Court of Appeal
Supreme Court
New South Wales

Case Name:	**Hanna v Raoul**
Medium Neutral Citation:	**[2018] NSWCA 201**
Hearing Date(s):	22, 23 May 2018
Date of Decision:	13 September 2018
Before:	Beazley P at [1]; Macfarlan JA at [160]; White JA at [163]
Decision:	Appeal dismissed with costs.
Catchwords:	CONTRACTS – agreement to transfer respondent's property to appellant subject to life estate in favour of respondent – whether respondent had capacity to enter into agreement – whether agreement was unconscionable – whether agreement was unjust
Legislation Cited:	*Contracts Review Act 1980* (NSW), ss 4, 7, 9
Cases Cited:	*Aboody v Ryan* (2012) 17 BPR 32,359; [2012] NSWCA 395 *Attorney General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557; [2005] NSWCA 261 *Benson v Rational Entertainment Enterprises Ltd (No 2)* [2018] NSWCA 148 *Blomley v Ryan* (1956) 99 CLR 362; [1956] HCA 81 *Bridgewater v Leahy* (1998) 194 CLR 457; [1998] HCA 66 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; [1983] HCA 14 *David v David* [2009] NSWCA 8 *Diprose v Louth (No 2)* (1990) 54 SASR 450 *Dominic v Riz* [2009] NSWCA 216 *Gibbons v Wright* (1954) 91 CLR 423; [1954] HCA 17 *Guthrie v Spence* (2009) 78 NSWLR 225; [2009] NSWCA 369 *Huguenin v Basely* (1807) 14 Ves Jun 273 *Johnson v Smith* [2010] NSWCA 306 *Jones v Moss* [2007] NSWSC 969 *Miwa Pty Ltd v Siantan Properties Pte Ltd (No 2)* [2011] NSWCA 344

	Powell v Powell [1900] 1 Ch 243 *Provident Capital Ltd v Papa* (2013) 84 NSWLR 231; [2013] NSWCA 36 *Public Trustee (WA) v Brumar Nominees Pty Ltd* [2012] WASC 161 *Ryan v Aboody* [2012] NSWSC 136 *Treloar Constructions Pty Ltd v McMillan (No 2)* [2017] NSWCA 146
Category:	Principal judgment
Parties:	George Hanna (Appellant) Gratien Raoul (Respondent)
Representation:	Counsel: L Ellison SC; V Culkoff (Appellant) I D Faulkner SC; D D Knoll (Respondent) Solicitors: Julie A Orsini (Appellant) Konstan Lawyers (Respondent)
File Number(s):	2017/331772

Decision under appeal

Court or Tribunal:	Supreme Court
Jurisdiction:	Equity
Medium Neutral Citation:	*Raoul (by his tutor Karamihas) v Hanna* [2017] NSWSC 728
Date of Decision:	28 June 2017
Before:	Lindsay J
File Number(s):	2015/120549

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

The respondent was the registered proprietor of an estate in fee simple of land subject to a mortgage, which had been entered into when Mr Raoul obtained a loan to assist a friend. In August 2014, the respondent received a letter of default from the mortgagee. The respondent showed the letter to the appellant, the respondent's nephew, and told him that if he discharged the mortgage, the respondent would transfer the property to him. In September 2014, the appellant and the respondent met with the appellant's solicitor. The solicitor prepared a deed of arrangement (the Deed), which provided that the appellant would discharge the mortgage and the respondent would transfer his property to the appellant, subject to a life estate in favour of the respondent. Before the parties executed the Deed, the appellant arranged for the respondent to meet with another solicitor, who explained the terms of the Deed to the respondent. Following this, on 16 September 2014, the parties executed the Deed and a memorandum of transfer (the Transfer).

The primary judge held that the Deed and the Transfer were not binding on the parties. His Honour held that the respondent lacked capacity to enter into the Deed and the Transfer. His Honour also held that the Deed and the Transfer were unconscionable, finding that the appellant took advantage of the respondent, who was at a serious disadvantage due to his age, frailty and state of health, by entering into the agreement. His Honour found that the advice given to the respondent by the solicitors was inadequate. His Honour also held that the Deed and the Transfer were unjust, having regard to the circumstances at the time they were made.

On appeal, the principal issues were as follows:

1. Whether the respondent had capacity to enter into the Deed and the Transfer on 16 September 2014 (Ground 1);

2. Whether the Deed and the Transfer were unconscionable (Ground 2); and

3. Whether the Deed and the Transfer were "*unjust*" at law or within the meaning of the *Contracts Review Act 1980* (NSW) (Ground 3).

The Court held, dismissing the appeal:

In relation to Ground 1

Per Beazley P (Macfarlan and White JJA agreeing)

(i) The primary judge erred in finding that the respondent lacked capacity to enter into the Deed and the Transfer, as the respondent understood the broad operation or general purport of the transaction: [47]-[63].

Gibbons v Wright (1954) 91 CLR 423; [1954] HCA 17 considered.

Guthrie v Spence (2009) 78 NSWLR 225; [2009] NSWCA 369; *Public Trustee (WA) v Brumar Nominees Pty Ltd* [2012] WASC 161 referred to.

Per Macfarlan JA

(ii) The primary judge did not find that the respondent would not have been able to understand the general purport of the Deed and the Transfer if a proper explanation of them had been given to him. Absent such a finding, a finding that the respondent lacked capacity was not warranted: [161]-[162].

Gibbons v Wright (1954) 91 CLR 423; [1954] HCA 17 considered.

Guthrie v Spence (2009) 78 NSWLR 225; [2009] NSWCA 369 referred to.

In relation to Ground 2

Per Beazley P (Macfarlan and White JJA agreeing)

(iii) The appellant took unconscientious advantage of the respondent, who was in a position of special disadvantage, by entering into the Deed and the Transfer. The advice given to the respondent by the solicitors did not render the agreement fair and reasonable. As the risks to the respondent's interests were clear, the respondent should have been advised as to the practical consequences of the agreement or been instructed to obtain independent financial advice. Accordingly, the Deed and the Transfer were unconscionable: [89]-[126].

Huguenin v Basely (1807) 14 Ves Jun 273; *Powell v Powell* [1900] 1 Ch 243; *Blomley v Ryan* (1956) 99 CLR 362; [1956] HCA 81; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; [1983] HCA 14; *Diprose v Louth (No 2)* (1990) 54 SASR 450; *David v David* [2009] NSWCA 8; *Dominic v Riz* [2009] NSWCA 216; *Aboody v Ryan* (2012) 17 BPR 32,359; [2012] NSWCA 395; *Provident Capital Ltd v Papa* (2013) 84 NSWLR 231; [2013] NSWCA 36 considered.

Bridgewater v Leahy (1998) 194 CLR 457; [1998] HCA 66; *Johnson v Smith* [2010] NSWCA 306; *Ryan v Aboody* [2012] NSWSC 136 referred to.

In relation to Ground 3

Per Beazley P (Macfarlan and White JJA agreeing)

(iv) The Deed and the Transfer were "*unjust*" having regard to: the material inequality of bargaining power between the parties; the absence of negotiation as to their terms; the imposition of conditions not reasonably necessary for the protection of the parties' interests; the respondent's inability to reasonably protect his interests; and the absence of independent advice: [136]-[140].

Jones v Moss [2007] NSWSC 969 referred to.

JUDGMENT

1 **BEAZLEY P**: The appellant, George Hanna, appeals from a judgment of Lindsay J, in which his Honour held that a transaction entered into by the respondent, Gratien Raoul, by which Mr Raoul purported to transfer his property to Mr Hanna, was not binding, such that Mr Raoul was beneficially entitled to the property, subject to compensation due to Mr Hanna for monies paid out by him in discharge of a mortgage on the property: *Raoul (by his tutor Karamihas) v Hanna* [2017] NSWSC 728.

2 Mr Raoul was registered as the proprietor of an estate in fee simple of land at Campsie (the property), subject to a mortgage in favour of a third party financier, which secured a principal sum of $200,000. Mr Raoul resided in the house on the property. On 16 September 2014, Mr Raoul and Mr Hanna executed a deed of arrangement (the Deed), which provided that Mr Hanna would discharge the mortgage on the property and Mr Raoul would transfer the property to Mr Hanna, subject to a life estate in his favour. Mr Hanna discharged the mortgage on the same day.

3 A memorandum of transfer (the Transfer) was also executed and registered pursuant to the *Real Property Act 1900* (NSW), and a new certificate of title was issued.

4 The house on the property was destroyed by fire on 3 January 2015. The insurance proceeds, in the sum of $392,190, are presently held on trust by the NSW Trustee pending the outcome of the proceedings.

