entitled to income from the rental proceeds – where the plaintiff claimed to have acted to his detriment by providing maintenance and renovation works at the Mooloolaba property in reliance upon the alleged agreement he reached with the first defendant – whether the defendants are estopped from denying the alleged agreement between the plaintiff and the first defendant regarding the Mooloolaba property

Powers of Attorney Act 1998 (Qld), s 33(1), s 43(2)(e), s 87

Anderson v Anderson [2013] QSC 8, applied
Comerica Bank-Texas v Texas Commerce Bank National Association 2 SW3d 723 (1999), cited
Commonwealth v Verwayen (1990) 170 CLR 394; [1990] HCA 39, cited
Ex parte Whelan [1986] 1 Qd R 500, cited
J.A.D. International Pty Ltd v International Trucks Australia Ltd [1994] FCA 939, cited
Lagunas Nitrate Company v Lagunas Syndicate [1899] 2 Ch 392, cited
Maguire v Makaronis (1997) 188 CLR 449; [1997] HCA 23, cited
Marek v Australian Conference Association Pty Ltd [1994] 2 Qd R 521, cited
Parnall v British Columbia (2004) 26 BCLR (4th) 45, cited
Smith v Glegg [2005] 1 Qd R 561; [2005] 1 Qd R 561, cited
Spence v Crawford [1939] 3 All ER 271, cited
Watkins v Combes (1922) 30 CLR 180; [1922] HCA 3 cited
Whereat v Duff [1972] 2 NSWLR 147, cited
White v Wills [2014] NSWSC 1160, cited

COUNSEL: D Marks QC for the plaintiff
T W Quinn for the first and second defendants

SOLICITORS: Crilly Lawyers for the plaintiff
Varitimos Lawyers for the first and second defendants

Introduction

[1] Eduardo Pinter and Giacomina Pinter died seven weeks apart in 2011. They had been happily married for many years, having migrated to Australia from Italy in the 1950s. This is a dispute between their second child, Giuliano Pinter, the plaintiff, and their first child and his wife, Marcello Luciano Pinter and Marisa Pinter, the defendants. The dispute is principally about whether the plaintiff is entitled to an interest in a property, a block of flats at Yallanga Place, Mooloolaba.

[2] That property was transferred on 5 March 1981 to the parents and the plaintiff who then held it as tenants in common in equal one third shares. Giuliano transferred his interest in what was essentially still vacant land to his parents on 25 August 1982 for what the defendants say was market value. The parents built flats on the property. There was disputed evidence as to the nature and extent of the work done by the plaintiff in the building of the flats.

[3] The parents earned income from the flats but decided, in about 2001, as they became older, to sell the flats. They did not receive satisfactory offers but remained concerned about the effect of the asset and the income they earned from it on their ability to receive Commonwealth government pensions. Consequently, they agreed to transfer the flats to the defendants, in exchange for a half interest in the defendants' proposed new residence at Hanrahan Street, Robertson. That residence was to be owned as tenants in common as between the defendants and the parents in equal shares. The plan proceeded. The Mooloolaba flats were transferred to the defendants by Eduardo and Giacomina on 30 May 2003 with Giacomina executing the transfer as Eduardo's attorney. One issue in the case is whether Giacomina was then in a position of special disadvantage with respect to Marcello, the first defendant, in signing that transfer. She executed a will on or about 7 September 2004. Her capacity to do that has not been challenged. She also travelled to Europe in 2005 and there was contested evidence about her capacity to look after herself on that trip.

[4] A new house was constructed by the defendants at Hanrahan Street, designed to accommodate both the defendants and the parents, with part of the residence being allocated to the parents. A half interest in the property had been transferred to the parents by the defendants in or about 3 June 2003 before the house was finished. As the parents grew older they were cared for by the defendants for a number of years before they eventually needed nursing home care. That was one of Giacomina's hopes when she made these arrangements for the sale of the Mooloolaba flats to her elder son and his wife. She did not want to go into a nursing home then. There is no doubt that her hopes were fulfilled until it became impossible for the defendants to continue to look after the parents.

[5] Giuliano had been offered the chance to take a share in the Mooloolaba flats when the transfer to the defendants had first been proposed about 2001 but did not take up the offer. He was involved in a matrimonial dispute at the time and was concerned about the effect of the proposed transaction on that dispute. Nonetheless, he now claims that there was an agreement between him and his brother that they would share the Mooloolaba property 50% each after their parents died, with the income from the flats applied to the property's maintenance and upkeep with any surplus to be used for the parents' care during their lives. He said the agreement was made in telephone discussions between him and his

brother on 7 May 2003 and on or about 3 June 2003. Marisa Pinter, the second defendant, was not said to have been a party to the agreement. He also alleges that his mother spoke to him on the latter occasion and confirmed that she would make a will leaving her estate equally to the plaintiff and the first defendant.

[6] The will was made in those terms and, as a consequence, the plaintiff is now entitled to a one quarter share of the defendants' residence that they shared with the parents. Giuliano also says that his mother, on or about 3 June 2003, confirmed to him that the Mooloolaba property would be transferred to Marcello on the clear understanding that it would form part of her estate and upon her death would pass equally to Marcello and Giuliano pursuant to her will. He also understood that the parents would come to live with the defendants and would be transferred 50% of the property on which the defendants proposed to build the residence to be shared by them and the parents.

[7] He alleges that his mother was subject to undue influence in entering into the arrangement with the defendants and that a presumption of undue influence arose because the male defendant held a power of attorney from his mother. That power of attorney was executed by Giacomina on 14 September 1999 in favour of Eduardo in the first instance and, if he became incapable to act, then to both of her sons.

[8] There are other legal issues concerning whether an estoppel should operate in favour of the plaintiff as to the agreement alleged by him in respect of actions to his detriment by the provision of maintenance and renovation work in relation to the Mooloolaba property. There was also a question of the effect of the *Limitation of Actions Act 1974* (Qld) on the relief sought in the case, which was not pursued actively in the submissions, and argument about the amount of any equitable compensation or damages that might be payable to the plaintiff.

[9] The plaintiff had originally pleaded that he had a beneficial interest in the Mooloolaba flats based upon his involvement with that property in the 1980s but abandoned those allegations during the hearing. The matter has been conducted since then, therefore, on the basis that the history of his involvement with those flats is now irrelevant and that his claim is to be dealt with without reference to events before 2002.[1]

[10] The remaining claims are for an account with respect to dealings involving money belonging to Giacomina due to come into the hands of Marcello or received by any other person on behalf of or on account of Marcello and an order for payment to the plaintiff of 50% of any sum established by the taking of that account. There are also claims for a declaration that the defendants hold 50% of the Mooloolaba flats on trust for the plaintiff or an order for equitable damages instead and, alternatively, a claim for a declaration setting aside the "Mooloolaba transfer" on the basis of undue influence.

[11] As part of the claim for an account the plaintiff says his brother has failed to account for receipts of rent of another unit at Nundah owned by his mother's estate. The parents had lived in that unit for several years before they moved into the house at Hanrahan Street

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[1] T 4-16/40 - T 4-17/23.

with the defendants. The unit was three storeys high and becoming unsuitable for them as they grew older. The plaintiff also claims, apparently as part of the claim for an account, that he has not been reimbursed for maintenance or renovation work he performed at the Mooloolaba property during the lives of the parents.

Evidence concerning the transfer of the Mooloolaba flats

[12] Giuliano's evidence was that his mother was fluent in English and read and spoke it well and that his father's spoken English was also good. Giuliano, the plaintiff, was a bricklayer/builder. He and his brother and their parents began to talk about the parents' future in the early 2000s. His mother was scared about losing her capacity to manage her own life but did not wish to move into a nursing home. Eduardo, his father, had a similar view.

[13] He and his brother, Marcello, spoke about that problem. Marcello said that he could look after the parents and suggested that the Mooloolaba flats go into his name. He wanted to build a new house on a vacant block at Hanrahan Street, Robertson which he suggested the parents could live in with him and his wife. Part of the reasoning was that, if the Mooloolaba flats went into the names of him and his wife, the parents could get the pension on the basis that their pension entitlements were not affected by the value of their residence. At the time, their pension entitlements would have been affected by the value of the Mooloolaba flats and the income they received from them. The plaintiff said that the proposal was that, if the flats went into Marcello's name, then the parents could receive an aged pension while the receipts from renting the flats could be used to pay off a loan in respect of the flats and provide income for the parents.

[14] Giuliano said that their mother went through the proposal with both of the sons. He said that she wanted the flats shared evenly between him and his brother. He was concerned about having the flats in his name at the time because of further potential problems in the relationship between him and his partner, Debra. He says that Marcello promised that he would ensure that the flats were shared evenly in the event of the parents' death.

[15] He also said that his father said something to him at the time to the effect that there was something going on between Marcello and their mother and that he, Giuliano, should be careful, that Marcello was very smart.

[16] Marcello had to borrow $600,000 to put towards the construction of the house at Hanrahan Street. He borrowed against the Mooloolaba flats. He told Giuliano that he would take the parents to Mr Giuseppe (Joe) Rinaudo, the family solicitor, for the paperwork. Giuliano said that he believed that the paperwork would include a will to leave the Mooloolaba flats to him as well as to his brother on top of their transfer to the defendants. Marcello invited him to the meeting with Mr Rinaudo and told him that that arrangement in respect of the ownership of the Mooloolaba flats would be in the will too. He did not go to the meeting, however, as he was working at the time.

[17] Marcello built the house at Hanrahan Street as an owner/builder and obtained trade prices by using Giuliano's accounts for his company, Pinter Constructions Pty Ltd. The parents

lived at Hanrahan Street between about 2004 and 2007 when they each had to go to nursing homes.

[18] The plaintiff worked on the Mooloolaba flats from time to time. Marcello paid the subcontractors and he did not charge for his time because he thought the flats belonged to both him and his brother. He renovated flats 1, 3 and 5 and referred to his work diary for January and February 2004 in respect of the work he did on flats 1 and 3. He worked on flat 5 in 2005. It was the flat used by his parents. He says that he spent a lot of his own time, at least 100 hours, which he did not record. His estimate for the time spent on flat 5 was between 60 and 70 hours by him and a longer period in respect of flats 1 and 3 extending over four to five weeks. He spent three to four weeks doing the work on flat 5. He had used flat 1 on the ground floor as a weekender at some stage and exhibit 1/19 shows that he paid the electricity bill through Pinter Constructions. The labour component of the work for which he charged $8,449.51 plus GST shown in exhibit 1/17A was not in relation to the work performed by him. It was work performed by a subcontractor.

[19] He went to Italy in the latter part of 2005 on a visit with his parents and the defendants to travel and see where his father had grown up in what is now Croatia. He agreed that they would spend all day, together with the parents, touring and that his parents were steady on their legs. He said that his mother had trouble speaking but knew who he was and that his father was fine but needed looking after.

[20] They each died within a brief time of each other in 2011. He did not catch up with their affairs until about a month after the funerals. He received a copy of the will about two to three months later and caught up with his brother at his brother's house. He learnt then that he was entitled to one-quarter of the Hanrahan Street property and to a half share in the unit at Nundah. He said that he told his brother that they had agreed with their mother that the Mooloolaba flats were to be divided half and half. He said his brother agreed about the half share but said that he had paid $600,000 so the plaintiff had to pay Marcello $300,000 to get his half interest. He said his brother then wanted the payment of further sums.

[21] About that time, he had been involved in litigation with his former wife and had told her lawyers that he had no interest in the Mooloolaba flats. He said that he did not have an interest at that time but, in effect, expected that he would acquire such an interest when his parents died.

[22] He gave evidence that he had spoken to a real estate agent from a firm called Stockdale & Leggo at Mooloolaba. His name was Mark Elston. He and his brother had given Mr Elston instructions to obtain a valuation for the transfer of the Mooloolaba flats into Marcello's name at about $600,000. That was relevant in respect of the transfer and also to inform Centrelink for the payment of a pension to his parents.

[23] The parents' unit at Nundah remained empty for a while after they moved to live with Marcello. Then the defendants' daughter moved into that unit rent free in return for repairing it by painting and cleaning it. He denied having a fallout with his parents in respect of the construction of the Mooloolaba flats but said that his ceasing work on them

was caused by his move to Brisbane. He did not see the documents concerning the transfer of the flats to the defendants until the litigation started against them. Nor did he see the transfer in respect of the Hanrahan Street property.

[24] In cross-examination, he agreed that he did not object to the transfer of the flats in 2003, subject to the conditions he asserted relevant to his claimed interest in the property. He did not believe that his parents would have been put upon, the main concern being that they were properly looked after. He agreed that they were well looked after by his brother and sister-in-law.

[25] He, when asked whether his parents were experienced real estate investors, said that they dabbled in the purchase of properties. His mother was the dominant figure in respect of business and astute. On further cross-examination, it became apparent that his parents had bought many properties over the years that he knew of. Some of them had been bought in conjunction with him. He agreed that he knew that it was important to have his interest registered on the title deed of a property and that in his earlier dealings with his parents all of their interests were registered. He also agreed that Mr Rinaudo was a pillar of the Italian community, regarded as astute and respectable and someone who had always been the family solicitor and a friend of his parents.

[26] He disagreed with the suggestion that he did not work on the Mooloolaba flats after the transfer of his interest to his parents, saying that he was still living at the coast at the time and used to observe what was happening with them. He disagreed with the suggestion that he was not involved in the placing of piles on the property. He agreed with the suggestion that his name was removed from the property to make him a smaller target for any prospective property settlement with his wife. He denied that he then disposed of his interests to his parents, saying that he gave his share to them. There was some evidence about offers being made in about 2001 for the purchase of the flats in a range from $450,000 upwards. He said they were listed at $795,000 and that his parents were looking for offers without success in late 2001. He denied the suggestion that his mother said, at the time of the transfer of the flats to his brother, that the parents were prepared to sell that property to him and his brother.

[27] A financial plan prepared by Mr Buhk, shown in ex 10, was one that he believed his brother would have arranged. It refers to the flats being valued at $650,000 and to the proposal that a half interest in the Hanrahan Street property be transferred to the parents.

[28] He agreed that his brother had told him of the appointment with Mr Rinaudo to document the transactions. It was put to him that his mother told him she wanted him to be there. He denied that. He agreed, however, that he knew of the appointment and was rung from the meeting by his brother to ask why he had not come. He disagreed with the suggestion that he told his brother that he was too busy but said that he left it to Marcello, trusting him to protect his interests.

[29] The parties agreed that the value of the Robertson property at present is $1.28 million net of selling costs. It was suggested to Giuliano that his brother and sister-in-law received the money from the rentals of the flats at Mooloolaba and paid tax on that as well as looking after their parents. There was no suggestion that he, Giuliano, would look after

them. He said that he did not go to see Mr Rinaudo because Marcello was handling the matter.

[30] Mrs Maria Mangano gave evidence of her observations of Eduardo and Giacomina when she met them on their holiday in Europe in Rome in 2005 where they were staying with her sister. They accompanied them for a holiday to a town called Pula and were with them in Rome after the defendants and their son had left. When she returned to Rome with them she said that Giacomina had trouble setting a table and needed help with her breakfast as did Eduardo. Eduardo fell on an escalator while she was with them in Rome, after the defendants had gone. He broke his arm which was put in plaster. That night he and Giacomina tried to take the plaster off his arm because he said there was nothing wrong with him and he did not need it. They had to take him back to hospital to have it replastered.

[31] At this stage, Giacomina was having problems in using the toilet and she had to clean up after her. She came back with them on the flight from Rome to Australia and said that Giacomina did not seem to understand that she was on a plane, wanted to get out of it on many occasions but, could not do so.

[32] Marcello's evidence was that from 2001 the Mooloolaba flats had become a bit of a burden for his parents because of the distance from where they lived at Nundah in Brisbane and they were leaning towards the idea of selling them. His mother had seen her own sister in a nursing home and did not want to be left in that position. When they hoped to sell the flats they did not receive any acceptable offers. His father would have been happy to sell them for $600,000. Marcello did his own sums and worked out how they could stay together as a family. He and his wife could purchase the flats and build a house for the parents. They sought help from a financial adviser, Mr Buhk. Before then they had spoken with his parents about their pension entitlements both from Italy and Australia. With the income from the flats his father would not have been eligible for an Australian pension. He also received an Italian military pension.

[33] His mother had significant input into the design of the building at Hanrahan Street so she could get what she wanted in what was virtually a self-contained section of the house. She discussed the detail of what she would like with Marcello and he designed and built the premises to meet his mother's requirements.