Issues on the appeal

5 On 13 February 2018, Mr Hanna filed a notice of appeal. The issues raised by the grounds of appeal may be summarised as follows:

(1) Whether Mr Raoul had capacity to enter into the Deed and the Transfer on 16 September 2014: appeal grounds 3(a)-(j). As the primary judge

dealt with this question first, I propose to begin with a consideration of this issue.

(2) Whether the Deed and the Transfer should be set aside on the basis that they were unconscionable: appeal ground 2(b). This issue raised the following further questions:

(a) Whether the primary judge erred in failing to have regard to certain evidence and the *Social Security Act 1991* (Cth): appeal grounds 1(a)-(b); and

(b) Whether the primary judge erred in determining the role of Anthony Panopoulos and Tony Taouk, two of Mr Raoul's solicitors: appeal grounds 4(a)-(b).

(3) Whether the Deed and the Transfer were "*unjust*" at law or within the meaning of the *Contracts Review Act 1980* (NSW): appeal ground 2(a).

6 The grounds of appeal also raised the following issues in relation to the primary judge's determination as to costs:

(1) Whether the primary judge erred in not awarding costs in favour of Mr Hanna in relation to Mr Raoul's unsuccessful application for the reappointment of Joseph Khalifeh, a friend of Mr Raoul's in favour of whom Mr Raoul had executed, but subsequently purported to revoke, an enduring power of attorney and/or the appointment of Mr Raoul's tutor to manage Mr Raoul's affairs: appeal ground 6(a).

(2) Whether the primary judge erred in awarding costs against Mr Hanna on an indemnity basis after 11 April 2017: appeal ground 6(b).

(3) Whether the primary judge failed to take into account the unjust enrichment to Mr Raoul consequent upon the costs order: appeal ground 5.

7 During the hearing on 23 May 2018, the Court granted leave to Mr Raoul to file a notice of contention, in which he contended that the appeal should be dismissed on the following grounds, in addition to the findings of the primary judge:

(1) That Mr Hanna failed to establish that the involvement of Mr Panopoulos and Mr Taouk rendered the Deed and the Transfer "*fair, just and reasonable*" or "*not unjust*" because:

(i) The Deed did not give effect to Mr Raoul's instructions requesting that Mr Hanna pay all the bills for the property;

(ii) The Deed did not give effect to Mr Raoul's instructions requesting that any rent be paid to him should he be admitted into a nursing home; and

(iii) The Deed did not address the circumstance where it might be in Mr Raoul's best interests to sell the property but Mr Hanna does not agree to do so, or Mr Raoul cannot give written consent to do so due to infirmity or loss of capacity; and

(2) That the primary judge did not err in awarding costs against Mr Hanna on an indemnity basis after 11 April 2017 as Mr Hanna's rejection of Mr Raoul's Calderbank offer dated 7 April 2014 was unreasonable.

Background facts

8 Mr Raoul, who was born in July 1939, is a widower and pensioner without immediate family. As stated above, he was the registered proprietor of an estate in fee simple of the property. In December 2004, Mr Raoul entered into an agreement with Mr Lewis Hiley to loan Mr Hiley $150,000. Mr Raoul funded the loan by entering into a 30-year loan agreement with BMG Mortgage Group for $200,000, which was secured by a mortgage on the

property. That loan agreement provided for interest only monthly payments over a period of 10 years.

9 The agreement between Mr Raoul and Mr Hiley was for one year and required Mr Hiley to make monthly loan repayments. Mr Hiley failed to repay the loan at the end of the one year period, but continued to make the monthly interest payments. In 2006, Mr Raoul instructed solicitors, Hunt & Hunt, to act for him to seek repayment of the loan and to have the mortgage on the property discharged.

10 In March 2014, Mr Hiley gave notice that he was on the brink of bankruptcy and could no longer make the monthly interest payments. Around this time, Hunt & Hunt wrote to the mortgagee seeking a meeting to discuss whether there was a way of having the mortgage removed. The mortgagee responded that payment in full was required.

11 In mid-March 2014, Mr Raoul asked a friend, Mr Khalifeh, whom he had appointed his attorney and enduring guardian, to "*help me with the loan*". Mr Khalifeh drew up a proposed deed of agreement, pursuant to which he agreed to discharge the mortgage in return for the transfer of the property to him. The draft deed was never executed, nor was any arrangement to the effect of that deed acted upon. In the meantime, however, Mr Khalifeh made a number of monthly interest payments.

12 In August 2014, the mortgagee sent a letter of default to Mr Raoul, stating that the latest repayment had been dishonoured. Mr Raoul showed the letter to Mr Hanna, who is Mr Raoul's nephew on his late wife's side of the family, and told him about the proposed arrangement with Mr Khalifeh.

13 In September 2014, Mr Hanna met with Mr Raoul and Mr Khalifeh. According to Mr Hanna, Mr Raoul told him that if he discharged the mortgage, Mr Raoul would give him the property, but that he wanted to keep living in it. Following this, on 4, 8 and 16 September 2014, Mr Raoul and Mr Hanna met with Mr Hanna's solicitor, Mr Panopoulos. During the meeting on 4 September

2014, Mr Raoul signed a letter of authority requesting Konstan Lawyers, who, at the time, were acting for him in a personal injury compensation claim, to deliver all his files to Mr Panopoulos. He also signed a discharge authority for the loan.

14 During the meeting on 8 September 2014, Mr Raoul signed a file note prepared by Mr Panopoulos which stated:

> "In exchange for transferring the property to [Mr Hanna, he] will do the following:
>
> 1. [Mr Raoul] to have a Life Estate in the property, [Mr Raoul] to remain in property for as long as he likes.
> 2. Pay all rates, levies, charges and insurance on the property.
> 3. Maintaining the property.
> 4. Repay [Mr Khalifeh] any payments made on the mortgage.
> 5. Payout the mortgage on the property.
>
> Revoke the Power of Attorney to [Mr Khalifeh]."

15 On the same day, Mr Raoul signed a Revocation of Power of Attorney, witnessed by Mr Panopoulos. Mr Panopoulos wrote to Mr Khalifeh advising him of the revocation. Mr Panopoulos also wrote to Konstan Lawyers, stating that he acted for Mr Raoul, enclosing an authority from Mr Raoul and asking, inter alia, for copies of any documents they held for Mr Raoul, including in relation to the power of attorney in favour of Mr Khalifeh.

16 After the meeting on 8 September 2014, Mr Panopoulos prepared a draft deed. Mr Hanna placed some significance on "*subtle*" differences in the terms of the draft deed, which included a clause regarding the determination of the life tenancy should, inter alia, Mr Raoul be unable to continue living in the property. That clause did not appear in the Deed the parties executed. Mr Hanna contended that the final Deed was thus more favourable to Mr Raoul than the draft. That may be so in respect of that clause. However, that does not answer the deficiencies otherwise affecting the transaction as a whole.

17 It should also be noted that the draft deed contains a note in the following terms:

> "Further provision for payment of care (Nursing Home etc.) for the 'life tenant' out of the capital and income of the residuary estate, and sale of the family home if necessary, between the time of his/her inability to continue living in the family home and death; and consequent delay in distribution of the balance of the residuary estate."

18 This is of some significance in light of the primary judge's finding that one of the reasons why the Deed and the Transfer were improvident was that they deprived Mr Raoul of "*access to capital should he require it in his declining years*". The notation demonstrates that Mr Panopoulos was at least conscious of this as a possible future need. However, no-one saw to it that Mr Raoul was advised as to that matter. Mr Hanna's response to this criticism was that had such provision been made in the Deed, it would have taken the arrangement out of the "*Granny Flat*" arrangements for social security purposes. Again, that is no answer. First, Mr Hanna did not have the "*Granny Flat*" arrangements in mind when the Deed was entered into. More fundamentally, as I consider later in these reasons, there were risks with the "*Granny Flat*" arrangements in any event and these were matters about which Mr Raoul should have had advice.

19 On 11 September 2014, Mr Khalifeh obtained from Mr Raoul a letter of instruction to Konstan Lawyers withdrawing the direction to deliver his files to Mr Panopoulos and his revocation of Mr Khalifeh's power of attorney. Mr Raoul stated in the letter that he "*did not realise that I signed such a form and I did not intend to revoke this Power of Attorney*". The letter further stated that he wished to reappoint Mr Khalifeh as his attorney and that he "[*did*] *not wish for any other person to look after my welfare and or affairs*". Mr Panopoulos was sent this letter on 22 October 2014.