[34] He spoke to Giuliano about the proposal with his parents. He thought that occurred sometime before 2003. Giuliano did not bring up any proposal that he was to get a half interest in the Mooloolaba flats when their parents died. Nor did he make such a promise to Giuliano. Nor did he make such a promise to his mother. Nor did his wife ever authorise them to promise on her behalf that she would transfer a half interest in the Mooloolaba flats to Giuliano at any time.

[35] He made the arrangements with Mr Rinaudo to arrange the paperwork to give effect to what was proposed. Their mother almost insisted that Giuliano come to a meeting with Mr Rinaudo so he rang Giuliano and told him that their parents wanted him to be involved and to come to the meeting with Mr Rinaudo. He told Giuliano the date and time of the meeting but Giuliano did not attend it. When he failed to appear Marcello rang Giuliano

on his mobile phone number and Giuliano told him that he had "a lot on, I'm very busy and I couldn't make it and it really doesn't concern me, he said, because I'm not a party to buying the units."[2] Their mother was very disappointed and angry that Giuliano had not come to the meeting.

[36] He then applied for a loan from a bank to build the property at Hanrahan Street. He borrowed $600,000 and spent at least $800,000 in building the house. They already owned the land. He and his wife thereafter accounted for the income from the Mooloolaba flats in their tax returns. Giuliano did not ever say to him that that income was still to be treated as if their parents had some entitlement to it. He made no promise either to his parents or to Giuliano to that effect. Nor did he have any authority from his wife to make any such promise on her behalf.

[37] He recalled asking his brother to do some work on flats 1 and 3 of the Mooloolaba flats and said that he paid the charges notified to him for that work. He did not ask him to do any further work on the flats.

[38] He gave evidence about the trip in 2005 to Europe with his parents. He identified a number of photographs taken during the trip, including one of their 60th wedding anniversary. He said that the evidence of Mrs Mangano about the problems she observed with his parents on that trip was not consistent with his observations of their behaviour. His father was still able to play the piano accordion to general acclaim. His parents were still able to get out and about, walking on sightseeing trips and going to restaurants.

[39] Giuliano raised his claim that he was entitled to half of the flats at Mooloolaba after their parents' death in a phone call. The parents had died in 2011. Giuliano told Marcello that he wanted to have a discussion with him about buying a section of the flats from Marcello so that he, Giuliano, would own the whole lot. Marcello told him he did not know where he got that from and he would not be prepared to sell him the half. He told him that he had bought the flats from their parents and that their mother then owned 50% of the house at Hanrahan Street and that was the only thing left in the estate apart from the home unit at Nundah.

[40] Giuliano later came to the house and there was a discussion where he said that he was going to try to work something out, an exchange where he could buy a share in the flats and give Marcello and Marisa back the quarter share of the house that Giuliano had inherited through their mother's estate. He proposed to Giuliano an agreement by which he and Marisa would sell 50% of the Mooloolaba property to him for $300,000 and 50% of itemised expenses at the time of settlement to be used to discharge the $470,000 mortgage still owed on the property if Giuliano agreed to sell his 25% holding in the Hanrahan Street property for a nominal amount to be agreed. He sent a copy of that document which is ex 2/13, to Giuliano but no agreement resulted. The mortgage on the Mooloolaba flats was eventually discharged. Part of the money used to discharge the mortgage came from the sale of property owned by Marisa.

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[2] T 4-49/24-27.

[41] He agreed in cross-examination that the $600,000 figure shown in the contract between him, his wife and their parents for the transfer of the Mooloolaba property was not paid in cash but by the transfer of the half interest in the land at Hanrahan Street, Robertson. He also agreed that the previously unencumbered land at Mooloolaba would be subject to a $600,000 mortgage to go towards the building of the house on the land at Hanrahan Street. He believed that his parents obtained independent advice from their accountants, a Mr Col Archer, and Mr Buhk who worked in Mr Archer's officer as a consultant. He took his parents to see Mr Buhk. He agreed that Mr Buhk's plan did not contain any income from renting out the Mooloolaba flats. It had an estimate of $150 per week for renting out the Nundah unit but it was not in a state to be rented out commercially at the time so the defendants' daughter resided there for some months.

[42] His parents wanted advice from the financial adviser as well as from their solicitor. He was not sure who arranged the meeting between the financial planner and his parents. While the Nundah unit was not rented the pensions his parents received were not sufficient to support them. The plan's reference to selling the Mooloolaba flats at market value to a unit trust controlled by Giuliano and Marcello was a suggestion put together because Giuliano was having problems with his wife at the time. The financial adviser advised against it and that plan did not proceed.

[43] He agreed that Mr Rinaudo was acting for both himself and his wife and his parents. He said, however, that his parents were friends of Mr Rinaudo over many years.

[44] He described his mother's English as very heavily accented Italian English. She was not able to write English. He disagreed with the information given to a Dr Appadurai, the geriatrician who treated his parents for memory problems, that she was usually fluent in English. He normally spoke to her in Italian. Nor could she read English. He agreed with some of the information he had provided Dr Appadurai about her not keeping track of her spending and writing things down more often in a notebook to assist her memory with appointments and shopping lists. He recalled being told that she suffered from mild dementia in about September 2002. He disagreed with the similar report about his father then. He had no difficulty speaking to them in Italian at that stage.

[45] He agreed that his mother improved with the drug she was prescribed. He also agreed that she had a memory problem or at least a concern about a memory problem then. He also agreed with the reporting about his father by him to Dr Appadurai. These included his comments that his father tended to be more verbally aggressive or a little bit cranky in his older years and that his depth of reasoning was not as much as it was in his earlier years. Nonetheless, he said that he was quite at ease when his parents went to see Mr Rinaudo on 30 May 2003.

[46] When it was suggested to him in cross-examination that the rent from the Mooloolaba property would be used to provide for the care of his parents he disagreed because, as he said: "If they had the units and still had the rent they would not qualify for a pension."[3] He described the suggestion that the money was not to be used in paying off the mortgage

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[3] T 5-33/16-17.

as a figment of his brother's imagination. He also vigorously disagreed with the suggestion that he and his brother would share the Mooloolaba property half each after their parents died. He said the building of the house at Hanrahan Street was well under way by May 2003. He was confident that he was capable of building the house.

[47] He did not discuss any claim by Giuliano that there was an agreement that he have a one half share in the property at Mooloolaba after their parents' death with his wife because there was never any such agreement. He agreed that he had told his wife in detail about what was proposed in respect of his parents, with whom she had a good relationship.

[48] Marisa Pinter's evidence was that she was not asked and did not agree with Giuliano to transfer half of the Mooloolaba flats to him. Marcello did not say to her that Giuliano would have a half interest in them. The rental from them went to repairs and maintenance and repayment of the mortgage they took over. There was no suggestion that the rental proceeds would be used to provide for the parents-in-law's care needs. She also explained the cash withdrawals in the accounts prepared by her. There had been some detailed cross-examination about them but I accept that she had properly recorded the reasons for the expenditure in cash and accounted for them in detail. She believed that the parents-in-law's pensions covered their expenses well enough. Giuliano did not tell her that he believed he had a half interest in the Mooloolaba flats.

[49] She said that her parents-in-law, on the trip to Europe in 2005, did not have the problems described by Maria Mangano. They did need help because they were elderly but they were not in any sense unruly or uncontrollable. She went through the photographs as well and confirmed them as consistent with the sightseeing, lunches, dinners and family activities that her parents-in-law engaged in on that trip. She said they were happy to talk to people, sociable and enjoyed themselves.

[50] She disagreed with evidence of Giuliano that his brother had said to him that if he, Giuliano, did not accept what Marcello was proposing, after their parents' death, then Giuliano could "fuck off". She had never heard her husband speak to Giuliano using that sort of language. Giuliano's evidence had been that Marcello said to him:

> "If you don't take what I give you now you can fuck off and you'll get nothing … You haven't got a leg to stand on."[4]

[51] She could recall Giuliano walking out at the time of the second visit he made to them after the parents' death when he just said: "I'll see you in court."[5]

[52] She disagreed with the proposition that Giuliano would be entitled with Marcello to share the Mooloolaba property 50/50 after their parents had died. She also disagreed with the proposition that the rental proceeds from the Mooloolaba property would be used to provide care needs for the parents. She believed that they received independent advice

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[4] See T 5-48/26-36 and T 1-97/35-40 and exs 2-13 and 2-14.

[5] T 5-49/3-4.

from the financial adviser and was not concerned that Mr Rinaudo was acting for both vendor and purchaser in the transaction.

[53] The defendants' son, Mr Tony Pinter, also observed his grandparents on their holiday in Europe in 2005. He was the driver for significant parts of the journey which was extensive. He recalled no particular difficulty with either of his grandparents as passengers. He said that his grandparents engaged with other people and were not withdrawn or a problem. He could not recall there being any issues with them. He knew that they had been seeing a specialist since 2002 about their memories. He also probably knew that they had been put on medication for those problems. He left Italy before they did and could not shed any light on what happened after he left.

[54] I shall refer to the medical evidence dealing with the capacity of Eduardo and Giacomina at the time of the transfers later.

Account claim

[55] The plaintiff's claim for an account with respect to dealings involving money belonging to Giacomina due to come into the hands of Marcello or received by any other person on behalf of or on account of Marcello and an order for payment to the plaintiff of 50% of any sum established by the taking of that account depended, in respect of the rentals from the Mooloolaba flats, on my acceptance of the agreement alleged by him involving Marcello and their mother. It was supported in an evidentiary way by evidence from an accountant, Mr Lytras, providing estimates of the net income from the Mooloolaba property since the date of the alleged agreement on 7 June 2003.

[56] There are less significant claims for the rent from the Nundah unit and the work that Giuliano said he performed on the Mooloolaba flats.

Rental payments from the Mooloolaba flats

[57] The defendants' argument in respect of the account sought in respect of the Mooloolaba flats is that, normally speaking, it should have been sought in an action against the first defendant as executor. He is sued in this action in his own capacity and as executor of his mother's estate and the issue is whether the accounts taken should include the income and expenses of the Mooloolaba flats. The defendant makes the point, therefore, that the parties have chosen to conduct their litigation on the assumption that Giacomina had capacity to make her will in 2004, something relevant in respect of any questions of capacity affecting the circumstances in which the flats came into the ownership of the defendants.

[58] The defendants also argue that the net rentals for the flats do not answer the description of "money belonging to the deceased due to come into the hands of the first defendant" contained in para 1 of the statement of claim. They also argue that the case as pleaded by the plaintiff contains no agreement sufficient to bind the defendants to treat the net rentals as money belonging to Giacomina.

[59] In that context they rely upon the allegations contained in para 13(d) and 13(e) as not containing an agreement nor any sufficient basis for an entitlement of Giacomina to receive the net rents. Paragraph 13(d) and paragraph 13(e) of the statement of claim provide as follows:

> "(d) The deceased, Edoardo, the Plaintiff and Marcello had a conversation at the Nundah Property in which:-
>
> (i) the deceased said she was worried about how she and Edoardo would be cared for in the future, and that she strongly did not want them to go into a nursing home;
>
> (ii) Marcello proposed a plan whereby:-
>
> (A) the deceased and Edoardo would be cared for by him and the Second Defendant ('Marisa');
>
> (B) the Mooloolaba Property would be transferred to him so that the deceased and Edoardo's assets would qualify them to receive Centrelink benefits;
>
> (C) he would borrow funds to build a house for him, his wife, and the deceased and Edoardo to live in together;
>
> (D) Edoardo and the deceased would receive Centrelink pensions;
>
> (E) the Mooloolaba Property would be rented and the rent (together with their Centrelink benefits) would be used to provide for the care needs of the deceased and Edoardo Pinter, with the surplus being used to pay for the Mooloolaba Property's upkeep and maintenance;
>
> (F) the deceased and Edoardo would be transferred 50% of the Robertson Property.
>
> (e) the plaintiff agreed to the proposal set out in (d)(ii) above provided that it was agreed that he and Marcello would share the Mooloolaba Property 50% each after the deceased and Edoardo died, and that the rent proceeds would be applied to the maintenance and upkeep of the Mooloolaba Property and any surplus would be used to care for the deceased and Edoardo;"

[60] The defendants' submission is that that pleaded discussion did not contain an agreement, nor did it form a sufficient basis for an entitlement of Giacomina to receive the net rents. Nor did the plaintiff's case as to what was actually agreed set out in para 15(d) of the statement of claim include any reservation as to rental entitlement.

[61] Further, the defendants submit that the difficulty with such an entitlement in Giacomina is that the object of obtaining pensions for both parents from the Commonwealth, would not have been achieved if the parents were still entitled to receive the income. The

proposal was intended to convert their income producing asset from the Mooloolaba property into a principal place of residence interest at Hanrahan Street so as to divest their income and turn a disqualifying asset, the Mooloolaba property, into one which did not affect their pension rights, namely a residence. Nor did the parties proceed on that basis as the rental income from the Mooloolaba flats was accounted for in the income tax returns of the defendants.

[62] Accordingly, the defendants submitted that the surrounding circumstances, with the parents' pension entitlement objective and the manner in which the transaction was carried into effect to permit them to receive Commonwealth pensions, were objectively inconsistent with the plaintiff's case but consistent with the defendants' case denying any special agreement regarding the rental income of the Mooloolaba flats.

[63] Nor did the plaintiff's case take account of the fact that the position of the second defendant could not simply be assimilated with that of the first defendant. There was no plea or proof of any actual or ostensible authority of Marcello to bind Marisa and no basis for disturbing her title to her interests in the Mooloolaba flats and, consequently, her entitlement to a share of its income. The defendants submitted, therefore, that the plaintiff's claim for an account based on the alleged reservation of rental entitlements should be rejected.

[64] I accept those arguments and shall develop the reasons why when I examine the evidence relating to the Mooloolaba property claims.

Rental from the Nundah unit

[65] There was a claim in para 22 of the statement of claim, apparently in support of the claim for an account, that the parents' Nundah unit was rented and that Marcello received the rent. The claim for an account was not relied on to support a particular remedy other than the taking of accounts. The evidence about the issue was imprecise. The unit was inhabited from January to December 2007 by the defendants' daughter and her husband rent free with the consent of Giacomina.[6] There was some conflict on the evidence about whether it was tenantable so that she should have been paying the estate rent or whether she had been excused the payment of rent in return for doing some repair work in painting and cleaning the unit. The latter was the plaintiff's own understanding of the situation.[7]

[66] The defence in para 21(b) was that the rent was paid into the parents' account and to the extent that proceeds from the account and rental payments were subsequently received by the first defendant, they had been accounted for in the estate accounts up to February 2013. Those accounts were tendered into evidence as exs 13 and 14. That evidence is that the defendants' daughter was inhabiting the unit before the parents' deaths and that

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[6] Ex 13 para 37.

[7] T2-65/1-10.

it was rented out from December 2007 with the rent paid into the parents' account.[8] The accounts in ex 14 support the fact that rent continued to be paid and recorded after the parents' deaths. Mr Quinn submitted that this was not a case for an account to be ordered against the first defendant as executor. That seems to me to be correct.

[67] There was no precise evidence drawn to my attention from which I could state an account of what may be owing to the estate, if anything. The defendants' submission was that, if this were merely a claim for an estate account an application could be made under r 645 of the *Uniform Civil Procedure Rules* 1999. On the state of the evidence I see no reason to order an account in this action in respect of this issue.

Work done by Giuliano on the Mooloolaba flats

[68] Paragraph 26 of the statement of claim alleged Giuliano had performed unpaid work on the Mooloolaba property from around September 2003 because he believed he had a 50% entitlement to the Mooloolaba property. Paragraph 24 of the defence put that in issue on the basis that a labour component of $8,449.91 had been paid to the plaintiff which was what he had charged. The reply alleged in para 20 that that payment was for a subcontractor's labour, not the plaintiff's own work. That was Giuliano's evidence.

[69] Giuliano also gave uncontradicted evidence that he had performed about 100 hours of labouring work on the property unpaid. There was other evidence from which it could be concluded that an appropriate rate for that work was $25 per hour. The defendants did not seem to wish to resist the possibility of an order that the estate should account to Giuliano in the amount of $2,500 for that work but I shall hear further submissions about that issue if needs be.[9]

Mooloolaba property claims

[70] The plaintiff seeks to establish an entitlement of 50% of the Mooloolaba flats on three bases. First, he claims there was an express agreement alleged in paras 13(e), 15(d) and 15(f) of the statement of claim through which he claims to be entitled to enforce an estoppel alleged in para 26 of the statement of claim.

[71] Secondly, he relies upon a statutory presumption of undue influence arising from the existence of the power of attorney causing the property to fall back into the estate so that he would be entitled to a 50% share of it under the 2004 will pursuant to para 29 of the statement of claim.

[72] Thirdly, he relies upon the general law presumption of undue influence alleged in para 30 of the statement of claim similarly causing the property to fall back into the estate.