20 In the meantime, Mr Panopoulos prepared the Deed that was ultimately executed and forwarded it to Mr Raoul for his consideration. He also arranged for settlement to discharge the mortgage to occur on 18 September 2014.

21 On 16 September 2014, Mr Raoul and Mr Hanna met with Mr Panopoulos for a third time. Mr Panopoulos explained to Mr Raoul that he needed to obtain advice on the Deed from another solicitor as Mr Hanna was his client. Mr Hanna arranged for Mr Raoul to meet that day with Mr Taouk, who knew Mr Hanna but had never acted for him as his solicitor.

22 Mr Taouk explained the terms of the Deed to Mr Raoul in the following terms:

> "I said: '*You will be transferring* [*the property*] *into the name of* [*Mr Hanna*], *do you understand? You will remain on the title of the house and will be entitled to live there until you die. The house will go to* [*Mr Hanna*] *after you die.*'
>
> Raoul said: '*Yes*'
>
> I said: '[*Mr Hanna*] *will pay off your mortgage, pay all rates and taxes on the property, maintain the property and he will make sure it is properly insured, do you understand?*'
>
> Raoul said: '*Yes*'
>
> ...
>
> I said: '[*Mr Hanna*] *will allow you to live in the property or rent it out if you don't want to live in it for as long as you are alive. If the property is rented you will get the income from the property as long as you are alive. Do you understand?*'
>
> Raoul said: '*Yes*'
>
> I said: '[*Mr Hanna*] *can only sell the property and invest the money with your permission, and if he does that, you will get any income from the investment as long as you are alive. Do you understand?*'
>
> Raoul said: '*Yes*'
>
> I said: '*So as long as you are alive, you are entitled to live in the house or receive the income from it and* [*Mr Hanna*] *cannot sell the house or do anything with it against your interest in it, without your permission. Do you understand?*'
>
> Raoul said: '*Yes*'"

23 After he had explained the Deed to Mr Raoul, Mr Taouk asked Mr Raoul what he understood of the Deed. Mr Raoul said:

> "I give [Mr Hanna] the house and he will pay all my bills and I can live at the house until I die. When I die, [Mr Hanna] will own the house."

24 Mr Raoul also told Mr Taouk that he was giving the property to Mr Hanna because:

> "I can't pay the mortgage or the bills anymore. I don't want to lose my house. I want to keep living in it. But I have no money to pay any bills. This is the best way because [Mr Hanna] has agreed to pay all my bills and let me continue to live in the property until I die. I don't have any other family. [Mr Hanna] is like a son to me."

25 Mr Taouk said that he was satisfied at the time that Mr Raoul understood the terms of the Deed and he witnessed Mr Raoul signing the Deed. Upon returning to Mr Panopoulos' office, Mr Hanna signed the Deed, witnessed by Mr Panopoulos.

26 The terms of the Deed were as follows:

> "1. Contemporaneously with execution of this deed [Mr Raoul] will execute all documents necessary to effect the transfer of the Property.
>
> 2. [Mr Hanna] will attend at his expense to discharging any mortgage on the Property including all fees associated with the discharge.
>
> 3. [Mr Hanna] will attend to repaying [Mr Khalifeh] any mortgage repayments on the Property made by him on presentation of acceptable evidence.
>
> 4. Contemporaneously with execution of this deed [Mr Hanna] will execute all documents necessary to effect the transfer of the property to [Mr Raoul].
>
> 5. [Mr Hanna] will
>
> (I) permit [Mr Raoul] to use, occupy and enjoy the property during his lifetime or to receive the nett income therefrom during his lifetime;
>
> (II) pay all rates and taxes on the Property;
>
> (III) insure the Property against loss or damage by fire storm and tempest who shall lay out any moneys received in respect of any such insurance in replacing or reinstating the property destroyed or damaged or in purchasing similar property to be held upon and subject to the same trusts and provisions as the Property destroyed or damaged
>
> (IV) maintain the property in good repair and condition (having regard to the condition thereof at the date of this Deed);

(V) on the death of [Mr Raoul, Mr Hanna] will own and hold the Property free of the Life Estate.

6. [Mr Hanna] may at any time during the lifetime of [Mr Raoul] with his consent in writing sell the Property and invest the nett proceeds of sale and pay the nett annual income arising therefrom to him during his lifetime."

27 Mr Raoul and Mr Hanna also executed the Transfer of the property in accordance with the provisions of the Deed. The expressed consideration was $1.

28 On 18 September 2014, Mr Hanna discharged the mortgage by a payment of $200,509.64. Following this, as the primary judge noted at [84], there followed a period during which Mr Raoul "*appears to have been torn between*" Mr Hanna and Mr Khalifeh. For example, Mr Hanna gave evidence that, on 19 September 2014, he had a conversation with Mr Raoul in which Mr Raoul said that he had "*a problem*", because Mr Khalifeh, who had said he wanted to look after Mr Raoul, was upset with the arrangement between Mr Raoul and Mr Hanna.

29 According to Mr Hanna, Mr Raoul said that Mr Khalifeh had told him that "[*Mr Hanna*] *can reverse everything … and* [*Mr Khalifeh*] *can do for me everything what* [*Mr Hanna is*] *doing*". Mr Raoul told Mr Hanna that he could not say "*No*" to Mr Khalifeh and that he felt he should give Mr Khalifeh "*another chance*". Mr Hanna said that he told Mr Raoul that Mr Khalifeh's wish to look after him did not "*have anything to do with the arrangement that is between us*". He said that Mr Raoul responded that he did not want to change his mind but that he did not know what to do as he did not want Mr Khalifeh to be upset.

30 Mr Raoul lived in the house on the property until 3 January 2015, when the fire occurred. The house has not been demolished and Mr Raoul presently resides in an aged care facility. Mr Hanna, who was a builder, gave evidence that the cost of demolishing the house and building a new house would exceed $600,000 if he used his own resources to do the work, and would cost even more if independent builders and contractors were engaged.

First issue on the appeal

Whether Mr Raoul had capacity to enter into the Deed and the Transfer on 16 September 2014: appeal grounds 3(a)-(j)

Primary judge's reasons

31 The primary judge held, at [116], that in the absence of "*a necessary, careful explanation of the business to be transacted*", Mr Raoul lacked the capacity to enter into the Deed and the Transfer on 16 September 2014. Relevantly, at [116], his Honour made the following findings:

(1) Mr Raoul was "*fixated*" on discharging the mortgage, without understanding how that could be, or was to be, brought about, and without understanding the disadvantages to him "*in the manner of which it was proposed that he be rid of the mortgage*", that is, by entry into the Deed;

(2) Mr Raoul signed the Deed and the Transfer without any appreciation of the meaning or legal and financial implications of the creation of a life estate in himself, the conferral of a remainder interest upon Mr Hanna or the respective rights and obligations of himself and Mr Hanna; and

(3) Mr Raoul signed the Deed and the Transfer without any appreciation of the fact, or extent, of his future dependence on Mr Hanna for security and support, or an appreciation that Mr Hanna acquired a present entitlement to his land.

32 In reaching this conclusion, the primary judge considered the evidence of several medical experts regarding Mr Raoul's capacity. First, his Honour considered the opinion of Dr Bruce Boman, a psychiatrist who conducted a "*capacity assessment focussing on* [*the*] *financial management and testamentary capacity*" of Mr Raoul. His Honour held, at [60], that the opinion of Dr Boman, whose report dated 16 June 2014 expressed the view that Mr Raoul possessed both the capacity to manage his own affairs without a financial manager and testamentary capacity, was not a "*reliable guide*" to

assessing Mr Raoul's capacity to transact the Deed and the Transfer on 16 September 2014.

33 Secondly, his Honour considered the opinion of Margaret Kennedy-Gould, an occupational therapist, as expressed in her report dated 27 July 2014, which had been prepared in aid of Mr Raoul's personal injury compensation claim. The primary judge noted, at [62], that the report:

> "... presented [Mr Raoul] as 'a rather frail elderly man, somewhat flamboyant in his appearance'. It alluded to problems experienced by Ms Kennedy-Gould in communication with him, some the product of language, some possibly attributable to capacity limitations. However, it recorded that [Mr Raoul] 'seemed to be generally oriented to time, place and person', and that a formal assessment by a clinical psychologist and geriatrician would be required to determine whether [he had] any cognitive problems attributable to [his] accident'."

34 Thirdly, his Honour had regard to a report prepared by an Aged Care Assessment Team assessor dated 20 January 2015 (the ACAT report), which was undertaken following Mr Raoul's displacement from his home following the fire for the purposes of assessing his need for and entitlement to government assistance for nursing home accommodation. That report recorded a diagnosis of dementia, but stated that Mr Raoul was "*alert, oriented and able to concentrate on* [*the*] *assessment*" and that he was apparently able to live on his own with assistance. The primary judge considered it appropriate to recognise the "*purpose-driven character*" of the report.