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[8] Ex 13 para 39.

[9] T6-72/1-10.

[73] His first claim assumes the validity of the transfer to the defendants subject to the agreement he pleads entitling him to a transfer back from them of a 50% interest. He makes no allegation of actual undue influence but rather relies on the operation of an estoppel. Nor does he allege any lack of capacity to enter into the agreement. For example he relies on the validity of the 2004 will.

Alleged agreement for 50% share of Mooloolaba flats

[74] The original claim for the plaintiff included allegations, since abandoned, that his parents held their interests in the Mooloolaba flats subject to a trust in his favour until their death. As I have said, the plaintiff did not persist with that allegation and had not pleaded how it became binding on the defendants or that it had been disclosed to them. Nor did the pleading make it clear how any trust allegedly created by the parents and any beneficial interest in the plaintiff could affect the registered title of the defendants. It was not alleged that the defendants' interest in the flats was taken with notice of the plaintiff's alleged interest pursuant to any trust binding his parents.

[75] Until that claim was abandoned during the hearing, however, the defendants submitted it provided an answer to a limitations defence because s 11(2) of the *Property Law Act* 1974 (Qld) excluded "the requirement for writing as affecting … the creation or operation of resulting, implied or constructed trusts." The defendants, on the abandonment of the claim, therefore, sought leave to deliver an amended defence to raise an argument that the action was unsupported by any deed, writing, contract memorandum or note signed by them.

[76] Leaving to one side for the moment that history before 2002, the defendants characterised the difficulties facing the plaintiff in respect of its claim based on events post-2002 as not creating enforceable rights. Their arguments included that:

- the plaintiff's testimony failed to support his own pleading in respect of the evidence alleged to have constituted the agreement on which he sued;
- the claim was not put on a contractual basis and no breach of contract was pleaded;
- the plaintiff gave no consideration for the alleged promise;
- equity does not assist a volunteer;
- the relief sought based on an estoppel was out of proportion to the detriment alleged so that, even if there was detrimental reliance, the equity generated was more appropriately satisfied by a modest award of equitable damages;
- no basis was shown for subjecting the second defendant's interest to the plaintiff's claim;
- the parents accepted performance of the agreement between them and the defendants and it was now practically impossible to achieve a reinstatement of that position such that equity would decline the relief sought by the plaintiff;

- the plaintiff's claim sought an interest in land where there was no contract, note or memorandum signed by the defendants such as was required by s 11 of the *Property Law Act 1974* (Qld).

[77] When developing their submissions that the evidence did not support the plaintiff's case, the defendants pointed to his admitted rejection of the opportunity to participate in a purchase of the land from his parents, his rejection of his mother's request to attend Mr Rinaudo's office and the improbability that any solicitor, let alone one of Mr Rinaudo's experience, would listen to such a wrong-headed proposition that a property transferred by the registered proprietor for consideration would nonetheless remain part of the estate of the transferor to be dealt with pursuant to the terms of the transferor's will. The submission was that one would expect that, if such a proposition had been made to Mr Rinaudo, he would have pointed out its impracticability. This submission also points out that the version alleged suffers from "post-event reconstruction" because at the time of the alleged promise by Giacomina, her husband, Eduardo, was still alive.

[78] The argument also points out that the plaintiff's evidence dealing with his alleged telephone calls to Marcello and Giacomina while they were at Mr Rinaudo's office falls short of the allegations in the pleading. In that context they point to the plaintiff's evidence that Marcello rang him from Mr Rinaudo's office saying "that all the paperwork would be done and I *thought* there was a will be made at the same time to say that the property would be in Mum's will once they passed away."[10]

[79] That was argued to be too vague to support the case pleaded in paras 13(e) and 15(d)(ii) of the statement of claim that the plaintiff and Marcello would share the Mooloolaba property 50% each after the deceased and their father died and that the deceased *would* make a will leaving her estate equally to the plaintiff and Marcello with the Mooloolaba property being transferred on the clear understanding that it would form part of the deceased's estate and would pass equally to the plaintiff and Marcello pursuant to her will. Further criticism was that later references to these conversations make it unclear whether Marcello was said to have rung the plaintiff during the meeting or after it.[11]

[80] A further curious aspect of the evidence, to my mind, was that the plaintiff, in his evidence-in-chief, said that he had a conversation with his father at the initial meeting between Marcello and his mother. The plaintiff said his father:

> "Had noticed that Mum and Marc had been talking and doing things and sort of talking behind his back, and Dad said to me there's something going on between Marc and your mother. He says be careful, he's very smart.

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[10] T 1-84/8-15 (emphasis added).

[11] See T 2-94/43-44; T 3-10/15 and T 3-14/30.

> And did you have anything to say?--- I told him that we were doing a deal where we would look after the folks and that me and Marc have organised that we would look after them and that everything was under control."[12]

[81] I later raised that issue with him on the third day of the trial:

> "HIS HONOUR: Well, before you do that, you gave evidence-in-chief that your father had warned you against what your mother and your brother might be, in effect, agreeing between themselves?--- Yes, your Honour.
>
> Did that concern you, about leaving your brother to handle the dealings with Mr Rinaudo?--- I've done many dealings with my brother, and I trusted him, that he would look after mum and dad and do what he had to do right. We've built a few houses together, and I would never, ever not – didn't trust him. I trusted him completely."[13]

[82] I later asked him:

> "HIS HONOUR: Did you think about ringing Mr Rinaudo and telling him of this agreement?--- No, I never, but my brother did ring me from Rinaudo's office."[14]

[83] I must confess that I found this apparent passivity by the plaintiff curious in the context of the alleged warning from his father and the ready opportunity he would have had to either attend the meeting with Mr Rinaudo or speak to him, at least over the telephone, about the nature of the transaction. The evidence makes it clear that the plaintiff was familiar with transactions involving the transfer of land and the desirability of documenting them clearly. The behaviour alleged by him as the basis of this claim is inconsistent with such an understanding and unlikely given the warning he alleges was made by his father and the ease with which he could have spoken to Mr Rinaudo.

[84] If a conversation, such as he alleges had occurred between him, his brother and their mother, had been relayed to Mr Rinaudo one would have expected a solicitor of his experience, as was submitted, to have clarified what would have been a fundamental misunderstanding as to the contents of Giacomina's estate after the transfer of the Mooloolaba property. Mr Rinaudo died well before the trial. There was no statement from him in evidence nor any of his file notes.

[85] The unusual nature of the transaction Giuliano says he believed was on foot would, one would think, have been a real spur to a person with his experience in dealing with land to discuss it with Mr Rinaudo or some other lawyer. The fact that he did not take up an obvious chance to raise it at the crucial meeting, where he says his father had warned him

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[12] T 1-82/40-47.

[13] T 3-12/15-23.

[14] T 3-14/29-30.

about his brother and mother, persuades me that there was no such arrangement. In other words, this is one feature of the plaintiff's evidence that makes it very difficult for me to accept it.

[86] I was also more impressed by the cogency of Marcello's evidence and by the consistency of what he said with the objective surrounding circumstances and the manner in which the Mooloolaba property was dealt with after its transfer to the defendants occurred. In that context, the careful bookkeeping by Marisa, who had experience in that role, also impressed me as consistent only with an understanding of the transaction that excluded anything consistent with Giuliano's case. Giuliano's failure to refer to any such alleged agreement on any view between the transfers in 2003 and after his parents' deaths in 2011 also persuades me against the view that there was any arrangement of the type alleged by him. I do not accept his evidence and do not believe that an agreement of the nature alleged in para 13(e) occurred or that it was repeated as alleged in para 14 and para 15(d) of the statement of claim.

Estoppel

[87] The plaintiff's argument was that if findings were made in his favour as to the agreement reached and if he were shown to have acted to his detriment by providing maintenance and renovation works in relation to the Mooloolaba property in reliance upon that agreement, it should be found that the defendants are estopped from denying the agreement. My conclusions about the plaintiff's failure to establish that such an agreement or arrangement as he alleged in the pleadings was made put paid to this argument.

[88] The defendants also argued that, even if the facts alleged by the plaintiff as to his input of labour into the maintenance of the Mooloolaba flats were accepted, the appropriate remedy would be to award him equitable compensation for his allegedly unpaid labour rather than a 50% interest in the property referring to *Commonwealth v Verwayen*[15] and *Marek v Australian Conference Association Pty Ltd*.[16]

[89] They point to the plaintiff's only quantification of his labour as being an estimate of 100 hours which could be valued by reference to the labour rates charged by his company, Pinter Constructions Pty Ltd. I have already referred to that issue.

Statutory presumption of undue influence

[90] The pleaded case in respect of the power of attorney is that Eduardo and Giacomina each executed an enduring power of attorney appointing each other and the plaintiff and the first defendant as attorneys on 14 September 1999; see para 12 of the statement of claim. The transfer of the Mooloolaba property to the defendants was executed by Giacomina

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[15] (1990) 170 CLR 394, 441-442.

[16] [1994] 2 Qd R 521, 530.

on 30 May 2003 in her own right and in her capacity as attorney for her husband; para 16 of the statement of claim.

[91] The plaintiff also alleges that Giacomina was aged approximately 75 years of age in early May 2003, suffering from dementia and had impaired cognition and that Eduardo was then aged approximately 85 and also suffering from dementia.

[92] The pleading then goes on in paras 29 and 30 to allege that, by reason of Marcello being Giacomina's attorney, and because of s 87 of the *Powers of Attorney Act* 1998, the Mooloolaba transaction is presumed to have occurred due to the undue influence of Marcello over Giacomina and is liable to be set aside. Paragraph 30 then goes on to allege that because of the emotional vulnerability of the deceased, her state of health and impaired cognition and the absence of independent legal advice, at the time Giacomina executed the Mooloolaba transaction, she was in a position of special disadvantage with respect to Marcello, which he well knew, and the transaction was also liable to be set aside because of a presumption of undue influence.

[93] Each of the parents' powers of attorney were expressed to appoint the other parent and, "in the event that he should become incapable to act" appointed the plaintiff and the first defendant as attorneys. Eduardo's power of attorney mistakenly said "he" instead of "she" in respect of his wife but that is an obvious mistake which, if necessary, could be corrected.[17]

When did Marcello become his mother's attorney?

[94] The first question that arises is whether Marcello became an attorney of his mother once those documents were executed or only once Eduardo became incapable to act. The plaintiff's primary submission was that Marcello was an attorney for the purposes of s 87 of the *Powers of Attorney Act* from the date of execution of the enduring power of attorney so that no finding is necessary that a parent was "incapable to act". If I were not satisfied of that, Mr Marks submitted that it would then be necessary for me to decide that at least Eduardo was incapable to act in terms of Giacomina's grant of an enduring power of attorney in favour of Marcello.

[95] Section 87 of the Act provides:

> "**87 Presumption of undue influence**
>
> The fact that a transaction is between a principal and 1 or more of the following—
>
> (a) an attorney under an enduring power of attorney or advance health directive;
>
> (b) a relation, business associate or close friend of the attorney;

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[17] See *Ex parte Whelan* [1986] 1 Qd R 500, 502-503.

> gives rise to a presumption in the principal's favour that the principal was induced to enter the transaction by the attorney's undue influence."

[96] Section 33(1) of the Act provides that a "principal may specify in an enduring power of attorney a time when, circumstance in which, or occasion on which, a power for a financial matter is exercisable." Section 43(2)(e) permits a principal to appoint successive attorneys for a matter or matters so power is given to a particular attorney only when power given to a previous attorney ends.

[97] The definition of "attorney" includes a "relation" which, by the definition of that word, also includes Marisa. It has been held that s 87 is "engaged where the transaction is between the principal and the attorney or another person … whether or not the transaction was effected by the exercise of the powers under the enduring power of attorney."[18]

[98] The powers of attorney in favour of the sons are expressed to begin on incapacity of a parent, however, and the decision of Dalton J in *Anderson v Anderson*[19] proceeds on the basis that proof of such incapacity at the time of the transaction is necessary in such a case. In my view, therefore, unless Eduardo's incapacity is established at the time of the transaction involving the transfer of the Mooloolaba property then the appointment of Marcello as Giacomina's attorney had not begun. This follows from the language of the document executed by Giacomina in appointing Eduardo as her attorney "and in the event that he should become incapable to act, I appoint my two sons …as my attorney/s …".

[99] That approach also seems to be consistent with s 33(1) and the ability to appoint successive attorneys "so power is given to a particular attorney only when power given to a previous attorney ends" in s 43(2)(e). Mr Marks argued that the provision in s 82 permitting an attorney under an enduring document to resign only with the court's leave argued against such a conclusion on the basis that, if a successive attorney, whose power to take a step under an enduring power of attorney had not yet arisen, could resign despite s 82, it would defeat the purpose of the legislation, but I am not convinced that that conclusion should follow.

[100] He also relied upon the decision in *Parnall v British Columbia*[20] where Saunders JA expressed the view that the authority was created at the moment of execution with a reservation which was effectively a restriction as to its use. In that case, the power of attorney provided that it "may only be exercised during any subsequent mental infirmity" on the donor's part but the relevant legislation also provided that the authority was to "continue despite any mental infirmity of the donor". By contrast, in *Comerica Bank-Texas v Texas Commerce Bank National Association*[21] the view was taken, on the

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[18] *Smith v Glegg* [2005] 1 Qd R 561, 570 at [40].

[19] [2013] QSC 8 at [68]-[70].

[20] (2004) 26 BCLR (4th) 45 at [25]-[26]; also reported as *Goodrich v The Queen in right of British Columbia* (2004) 236 DLR (4th) 433.

[21] 2 SW3d 723 (1999).

language of the instrument in that case, that the power of the attorney commenced only upon the donor's disability.[22]

[101] In this case, having regard to the language of the power of attorney and the provision made for when successive attorneys are given power, the better approach is to proceed on the basis that it is necessary to establish the incapacity of Eduardo for s 87 to take effect as establishing a presumption of undue influence pursuant to s 87 in respect of Giacomina's dealings with Marcello. Giacomina's capacity is an issue also, however, in respect of the argument that she was in a position of special disadvantage with respect to Marcello. It is convenient, therefore, to consider the evidence about them together.

The capacity of Eduardo Pinter in late May 2003

[102] Eduardo was 85 in May 2003 and had been treated by Dr Appadurai, a geriatrician, at the Memory Clinic at the Royal Brisbane Hospital. Marcello reported to the doctor in September 2002 that he had noted a deterioration in his father's short term memory gradually over two years. He said that he repeated himself, misplaced objects and personal effects, was not good with "names, etc" and sometimes forgot that he had finished breakfast and made a second one. Otherwise he remained active and independent, drove his own car well on familiar routes but had difficulty with new routes, maintained his hobbies including gardening, played the guitar and accordion and sang Italian songs. He was a retired electrician who was able to repair small electrical goods at home. There was also evidence that Eduardo had been a successful restaurateur at another stage in his life.

[103] His mini-mental state examination (MMSE) at that stage recorded a figure of 16/30 indicating cognitive impairment. Dr Appadurai indicated on the form that Eduardo's first language was Italian but Mr Marks submitted that it was concerning that he was unable to name the year, date, day and month and apparently believed it was April when it was September. He was diagnosed with mild dementia which both defendants were told of at the time. He was treated with a drug called Aricept but it was discontinued because he could not tolerate the standard dosage of 10 mg per day.

[104] A letter from Dr Appadurai of 14 May 2003 said that he had not been tolerating the Aricept despite a reduction in dose to 5 mg daily. Marcello then indicated to the doctor that there had been no improvement and in fact a decline where his father had become more suspicious with some paranoid ideas, was also losing his social skills and tended to be more verbally aggressive. Marcello told the doctor that there had been a further deterioration in his father's capacity to absorb events and make appropriate judgments. He repeated himself frequently. His MMSE on that day was 17/30. Eduardo's general practitioner, Dr Roush, gave similar evidence and said that each of the parents had reported that the other was having memory problems.

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[22] See the discussion in Dal Pont, *Powers of Attorney* (2nd ed) at p 132 n83.

[105] Mr Quinn, for the defendants, relied upon evidence of Eduardo's apparent ability to enjoy himself on the parents' trip to Italy in 2005 as consistent with his continuing to have sufficient capacity to act for himself. It seems relevant to me, however, that Giacomina executed the transfer on 30 May 2003 on behalf of Eduardo. Nor was there any clear evidence that Eduardo took an active part in the discussions between Giacomina, Giuliano and Marcello about the transfer of the Mooloolaba flats. The fair inference from that, the medical evidence and Giacomina's exercise of her power of attorney from him is that he probably then lacked capacity.