35 Finally, his Honour considered the evidence of Dr Gail Jamieson and Professor Ian Coyle, Mr Raoul and Mr Hanna's respective medico-legal experts, including their joint report dated 15 February 2017. His Honour observed, at [64], that neither expert considered the ACAT report to be "*definitive of* [*Mr Raoul's*] *mental state*". Further, based on the joint report and their oral evidence, his Honour, at [69], made the following observations regarding Mr Raoul's capacity as at 16 September 2014:

> "(a) He was suffering from dementia, probably Alzheimer's Disease.

(b) He was highly suggestible.

(c) He was vulnerable to undue influence.

(d) He would not have been able to understand anything complex.

(e) He probably would have understood that, if he signed [the Deed] and [the Transfer] as presented to him, that would rid him of the mortgage; but he probably would not have been able to understand any greater complexity than that.

(f) His capacity to understand [the Deed, the Transfer] and what was proposed to be done with them would have depended upon what explanations were given to him, who was present at the time business was transacted, and other variables such as the level of stress he was under and fluctuations in his condition."

36 The primary judge held, at [117], that Mr Hanna ought to have known of Mr Raoul's incapacity, based upon his knowledge and experience of Mr Raoul as a "*frail, elderly man open to suggestion*". His Honour noted Mr Hanna's implicit reliance on Mr Panopoulos and Mr Taouk to protect Mr Raoul. However, his Honour found, at [118], that neither solicitor was "*sufficiently vigilant, or protective of the interests of* [*Mr Raoul*], *to see in fact, or to guard against,* [*his*] *incapacity*". In circumstances where Mr Raoul was "*manifestly elderly, frail and suggestible*", and "*acquiesced in what was put before him*", his Honour considered that the intervention of Mr Panopoulos and Mr Taouk was "*too formal*" to address or overcome Mr Raoul's lack of understanding.

37 His Honour noted that although Mr Panopoulos recognised the existence of a conflict of interest, he left Mr Hanna to arrange for Mr Raoul to receive 'independent' advice before resuming acting for both parties. His Honour also found that although Mr Taouk recognised the need to question Mr Raoul's capacity, "*he set a low threshold for capacity because of his uncritical acceptance of the proposed transaction as intra-family business*".

38 Accordingly, the primary judge concluded, at [119], that at common law, due to Mr Raoul's lack of mental capacity and Mr Hanna's state of knowledge, the Deed and the Transfer were void. Having regard to the provisions of the *Real Property Act*, s 42, his Honour held, at [120], that although registration of the

Transfer was sufficient to vest legal title in the parties in accordance with its terms, Mr Hanna's interest in the land was subject to personal equities.

Submissions

39 Mr Hanna submitted that in finding that Mr Raoul lacked capacity, the primary judge failed to give sufficient weight to the contemporaneous evidence as to Mr Raoul's capacity, including the expert medical evidence and the evidence of the solicitors who had had dealings with him. Mr Hanna submitted that this evidence, which was the "*only evidence that could be relied on*", indicated that Mr Raoul had capacity to enter into the Deed and the Transfer on 16 September 2014.

40 Mr Hanna contended that it was not open to the primary judge to make a finding of incapacity in the absence of other contemporaneous evidence to that effect. Mr Hanna also submitted that the primary judge erred in failing to have proper regard to the following evidence:

(1) Mr Raoul's attempts to remove the mortgage from at least 2006 through to March 2014, his "*very strong desire*" to stay in the house and his "*actual knowledge*" that if the mortgage was not removed, the property would be sold and he would lose his house;

(2) Mr Raoul's own proposals to Mr Khalifeh and Mr Hanna to effect a transfer of the property, on the conditions that the mortgage would be discharged and Mr Raoul could remain in his home;

(3) Mr Raoul's participation, including providing instructions to Konstan Lawyers, in the settlement of his personal injury compensation claim, which was finalised in November 2014, during the course of which no concerns were raised as to his capacity. Mr Hanna also submitted that insufficient regard was had to the evidence of a solicitor from Konstan Lawyers, Joseph Kotowitz, who advised and sought instructions from Mr Raoul on 18 September 2014 and 1 October 2014 in relation to

Mr Raoul's compensation claim, that he had no concerns as to Mr Raoul's capacity;

(4) Mr Panopoulos' and Mr Taouk's evidence that Mr Raoul was "*lucid*", understood their advice and provided instructions in direct response to their advice; and

(5) The evidence of Dr Boman, Ms Kennedy-Gould and the ACAT assessor, as well as Dr Jamieson and Professor Coyle's evidence that Mr Raoul understood what he wanted to achieve and the effect of the Deed and the Transfer.

41 Mr Raoul submitted that the primary judge had proper regard to the evidence to which Mr Hanna referred. He contended that the primary judge was required to be satisfied as to whether he had the capacity to understand the "*broad operation*" of the Deed and the Transfer, that is, the manner and extent to which the terms of the Deed and the Transfer altered the character of his proprietary interest in the property. This included whether he had the capacity to understand the following aspects of the arrangement:

> "a. [that] he was transferring an existing proprietary right to [Mr Hanna];
>
> b. [that] that proprietary right, [namely] an interest as remainderman, was immediately disposable by [Mr Hanna];
>
> c. [Mr Hanna's] personal obligations, particularly the unstated conditional nature of those obligations and the risk of their non-performance should anything happen to [Mr Hanna];
>
> d. [the] application of the *Conveyancing and Law of Property Act 1898* to the transaction once effected, including the [life tenant's] unilateral right to lease a property for ten years and the right to go to Court to [have] the property sold and the [capital] proceeds divide[d] up as [between the life tenant and the remainderman], as the Court may direct;
>
> e. [that] the 'broad operation' and 'general purport' of [the Deed and the Transfer] had the effect of denuding [Mr Raoul] of access to any capital [and] in particular, to provide a bond for nursing home care."

42 Mr Raoul pointed out that his desire to remove the mortgage was "*driven by an overwhelming and disabling fear and anxiety*" of losing his house and that

Mr Hanna was aware of this. It was this fear and anxiety that led him to enter into the arrangement with Mr Hanna, notwithstanding that it involved the transfer of his property at an undervalue and otherwise deprived him of access to a capital fund that he might need for his future care.

43 He also argued that his participation in the settlement of his personal injury compensation claim was of little significance in determining whether he had capacity to enter into the Deed and the Transfer, as the compensation claim was only concerned with quantum and no evidence was adduced as to the nature and quality of the advice he received in respect of it.

44 Mr Raoul also submitted that the primary judge did not err in finding that Dr Boman's opinion of 16 June 2014 was not a "*reliable guide*" as to his capacity on 16 September 2014. Dr Boman noted that Mr Raoul's memory from recent events "*seemed reasonable*" and recorded the following observations in respect of Mr Raoul's capacity:

> "In terms of capacity to make the Enduring [Power of Attorney] and Guardianship, [Mr Raoul] had the understanding that he was handing over his financial affairs to his friend ... He told me he willingly signed the document [and] has no regret about his actions.
>
> [Mr Raoul] also told me he deeply regrets agreeing to take out the mortgage, but agreed to do it because it was for a very old friend, who he now realises was a 'crook'. He does not seem to have fully appreciated the significance of the document he was signing.
>
> In terms of testamentary capacity [Mr Raoul] knew the implications of making a will and [had] a good appreciation of his assets ($800,000 or so for his house plus about $7,000 in the bank) ... [he] wants $100,000 or so to go to the school in Egypt ... to recompensate his friend, he wants him to have the $200,000 he paid out to settle the mortgage and any accrued interest plus the rest of the proceeds from the house. He explained that as his friend had saved him from his current financial problems, he wanted him to have the majority of his estate ...
>
> In conclusion, [Mr Raoul] had the capacity to sign the Ensuring Guardianship and [Power of Attorney] and currently has testamentary capacity. His decision to take out the mortgage may have been influenced by alcohol but I find he currently has capacity for financial management decisions."

45 Mr Raoul identified several deficiencies in Dr Boman's report due to Dr Boman's failure to make appropriate enquiries of him during the

consultation. This included failing to ask Mr Raoul about any existing will. Had he done so, Mr Raoul contended that this would have revealed Mr Raoul's "*grossly deficient recall*". For example, contrary to what Mr Raoul told Dr Boman about giving $100,000 to the school in Egypt, his will specified a bequest of $80,000 to a convent in Egypt.