Applicability of the statutory presumption of undue influence

[106] It is safer, therefore, to operate on the basis that the statutory presumption under s 87 that Giacomina was induced to enter the transaction by Marcello's undue influence does arise. In that context, it is now necessary to examine the evidence about her capacity at the time and to consider whether that presumption has been rebutted.

The capacity of Giacomina Pinter in late May 2003

[107] Giacomina was then aged 75 and was also under treatment from Dr Appadurai who gave evidence principally by reference to his clinical notes from 18 September 2002. The history he took from her and Marcello who attended at the consultation on 18 September 2002 was that she had short term memory problems over the previous year, problems with numbers, addition and subtraction and money handling difficulties. Marcello was helping her with her finances which she had managed by herself in the past. Her fluency in English had decreased and she had difficulties with written English in both reading and understanding it. He scored her 18 out of 30 on a mini-mental state examination and was left with the impression that she had "mild dementia – probably mixed". He put her on Aricept too.

[108] At the next consultation on 12 March 2003, not too long before the execution of the transfer, Marcello told Dr Appadurai that there had been a noticeable improvement in his mother, that she was more alert and assertive and cared for herself better. There was no change to the mini-mental state examination at that consultation, although at a later consultation on 14 May 2003 her score increased to 21 out of 30. The doctor noted that she qualified for long term prescription of Aricept.

[109] The next consultation was on 6 August 2003 when her mini-mental state examination had decreased to 17 out of 30 and the doctor noted that her accuracy was affected by language. Italian was her first language rather than English. At a consultation on 11 February 2004, the doctor recorded no deterioration. The mini-mental state examination was then 19 out of 30 and she appears to have spoken to him about her plans to move in with her son. At a later consultation on 28 July 2004, there was mention of her going to Italy in September and October of that year. It seems to have ended up as the trip taken in 2005.

[110] There was evidence of that trip to Italy with her husband and members of her family in 2005 from which one could conclude that she was still at a stage where she was capable of acting independently to some extent, although, at least according to the evidence of

Mrs Maria Mangano, she was suffering toileting accidents that were embarrassing by the end of it. She also needed to be accompanied, for example, when out shopping or on the return flight from Italy to Australia.

[111] Giacomina and Eduardo had, however, gone to Italy independently of Mrs Mangano and her husband and the reports of their behaviour before the accident on the escalator to Eduardo in Rome shortly before their departure do not suggest problems with her ability to function appropriately then. Mrs Mangano had not seen as much of them during the earlier period they were in Italy.

[112] Dr Roush, Eduardo and Giacomina's general practitioner, gave similar evidence to that of Dr Appadurai. One thing he said of some significance in respect of the observations of Maria Mangano was that people who had dementia and were thinking of moving on a plane or going any distance suffered a very increased risk of becoming quite impaired.[23] That may well explain the behaviour observed by Maria Mangano but does not particularly address whether Giacomina lacked appropriate capacity or was suggestible at the end of May 2003.

[113] There is also evidence that Giacomina gave instructions to execute a will on or about 7 September 2004, a document which has not been challenged by the plaintiff, that she remained independent in daily living including cooking and cleaning fairly well around the time of execution of the transfer and that she maintained her social activities without notable neurological deficits and where her cranial nerves were intact.

[114] Some photographic evidence of the trip to Europe in 2005 was also relied upon showing someone entirely at ease with the company around them. It was submitted by Mr Quinn for the defendants that there was no indication that she was then a regressive personality who might easily be dominated by her son.

[115] Although the medical evidence does suggest that there had been some decline in Giacomina's cognitive faculties by 30 May 2003, that evidence does not suggest to me that, by then, she lacked capacity to look after her own interests. The fact that she executed a will with solicitors some time later than that which remains unchallenged has a bearing on that issue as does the unchallenged evidence that the idea behind the decision to transfer the Mooloolaba flats came partly at least from her own concerns that they were becoming difficult for them to manage, that she and her husband not enter a nursing home before it became really necessary and that they protect their ability to receive a Commonwealth pension. Both brothers gave evidence that she was aware of those issues as concerns that she and her husband needed to deal with as they aged. The evidence also supports the view that she was concerned to own a significant equity in the property they were to build and live in with the defendants and played a real part in its design to suit hers and Eduardo's needs.

Has the presumption of undue influence been rebutted?

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[23] T 2-62/5-9.

[116] I am not satisfied from the evidence I have analysed above that I should conclude that at the time Giacomina signed the transfer she lacked the capacity to know and understand what she was doing or that she was in a position of special disadvantage with respect to Marcello. She was actively looking after hers and her husband's interests. I shall discuss some of the relevant evidence further in the next section of the judgment but, in my view, the presumption of undue influence has been rebutted.

Non-statutory presumption of undue influence

[117] My conclusions about the nature of the transaction and the capacity of Giacomina to enter into it in 2003 are also relevant in respect of the determination of the issue whether there has been shown to be actual undue influence in the transaction.

Events surrounding the transaction

[118] The plaintiff relied upon evidence that his mother was scared at the time because she knew she was "losing it".[24] She was also worried about going into a nursing home, facts known to each of the defendants. Mr Marks also argued that the advice from Mr Rinaudo was not independent because he was acting for all parties to the transaction and there was no evidence that he knew of the diagnosis of "mild dementia" known to both the defendants at that time.

[119] He also discounted the evidence of the meeting with the financial planner, Mr Buhk, who had gone through a financial plan with the parents in the presence of Marcello. He criticised that financial plan as not recording that there was a substantial income from the Mooloolaba property or that it was unencumbered. He also criticised the plan for formulating too modest an objective in respect of the parents' income from combined Australian and Italian pensions. He also argued that the plan outlined a transaction different from that which occurred which was to sell the Mooloolaba property to a unit trust controlled by the sons. A further aspect was to retain the Nundah home unit rented out at approximately $150 per week. He submitted that did not occur for some years but the evidence is that it was rented out from December 2007. The plan also recorded that the funds would be used to purchase a new home which would be their principal place of residence rather than a half share with the defendants in a new home.

[120] Mr Marks submitted that what occurred was that no funds were paid and the parents instead took a transfer of a half interest in land with at best an incomplete building on it. Therefore, he criticised the evidence of the financial planner as misdirected. There was also no evidence about what advice, if any, was given by Mr Rinaudo.

[121] To the contrary, however, in the submissions of Mr Quinn, it was pointed out that this was not a normal case of alleged undue influence in that it was not a case of an adult child carer inducing a gift by the parent to the child. Rather, substantial consideration flowed from the defendants in favour of the parents, namely the transfer of a half interest in what

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[24] T 1-77/43-47.

was to have been the defendants' home and the undertaking to help look after the parents at that home. The plaintiff knew what was proposed and had ample opportunities to speak to his parents about it.

[122] The first defendant's evidence was that he spent $800,000 in building the home, not including any builder's margin. The evidence was also clear that the defendants had provided substantially for Giacomina and Eduardo during the years they lived with them. Granted it may have been simply a promise to do that at the time the transaction was entered into but, in the circumstances, it was clearly a valuable promise likely to provide real advantages to the parents in their old age. There was no suggestion, for example, that the defendants' promise to build the new house and look after the parents was "practically worthless".[25] The arrangement also provided a substantial collateral benefit, the receipt of Commonwealth pensions. That was an advantage contemplated by the financial plan from Mr Buhk.

[123] Reliance was also placed on a passage from *White v Wills* to this effect:[26]

> "For a presumption of undue influence to arise, it is necessary to establish that the transaction in question was 'so substantial or improvident as not to be reasonably accounted for on the grounds of friendship, relationship, charity or other ordinary motives on which ordinary persons act': *Quek v Beggs* (1990) 5 BPR 11,761 at 11,764 (per McLelland J); *Courtney v Powell* [2012] NSWSC 460 at [38] (per Ball J)."

[124] Mr Quinn also submitted that the transaction was now fully executed and that the parents were not socially isolated by the defendants, and remained living independently in the unit at Nundah for the year after the transaction was documented in 2003 while the house was being built for all of them at Hanrahan Street.

[125] The independence of Mr Rinaudo as a solicitor was also pointed to in the sense that by 2003 another solicitor, Mr Varitimos, rather than Mr Rinaudo generally acted for the defendants and the parents had an accountant, a Mr Archer, to whom they resorted to for the purposes of the 2003 transaction in order to establish that it would yield the Commonwealth pensions which they wished to access. Accordingly, Mr Quinn submitted, the defendants had not exercised undue influence over Giacomina who was not in a position of special disadvantage to them. That was established by Giacomina's ability to negotiate the share of ownership of the residence of her son and daughter-in-law.