46 Mr Raoul submitted that the primary judge was entitled to accord little weight to the reports of Ms Kennedy-Gould and the ACAT assessor. In this regard, he noted that both Dr Jamieson and Professor Coyle placed no weight on the ACAT assessor's report. Mr Raoul referred the Court to the comments of Dr Jamieson and Professor Coyle, contained in their joint report, which indicated that Mr Raoul was "*highly suggestible*" and "*wouldn't have been able to understand anything complex*".

Consideration

47 A person will lack the mental capacity to enter into a binding transaction if they are not capable of understanding the general nature of what they are doing or do not have the capacity to understand the transaction when it is explained. Whether a person has capacity will depend on the particular transaction in question: see *Gibbons v Wright* (1954) 91 CLR 423; [1954] HCA 17; *Guthrie v Spence* (2009) 78 NSWLR 225; [2009] NSWCA 369.

48 In *Gibbons v Wright*, the High Court stated, at 437, that:

> "The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation."

49 Their Honours continued, at 438, as follows:

> "... the mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained. "

50 Their Honours explained that the "*nature of the transaction*" refers to "*the broad operation*" or "*general purport*" of the instrument. However, in some cases, it may mean the "*effect of a wider transaction which the instrument is a means of carrying out*".

51 It is also necessary, for a transaction entered into by a person without the required capacity to be voidable, that the other party to the transaction have knowledge of the incapacity: see *Gibbons v Wright* at 441. It should be noted that there is an unresolved question whether actual knowledge of the incapacity is required or whether constructive knowledge is sufficient: see *Public Trustee (WA) v Brumar Nominees Pty Ltd* [2012] WASC 161 at [90]-[96]. Putting that question to one side for the moment, it is necessary to ascertain whether Mr Raoul, for his part, satisfied the test for incapacity as stated by the High Court in *Gibbons v Wright*.

52 As I stated earlier, at [31], the primary judge found, at [116], that in the absence of a "*careful explanation of the business to be transacted*", Mr Raoul lacked the capacity to enter into the Deed and the Transfer. One reason for his Honour coming to that conclusion was that Mr Raoul signed the Deed without any appreciation of the legal and financial implications of the creation of a life estate and the conferral of a remainder interest on Mr Hanna, or of the respective rights and obligations of himself and Mr Hanna under the agreement. There were two other reasons for his Honour's conclusion: Mr Raoul's fixation on discharging the mortgage; and his lack of appreciation of the extent of his future dependence on Mr Hanna and, importantly, his lack of appreciation that Mr Hanna had acquired a present interest in the land.

53 Not all of these reasons were relevant to the question whether Mr Raoul lacked capacity. His fixation on having the mortgage discharged, his lack of appreciation of the financial implications to him of creating a life estate and his lack of appreciation of the extent of his dependence on Mr Hanna under the arrangement were not matters that related to the nature of the transaction. Rather, they related to his motivation for entering into the transaction and the financial implications of doing so. Nor do I consider that these matters were

aspects of "*a wider transaction which* [*the Deed and the Transfer were*] *a means of carrying out*": see *Gibbons v Wright* at 438, quoted above at [50]. As I have said, these matters were the motivation for and consequences of the transaction. I will return to his Honour's finding that Mr Raoul lacked an appreciation that Mr Hanna had acquired a present interest in the land.

54 The primary judge, in determining the question of capacity, was also concerned with the failure of the solicitors to be sufficiently vigilant and properly protect Mr Raoul's interests, including Mr Taouk, who explained the documentation to Mr Raoul. In the context of his Honour's reasons as a whole, it is apparent that his Honour was concerned with the solicitors' failure to be vigilant in respect of the improvidence of the transaction, and not merely in respect of the explanation that was given of the nature of the transaction. However, for the purposes of determining capacity, it is sufficient if the explanation enables the person to understand the general purport of the transaction. In my opinion, his Honour imposed too high a standard of what was required for the purpose of determining capacity.

55 The primary judge's findings insofar as they related to the question of capacity, therefore, were that Mr Raoul did not understand the legal implications of the creation of a life estate and the conferral of a remainder interest on Mr Hanna, and that he did not understand that Mr Hanna had acquired a present interest in the land.

56 The question in relation to the first two of these findings, namely, that Mr Raoul did not understand the legal implications of the creation of a life estate or the conferral of a remainder interest on Mr Hanna, is whether an understanding, or lack thereof, of the legal implications of a transaction is different from an understanding of the "*broad operation*" or "*general purport*" of the instrument in question.

57 In seeking to answer that question, it is relevant in this case to have regard to the provenance of the transaction, which was Mr Raoul's desire to have the mortgage discharged so that he could continue to live in his own home. In

this regard, Mr Raoul's proposal to transfer the property was straightforward in terms of the legal arrangements involved. According to Mr Panopoulos' file note, Mr Raoul gave instructions, relevantly, that "[*i*]*n exchange for transferring the property to* [*Mr Hanna*]", Mr Raoul was to have a life estate and Mr Hanna was to pay out the mortgage. When Mr Taouk, after having explained the Deed to Mr Raoul, asked him what his understanding of the Deed and the Transfer was, Mr Raoul said: "*I give* [*Mr Hanna*] *the house and he will pay all my bills and I can live at the house until I die. When I die,* [*Mr Hanna*] *will own the house*". Mr Raoul told Mr Taouk about his inability to pay off the mortgage, but that he wanted to keep living in the house.

58 In my opinion, his Honour's finding that Mr Raoul did not understand the legal implications of the creation of a life estate and the conferral of a remainder interest on Mr Hanna does not answer the question whether he understood the "*broad operation*" or "*general purport*" of the transaction encompassed in the Deed and the Transfer. Having regard to the instructions he gave Mr Panopoulos and what he understood when the Deed was explained to him, I consider that it is probable that he understood the general purport of the transaction into which he was entering.

59 My conclusion in that regard is fortified by two matters. First, the transaction encompassed in the Deed and the Transfer was similar to that which he had proposed to Mr Khalifeh. This indicates that Mr Raoul understood what he wanted to achieve in having someone else pay out the mortgage. Secondly, his Honour's observation, at [101], of the:

> "… focused attention of [Mr Raoul], [Mr Hanna], Mr Panopolous and Mr Taouk upon giving effect to [Mr Raoul's] proposal for transferring title to his land in return for a discharge of the mortgage …"

indicates that Mr Raoul understood what he wanted to achieve, and that the terms of the Deed and the Transfer implemented that aim, as Mr Raoul understood when the documents were explained to him.

60 His Honour's concern that the availability of alternatives had not been explored, as is apparent from the balance of [101], does not go to determining capacity.

61 The question of capacity was not an easy one given that by the time of the hearing in May 2017, Mr Raoul's dementia was evident and his affidavit of 1 April 2016, in which he said that he thought he was "*signing documents so that* [*Mr Hanna*] *could help me keep my house and look after me. I did not wish* [*Mr Hanna*] *to own my house*", was contrary to the tenor of his statements at the time the Deed and the Transfer were executed. Nonetheless, I am satisfied that his Honour's finding of incapacity was significantly affected by his concern as to the absence of advice on the broader implications of the transaction, as discussed below.

62 As I am not satisfied that Mr Raoul did not have capacity, it is not necessary to consider Mr Hanna's position in this respect.

63 Accordingly, I would uphold the first issue on the appeal. However, for the reasons that follow, I consider that the primary judge correctly determined that Mr Raoul was entitled to equitable or statutory relief on the basis that the transaction was unconscionable or unjust.

Second issue on the appeal

Whether the Deed and the Transfer should be set aside on the basis that they were unconscionable: appeal ground 2(b)

Whether the primary judge erred in failing to have regard to certain evidence and the *Social Security Act*: appeal grounds 1(a)-(b)

Whether the primary judge erred in determining the role of Mr Panopoulos and Mr Taouk: appeal grounds 4(a)-(b)

Primary judge's reasons

64 The primary judge held, at [121], that whether or not Mr Raoul lacked capacity to enter into the Deed and the Transfer, his age, frailty and state of health were sufficient to amount to a special disability, such that he was at a serious disadvantage *vis-à-vis* Mr Hanna. His Honour held that Mr Raoul was "*unable*

to make a sound judgement as to his own best interests, or to protect his own interests".

65 His Honour found, at [122], that Mr Hanna took advantage of Mr Raoul's "*weakness of mind and body*", knowing of Mr Raoul's age and frailty, in circumstances where he ought also to have known of Mr Raoul's vulnerability.