[126] I accept those submissions about Giacomina's practical ability to look after hers and Eduardo's interests. There was an important element of mutual benefit in the arrangement in what was a close, loving family. It would have been preferable, obviously, if Mr Rinaudo had not acted for all parties to the transaction but there is no suggestion that he

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[25] Compare *Watkins v Combes* (1922) 30 CLR 180, 195, 198.

[26] [2014] NSWSC 1160 at [67].

preferred the defendants' interests to those of Eduardo and Giacomina. In fact, as I have said he died well before the trial and there is no evidence of any terms of his advice or that he overheard any telephone conversation between Giuliano, Marcello and/or Giacomina. Accordingly I am not satisfied that Giacomina received independent legal advice from Mr Rinaudo.

[127] Even though Marcello attended their meeting with Mr Buhk, however, there is no reason for me to conclude that the advice in his report was not independent. It was not directed to the plan as it was finally performed but did cover significant aspects of it. Where, in my assessment, Giacomina possessed sufficient ability to look after her and her husband's interests and where they were to receive real benefits from the transaction, the advice they received from Mr Buhk makes it likely that the obtaining of independent advice from a solicitor would not have made a difference in the result. Even if Marcello was in a position to exercise influence over his mother it has not been established that he used such a position to obtain unfair advantage for himself or injury to his parents.[27]

Unwinding the transaction

[128] It is also relevant that, at this stage, it would be practically impossible, to rescind or unwind the transaction in such a way as to do equity to all the parties having regard to the care provided by the defendants to Eduardo and Giacomina during their later years, to Giuliano's knowledge. There was no attempt to quantify how that could be valued. As Mr Quinn submitted it is assessed with a different set of scales than mere money. It may be possible for me to order an inquiry into the commercial costs of providing such care at the time and to direct an account be taken of the worth of the provision of accommodation by the defendants for the parents but that would still not be an adequate measure of what was provided by the defendants.

[129] Mr Quinn also submitted that the focus of the plaintiff's criticism of the transaction was not so much that it was unfair to his parents but that his claimed half share in the Mooloolaba property was not transferred to him on their death. That does less than justice to Mr Marks' reliance on the discrepancy in value between the Mooloolaba property and the yet to be completed Hanrahan Street property at the time of the transfers. But Mr Marks' analysis itself does not take into account the worth of the defendants' promises to build the new house, share it with the parents and look after them into the future.

[130] In those circumstances how could all the parties be restored to their original positions if I declared that the transfers should, in effect, be rescinded? The defendants were anything

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[27] See the discussion in *Whereat v Duff* [1972] 2 NSWLR 147, 160, 168.

but conscious wrongdoers and conferred real advantages on the parents over time, not measurable simply in monetary terms.[28] As Lord Wright said in *Spence v Crawford*:[29]

> "The remedy is equitable. Its application is discretionary, and, where the remedy is applied, it must be moulded in accordance with the exigencies of the particular case. The general principal is authoritatively stated in a few words by Lord Blackburn in *Erlanger v New Sombrero Phosphate Co*, where, after referring to the common law remedy of damages, he went on to say, at p 1278:
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> > 'But a court of equity could not give damages, and, unless it can rescind the contract, can give no relief. And on the other hand, it can take accounts of profits, and make allowance for deterioration. And I think the practice has always been for a court of equity to give this relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract.'
>
> In that case, Lord Blackburn is careful not to seek to tie the hands of the court by attempting to form any rigid rules. The court must fix its eyes on the goal of doing 'what is practically just.' How that goal may be reached must depend on the circumstances of the case, but the court will be more drastic in exercising its discretionary powers in a case of fraud than in a case of innocent misrepresentation. This is clearly recognised by Lindley MR, in the *Lagunas* case. There is no doubt good reason for the distinction. A case of innocent misrepresentation may be regarded rather as one of misfortune than as one of moral obliquity. There is no deceit or intention to defraud. *The court will be less ready to pull a transaction to pieces where the defendant is innocent*, whereas in the case of fraud the court will exercise its jurisdiction to the full in order, if possible, to prevent the defendant from enjoying the benefit of his fraud at the expense of the innocent plaintiff. Restoration, however, is essential to the idea of restitution."

Conclusion in respect of undue influence

[131] In the circumstances, therefore, I am not satisfied that the plaintiff has established that there was any actual undue influence involved in the transaction. Rather it was explicable as an appropriate transaction reflecting the family relationship between the parties. Even if there had been an exercise of undue influence it was not one where the defendants had acted fraudulently. They clearly believed they were acting in the interests of Marcello's

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[28] For a useful general discussion of the limits of the judicial discretion to order rescission in equity where *restitutio in integrum* may be impossible see O'Sullivan, Elliott and Zakrzewski, *The Law of Rescission* (2nd ed, 2014, OUP) at 13.07-13.13.

[29] [1939] 3 All ER 271, 288 (emphasis added). See also *Lagunas Nitrate Company v Lagunas Syndicate* [1899] 2 Ch 392, 434 per Lord Lindley MR, *J.A.D. International Pty Ltd v International Trucks Australia Ltd* [1994] FCA 939 at [19]-[20] and *Maguire v Makaronis* (1997) 188 CLR 449, 495-496 per Kirby J.

parents. I would not exercise my discretion to unwind the transaction to declare that the Mooloolaba property should be regarded as part of Giacomina's estate or as an asset held in trust as to a one-half share by the defendants for the plaintiff. Nor has the occasion arisen to order equitable damages or compensation.

The position of Marisa Pinter

[132] Marisa Pinter's position must also be taken into account. There is no evidence that she was aware of the agreement alleged by the plaintiff at the time he says it was made. Mr Marks said I could infer, if I found that the agreement was made, that a substantial term such as that the plaintiff would benefit by taking a half interest in the Mooloolaba property on the death of the parents, would have been reported by Marcello to Marisa. There was no evidence of that, however.

[133] He also argued that she needed to establish that the transaction was entered into in good faith and that the evidence of the parents' lack of capacity required her to investigate the nature of the transactions. She said that she simply left it to her husband because it related to his parents.[30] The argument that, had she made inquiries, she would have discovered the condition of the agreement by which the plaintiff was to benefit by taking a half interest in the Mooloolaba flats is not made out on my findings because no such condition was agreed.

[134] Otherwise, her position as the registered proprietor of the Mooloolaba property protects her against the plaintiff's claim. He has not established any of the necessary conditions to interfere with her rights in respect of that property.

***Property Law Act* 1974 s 11**

[135] The defendants applied on the sixth and last day of the hearing to amend the defence to allege the absence of writing signed by the defendants as required by s 11(1) of the *Property Law Act* 1974 (Qld) to support the plaintiff's claim. They had not done so earlier because the plaintiff still relied on his claim for an equitable interest in the land based on an agreement alleged with his parents in 1982 and work he had done on the property in accordance with that alleged agreement. Section 11(2) provides that s 11(1) does not affect the creation or operation of resulting, implied, or constructive trusts so the defendants, through their lawyers, took the view that there was no point in pleading the Statute of Frauds.

[136] The plaintiff abandoned the 1982 claim on the fourth day of the hearing, however, while maintaining its claim based on the arrangement alleged in 2003 for what might be characterised as an express trust. That is why Mr Quinn then sought leave to make the amendment. Mr Marks objected on the basis that it was too late but frankly admitted that he could not say whether he would have led any different evidence.

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[30] T 5-50/27-29.

[137] In those circumstances I shall permit the amendment. It makes no difference to the result, however, because of my finding that there was no such arrangement made as alleged by the plaintiff. If I had made a contrary factual finding, of course, the amendment may have been decisive.

Conclusion

[138] Accordingly the plaintiff's claim is dismissed.

[139] On the delivery of these reasons there were further submissions concerning the removal of a caveat on the title to the Mooloolaba flats and the plaintiff's entitlement on the pleadings to labour costs in the sum of $2,500 for the work done by him on the Mooloolaba flats. Consequently I order as follows:

> On the undertaking by the defendants by their counsel to pay the plaintiff the sum of $2,500 on or before 12 January 2017:
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> 1. The plaintiff's claim is dismissed.
> 2. Order the plaintiff to pay the defendants' costs of the action including reserved costs, if any, on the standard basis up to and including 12 August 2014 and on the indemnity basis thereafter.
> 3. Order that caveat 715296821 be removed from lot 26 on RP 174076.