66 His Honour considered, at [92], that the Deed and the Transfer were "*improvident*" in that:

> "... (i) they deprived [Mr Raoul] of access to capital should he require it in his declining years; (ii) in a practical sense, they subjected him to discretionary decisions on the part of [Mr Hanna] in management of the land and the provision of support; (iii) they made no provision for protection of [Mr Raoul] from a remainderman other than [Mr Hanna] should [Mr Hanna] die or should his interest in the land be sold or charged to somebody else; and (iv) the remainder interest created in favour of [Mr Hanna] was disposed of by [Mr Raoul] at an undervalue."

67 As noted earlier, there was no dispute that the remainder interest was transferred to Mr Hanna at an undervalue. In that regard, the evidence was that, on the basis that Mr Hanna was responsible for the payment of rates and other taxes on the property, the value of the remainder interest was $475,869, and the value of Mr Raoul's life interest was $199,131.

68 His Honour concluded, at [123], that Mr Hanna's conduct, in inducing Mr Raoul to transact as he did and in retaining the benefit of it for himself, was unconscientious, and that the Deed and the Transfer were liable to be set aside in equity. In reaching this conclusion, his Honour noted, at [107], that the parties engaged in "*hot controversy*" over whether the arrangement put Mr Raoul's pension at risk but said, at [108], that it was not necessary for him to determine the correct interpretation or operation of any legislation or administrative policies attending the administration of Mr Raoul's pension.

69 With respect to the involvement of Mr Panopoulos and Mr Taouk, the primary judge noted, at [93], that Mr Panopoulos accepted that his advice was less than adequate and suffered from the following shortcomings: first, he saw his

role, primarily, as protecting the interests of Mr Hanna as an established client; secondly, he failed to comply with Mr Raoul's instructions by omitting to include in the Deed express provision for what would occur if Mr Raoul needed to be admitted to a nursing home; and thirdly, he failed to arm Mr Raoul, or any prospective solicitor, with sufficient details of the instructions given to him by Mr Raoul to enable Mr Raoul to receive appropriately critical advice from an independent solicitor.

70 His Honour held, at [94]-[95], that Mr Taouk's performance of his obligations as an independent solicitor was "*irretrievably compromised*" by an erroneous belief that it was sufficient for him to confine his advice to the terms of the Deed without making general enquiries about Mr Raoul's circumstances, asking for associated documentation, exploring the underlying transactions or testing Mr Raoul's understanding of the legal and financial implications of the transaction. His Honour found, at [79], that Mr Taouk's advice was "*limited to the deed, without a critical examination of the whole transaction or its wisdom*". His Honour also noted that he did not share:

> "... Mr Taouk's confidence in his ability to judge [Mr Raoul's] capacity or to provide competent, thorough, independent advice to his elderly client."

71 His Honour found, at [99]-[104], that instead of heeding the alarm bells, namely, Mr Raoul's age, status as a widower without children, "*evident eccentricities*" and dependency upon a pension for his livelihood, as well as the nature of the transaction and Mr Hanna's involvement in it, Mr Panopoulos and Mr Taouk "*pressed ahead, in haste*", without exploring the alternatives open to Mr Raoul, including the alternatives that might have become apparent had the solicitors enquired as to Mr Raoul's will.

Submissions

72 Mr Hanna submitted that unconscionability is a narrow principle which requires proof of a "*high level of moral obloquy*": see *Attorney General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557; [2005] NSWCA 261 at [121]. Mr Hanna submitted that Mr Raoul had not demonstrated that his

circumstances met this high threshold. He submitted that although Mr Raoul was in a financially difficult position, which led to anxiety, neither his age nor his infirmity gave rise to any special disability. He pointed to the fact that, at about the same time, Mr Raoul settled his personal injury compensation claim, which was a financially complex matter.

73 In his oral submissions, Mr Hanna submitted that given Mr Raoul's age and his immediate predicament, that being that the mortgage was not being serviced and he had no ability to pay it himself, something had to be done, or, as it was put, "*doing nothing was not an option*". Mr Hanna placed particular emphasis on the fact that the Deed met Mr Raoul's principal concern to stay in the house. He submitted that under the terms of the Deed:

> "... Mr Raoul got everything he wanted and everything he needed. He had no immediate family. His concern was to get that security. He had accommodation and financial security ..."

74 Given Mr Raoul's overriding concern, Mr Hanna contended that there was no need to have had the life estate and remainder interest valued.

75 Mr Hanna accepted that he had acquired the remainder interest at an undervalue and that Mr Raoul was not advised of this, but submitted that it was not so improvident as to be unconscionable. As he put it, to say that the arrangement was improvident "*on paper*" was to put too much emphasis on the dollar value of the arrangement, and not enough on what Mr Raoul wanted and whether that was achieved by the terms of the Deed. Mr Hanna also relied upon the fact that he had not initiated the arrangement, that suggestion having come from Mr Raoul, and that it was something Mr Raoul had been seeking for some time, evidenced by the fact that he had had prior discussions with Mr Khalifeh to a similar effect.

76 Mr Hanna further contended that in finding that the Deed and the Transfer were unconscionable, the primary judge had "*completely failed*" to consider the evidence of Stuart Bell, a financial planner, whom Mr Hanna had retained for the purposes of the proceedings to provide an opinion "*on how the ...*

transaction would be assessed by Centrelink and any potential impact on Mr Raoul's entitlements following the transaction".

77 Mr Bell advised that the arrangement between Mr Raoul and Mr Hanna would be considered, for the purposes of assessing Mr Raoul's pension entitlements, under the "*Granny Flat rules*" and that Mr Raoul would retain his full pension entitlements. Mr Bell advised that if the "*Granny Flat*" arrangement ceased within five years of the date the arrangement with Mr Hanna was entered into, and the reason for vacating the property was reasonably foreseeable at that time, the "*deprivation rules*" may come into play. Mr Bell advised that those rules provide that:

> "Where an asset is disposed of for less than its market value, the difference between the market value of the asset and the consideration received is considered a deprived asset (a gift)."

78 Mr Bell said that, had Mr Raoul, at the time the Deed was entered into, come to him for advice "*on how to avoid the very real possibility of him losing his home while also retaining as much pension as possible*", he would have recommended the very arrangement contained in the Deed.

79 Mr Hanna submitted that, in light of Mr Bell's evidence, and having regard to the fact that the Deed and the Transfer achieved Mr Raoul's objectives, the primary judge "*misdirected himself*" by speculating as to alternative arrangements which should have been explored. Mr Hanna also submitted that the primary judge failed to take into account that the arrangement was the "*best possible option*" for Mr Raoul, as it did not affect his pension entitlements.

80 Finally, Mr Hanna submitted that, contrary to the primary judge's finding, it was sufficient for Mr Panopoulos and Mr Taouk to have confined their advice to the terms of the Deed. He submitted there was "*no (absolute) requirement for independent advice*" and that, in any event, the solicitors were not obliged to embark on any form of general enquiry.

81 In response to Mr Hanna's reliance on Mr Bell's evidence and the *Social Security Act*, Mr Raoul submitted that the primary judge had considered these matters at [107]-[108], but found that it was not necessary for him to determine the correct interpretation of any legislation or administrative policies regarding Mr Raoul's pension. In any event, Mr Raoul submitted that Mr Hanna's reliance on Mr Bell's evidence was "*misplaced*". Mr Bell's evidence was not expert evidence based on industry practice. Rather, it "*said no more than what, in his subjective view",* would have been the advice that he would have given had his advice been sought at the time the Deed was in contemplation.

82 Mr Raoul further contended that Mr Bell did not consider, and could not have considered, the question whether the Deed and the Transfer were unconscionable, as he did not know the relevant facts. Further, Mr Raoul submitted that in the proceedings below, Mr Hanna only relied on Mr Bell's evidence to counter Mr Raoul's submission that there may have been a risk to his pension entitlements in respect of which he should have been advised. Accordingly, Mr Hanna could not, on appeal, contend that Mr Bell's evidence "*should be weighed as a factor on any issue other than pension risk*".

83 Mr Raoul contended that, in any event, Mr Bell's conclusion as to his pension entitlements under the *Social Security Act* was wrong: there was a risk that, in the future, the arrangement would be assessed as a deprivation of an asset and result in a reduced pension.

84 Mr Raoul, for his part, had adduced evidence from Michael Johnson, also a financial planner, in respect of the effect of the transaction on his pension entitlements. That evidence was admitted subject to a ruling pursuant to the *Evidence Act 1995* (NSW), s 136 limiting it to evidence as to the existence of a risk that Centrelink might treat the transaction embodied in the Deed and the Transfer as involving a deprived asset.

85 It should be noted that there was no dispute between Mr Bell and Mr Johnson that the arrangement in the Deed would be treated as a "*Granny Flat*"

arrangement and that the gift/deprivation of asset regime did not apply directly. However, the point that Mr Raoul made before the primary judge, and again on the appeal, was that, having regard to Mr Johnson's evidence, and as is apparent from Mr Bell's evidence in any event, there was a risk that Mr Raoul's pension would be reduced should he have to vacate the property within five years and that was a risk of which he needed to be advised.

86 In relation to Mr Panopoulos and Mr Taouk's involvement, Mr Raoul submitted that Mr Hanna, knowing of Mr Raoul's fear and anxiety, could have had no confidence that even independent legal advice would have been sufficient to eliminate the influence working on Mr Raoul. In any event, he submitted that, contrary to Mr Hanna's submissions, the authorities supported a requirement for independent advice. As for the required content of this advice, Mr Raoul submitted that he should have been advised as to whether the transaction was "*right and proper*", within "*the rule*" in *Powell v Powell* [1900] 1 Ch 243.

87 Mr Raoul also submitted that Mr Panopoulos was "*hopelessly conflicted*" and noted his concession that there were matters that he ought to have discussed with Mr Raoul before it would have been appropriate for Mr Raoul to have entered into the Deed and the Transfer. Mr Raoul also submitted that Mr Taouk's advice was "*worthless*". Mr Taouk did not advise Mr Raoul about the propriety of him entering into the Deed or recommend that he receive independent financial advice, nor did Mr Taouk properly understand what was required of him, as demonstrated by the fact that he considered that the family relationship of Mr Raoul and Mr Hanna lessened the degree of scrutiny required. Further, Mr Taouk did not advise Mr Raoul about alternative arrangements that could have been entered into and did not ascertain Mr Raoul's instructions to Mr Panopoulos to test whether the Deed conformed with his instructions. Finally, Mr Taouk did not satisfy himself of the absence of fear and anxiety on the part of Mr Raoul.

88 Mr Raoul also contended, in his notice of contention, that the Deed did not conform to his instructions as it did not include provisions regarding the payment of utility bills or nursing home arrangements. Further, although cl 6

of the Deed provided that Mr Hanna was entitled, with Mr Raoul's written consent, to sell the land, invest the net proceeds of sale and pay the net annual income arising therefrom to Mr Raoul, Mr Raoul submitted that he needed to have been advised as to the circumstance where it would have been in his best interests to sell the property but Mr Hanna did not agree to do so, or where Mr Raoul was unable to give written consent due to infirmity or loss of capacity.

Consideration

89 In *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; [1983] HCA 14, Gibbs CJ, quoting from Kitto J's judgment in *Blomley v Ryan* (1956) 99 CLR 362; [1956] HCA 81, identified, at 459, an unconscientious transaction in respect of which equity would intervene as one:

> "... 'whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands'."

90 To the same effect, Mason J stated, at 461, that relief on the ground of "*unconscionable conduct*":

> "... is usually taken to refer to the class of case in which a party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from some special disability or is placed in some special situation of disadvantage ..."

91 Mason J compared this doctrine to the doctrine of undue influence. As his Honour explained, at 461, although there were resemblances between the two doctrines, the essential difference was that in the case of undue influence, "*the will of the innocent party is not independent and voluntary because it is overborne*", whereas, in the case of an unconscionable bargain:

> "... the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position."

92 Mason J also referred, at 462, to Kitto J's judgment in *Blomley v Ryan*, set out above at [89], as identifying some of the circumstances in which a person may be found to be suffering from a special disability. His Honour observed, however, that these were but:

> "... exemplifications of an underlying general principle which may be invoked whenever one party by reason of some condition of circumstance is placed at a special disadvantage vis-a-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created."

93 Mason J continued:

> "I qualify the word 'disadvantage' by the adjective 'special' in order to disavow any suggestion that the principle applies whenever there is some difference in the bargaining power of the parties and in order to emphasize that the disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment as to his own best interests, when the other party knows or ought to know of the existence of that condition or circumstance and of its effect on the innocent party."

94 Deane J, with whom Mason J and Wilson J separately agreed, explained, at 474, that the equitable jurisdiction to set aside a transaction as unconscionable applied where:

> "... (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that disability was 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. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable ..."

95 His Honour further explained that the principles relating to relief against unconscionable dealing look to the conduct of the stronger party who, as is relevant to this case, seeks to:

> "... retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so."

96 Having regard to these principles, it will be immediately apparent that Mr Hanna's submissions and, in particular, his insistence on the fact that the

arrangement provided Mr Raoul with what he wanted were, in large part, misconceived. As Jacobs ACJ stated in *Diprose v Louth (No 2)* (1990) 54 SASR 450:

> "It is an oversimplification to say that because the respondent acted as he did with his eyes open, and with a full understanding of what he was doing, he was not in a position of disadvantage, and therefore not the victim of unconscionable conduct."

This passage was cited with approval by the majority in *Bridgewater v Leahy* (1998) 194 CLR 457; [1998] HCA 66.

97 The same point was made at a very early point in the jurisprudence on unconscionability by Lord Eldon in *Huguenin v Basely* (1807) 14 Ves Jun 273, which was also cited with approval by the majority in *Bridgewater v Leahy*:

> "Take it, that she intended to give it to him: it is by no means out of the reach of the principle. The question is, not, whether she knew what she was doing, had done, or proposed to do, but how the intention was produced."

98 In the present case, there can be no doubt that Mr Raoul was in a position of special disadvantage. He was elderly and frail. He was under extreme personal and financial stress. He wished to continue living in his home but had no means of paying the mortgage on his property and there was a real likelihood of a mortgagee sale. Mr Raoul's mental health was deteriorating, and leaving aside the question whether he was in fact suffering from Alzheimer's disease or the extent and effect of that condition at the time the Deed was entered into, the medical and other evidence clearly established that he was highly suggestible, that his memory was failing him and that he was confused about relevant details of his personal and financial circumstances.

99 Contrary to Mr Hanna's submissions, it was not to the point that Mr Raoul approached him to enter into the transaction and that the Deed provided him with what he wanted, namely, the ability to remain in his house and to have the mortgaged discharged: see the test set out by Deane J in the passage cited above at [94]. In any event, to the extent that the Deed may have

provided him with what he wanted in a broad sense, it did not comply with his specific instructions regarding the payment of utility bills by Mr Hanna and the payment of rent to him should he be admitted to a nursing home. Nor was it to the point that Mr Hanna did not act dishonestly or with any hint of trickery. Rather, it was his attempt to retain the benefit of the arrangement in light of Mr Raoul's frailty at the time the transaction was entered into which is central to the determination whether the transaction was unconscionable: see *Johnson v Smith* [2010] NSWCA 306 per Allsop P at [5]; Young JA at [101].

100 In this regard, inadequacy of consideration is one, but not a necessary, indicator that unconscientious advantage has been taken of a person under a special disability or disadvantage: *Blomley v Ryan* at 405; *Commercial Bank of Australia v Amadio* at 475. In this case, the transfer to Mr Hanna of the remainder interest was at a substantial undervalue and thus an important consideration, given Mr Raoul's circumstances.

101 That it was unconscientious for Mr Hanna to have agreed to the arrangement is reinforced by the following circumstances. First, Mr Raoul did not know the extent of the undervalue at which he had agreed to transfer the remainder interest. Secondly, subject to his statutory rights under the *Conveyancing and Law of Property Act 1898* (NSW), the transfer of the remainder interest to Mr Hanna meant that Mr Raoul had lost his recourse to capital. This was potentially of significance should he, in the future, require aged residential or nursing home care. Thirdly, Mr Hanna was not constrained by the terms of the Deed from selling or otherwise dealing with his remainder interest. Although he could not sell the property without Mr Raoul's consent, Mr Raoul's mental state and, in particular, his suggestibility were likely to make him particularly vulnerable should Mr Hanna seek to sell the property.

102 Accordingly, I consider that the primary judge was correct in finding that Mr Hanna had taken unconscientious advantage of Mr Raoul in entering into the transaction, unless it can be said that Mr Hanna demonstrated that the transaction was fair and reasonable, being an onus which he bore: see *Commercial Bank of Australia Ltd v Amadio* at 474 above,

103 Mr Hanna sought to discharge his onus by advancing the following arguments. First, he was not the instigator of the proposal. As stated above, this is not to the point in determining whether the transaction was unconscionable. Secondly, Mr Raoul got what he sought to achieve by the transaction. That argument is also not to the point in circumstances where Mr Raoul was not able to exercise appropriate judgement as to what was in his own best interests.

104 Mr Hanna also suggested that Mr Raoul was protected by the *Conveyancing and Law of Property Act*, particularly insofar as that Act enabled Mr Raoul to approach the Court to seek a sale of the property and the distribution of any proceeds as between himself as life tenant and Mr Hanna as the remainderman. With respect to this submission, the suggestion that Mr Raoul, whose frailty had already placed him in a position of special disadvantage *vis-à-vis* Mr Hanna in relation to the arrangements in the Deed and the Transfer, could at some later date seek to exercise his statutory rights and, to that end, retain solicitors or obtain assistance from a community legal centre, bore an air of unreality.

105 Mr Hanna relied upon the evidence of Dr Boman, set out above at [44], who assessed Mr Raoul as having both the capacity to manage his financial affairs and testamentary capacity as at 16 June 2014.

106 Mr Hanna also relied upon the fact that a number of legal practitioners had had dealings with Mr Raoul around the same time, including in relation to the arrangement contained in the Deed and the Transfer, and were satisfied that he understood what he was doing. In any event, Mr Hanna submitted that the evidence demonstrated that the arrangement ultimately entered into was the most advantageous one for Mr Raoul for the purpose of preserving his pension entitlements. Each of these matters requires separate consideration.

107 The primary judge dealt with the report of Dr Boman in some detail. As his Honour pointed out, at [53], the circumstances in which Dr Boman prepared his report are unknown. In any event, what Mr Raoul told Dr Boman in

relation to how he wanted to dispose of his property in his will and his statements to Dr Boman about the mortgage on his property suggested, in his Honour's view, that Dr Boman was not provided with accurate information about Mr Raoul's affairs. In particular, it was not apparent on the face of Dr Boman's report that he was aware that Mr Raoul already had a will. Nor was what Mr Raoul told Dr Boman about the mortgage, namely, that his "*friend*" (Mr Khalifeh) had paid out the mortgage, as recorded in Dr Boman's report, correct.

108 As noted earlier, his Honour concluded, at [60], in a finding that was not challenged by Mr Hanna, that having regard to the matters to which I have just referred, and the lapse of time between Dr Boman's report of 16 June 2014 and the relevant date for assessing the appellant's capacity, namely, 16 September 2014, Dr Boman's view of his capacity:

> "... *in the abstract* is not a reliable guide to an assessment of the plaintiff's capacity to transact the *particular* business purportedly transacted by the plaintiff on 16 September 2014." (emphasis in original)

109 In any event, his Honour found, at [69], that as at 16 September 2014, Mr Raoul was suffering from "*dementia, probably Alzheimer's Disease*", and would not have been able to "*understand anything complex*". This finding was not the subject of challenge on the appeal.

110 The primary judge also rejected that the advice given by Mr Panopoulos and Mr Taouk was sufficient in the circumstances. In my opinion, his Honour was correct to do so. The circumstances which call for independent advice to be given and, more particularly, the required content of any independent advice has been considered in a number of authorities in this court.

111 In *Aboody v Ryan* (2012) 17 BPR 32,359; [2012] NSWCA 395, a case involving an unconscionable transaction, Allsop P held, at [69], that the solicitor's advice in that case did not transform the relevant transaction into one that was "*fair, just and reasonable*". In coming to this conclusion, Allsop P had regard, at [68], not only to the fact that the appellant knew of the

respondent's age, health, financial position and dependence on the appellant's wife, but also the specific circumstances that: no mention had been made to the solicitor of an irrational fear operating upon the respondent; the solicitor had failed to make inquiries about the respondent's financial position and the risks associated with the proposed transaction; and there had been no discussion or advice about any mechanisms that might have been put in place to address those risks. His Honour found that if such steps had been taken, "*the fairness and reasonableness of the transaction and its attendant transaction costs could have been evident and advised upon*".

112 Allsop P further observed, at [78], that the "*fundamental inadequacy*" of the solicitor's advice was the failure to address with the respondent the financial and practical consequences of what he was doing. His Honour noted that the solicitor neither attempted to make any assessment of the financial consequences of the transaction nor take steps to see that the respondent obtained advice on the matter. In circumstances where the solicitor "*was dealing with an old man who was giving away the capital in his home*", his Honour considered that the potential consequences and risks of that were "*clear*". Accordingly, his Honour held that it was part of the solicitor's duty in that case to see that the respondent "*understood fully the legal and practical consequences of what he was doing*".

113 The required content of independent legal advice arose again for consideration in *Provident Capital Ltd v Papa* (2013) 84 NSWLR 231; [2013] NSWCA 36, which concerned a question whether a contract was "*unjust*" pursuant to the *Contracts Review Act*. Allsop P observed:

> "[2] The extent of the responsibility of a solicitor in the provision of independent legal advice will depend on the retainer and the circumstances attending the retainer and its execution. **It is therefore unwise to be in any way dogmatic in general terms about what needs to be done in fulfilment of the retainer. It is for that reason that any mechanical approach that limits independent advice to explaining the content of the legal obligations in the document in question may lead, in any given circumstances, to the provision of inadequate advice. If the retainer is to give legal advice, depending on the circumstances, that may ... extend to explaining the practical consequences of the legal obligations**

> **arising from the relevant document in the known circumstances.** It may be apparent ... that the legal *and* practical consequences *to a client* of entering into a transaction may be significant, but are not such as can be assessed without financial or further financial information or advice. In such circumstances, the solicitor may be obliged to counsel in appropriate terms (perhaps strong terms) about the risks in proceeding without further information or advice. Depending upon the circumstances, such as apparent ties of loyalty, whether of blood or love, the apparent risks may have to be brought home with clarity and force ...
>
> ...
>
> [6] I recognise the risk of simplistic encapsulation; but many clients look to and rely on an advising lawyer, not as the expounder of legal doctrine, but as the confidential adviser about the law, and its practical intersection with life. That is why they seek advice ..." (emphasis added)

114 Macfarlan JA, in his judgment, observed that whilst a solicitor is not ordinarily required to advise upon the wisdom of a transaction, the proper execution of a retainer to give independent legal advice in respect of a document to be executed may, depending on the circumstances known to the solicitor, require more than an explanation of the legal effect of the document.

115 In explaining why this was so, Macfarlan JA referred to *David v David* [2009] NSWCA 8, where Allsop P (Hodgson JA and Handley AJA agreeing) stated, at [76], that:

> "... the notion that a solicitor may owe a client a 'penumbral' duty that extends beyond scope of the retainer is doubtful. If, however, the solicitor during the execution of his or her retainer learns of facts which put him or her on notice that the client's interests are endangered or at risk unless further steps beyond the limits of the retainer are carried out, depending on the circumstances, the solicitor may be obliged to speak in order to bring to the attention of the client the aspect of concern and to advise of the need for further advice either from the solicitor or from a third party."

116 In *Dominic v Riz* [2009] NSWCA 216, Allsop P, after referring to the passage quoted above from *David v David*, stated that it was not meant to be "*an operative legal principle*". Rather, it was intended "*to do no more than posit the possibility that the performance of the retainer, and what is learnt during it, may affect how the retainer is properly discharged*".

117 It needs to be noted that *David v David* and *Dominic v Riz* were not concerned with unconscionable transactions. The question in issue in those cases was the content of a solicitor's duty of care. Allsop P emphasised this distinction in *Dominic v Riz* at [87]. However, what these cases demonstrate, including what was said in *Provident Capital Ltd v Papa*, is that whether independent advice is required and the required content of any such advice depend upon the nature of the case and the particular factual circumstances in play.

118 For that reason, the statement of Farwell J in *Powell v Powell*, upon which Mr Raoul relied, must be applied with care. That case involved undue influence exerted upon a young adult by her guardian to make a voluntary transfer to the guardian. The same solicitor had acted for both parties. In that context, Farwell J stated, at 247, that:

> "... the solicitor does not discharge his duty by satisfying himself simply that the donor understands and wishes to carry out the particular transaction. He must also satisfy himself that the gift is one that it is right and proper for the donor to make under all the circumstances; and if he is not so satisfied, his duty is to advise his client not to go on with the transaction, and to refuse to act further for him if he persists."

119 *Powell v Powell* was applied at first instance by Slattery J in *Ryan v Aboody* [2012] NSWSC 136, in finding that the content of the advice given by the solicitor in that case was inadequate. However, the reasons of Allsop P on appeal demonstrate that whether independent advice has been given and whether the content of that advice is sufficient to discharge the onus of the party who procures or retains the benefit of a transaction which is prima facie unfair, involves more nuanced considerations. The authority in this Court establishes that, in certain circumstances, such as where the risks of a transaction to a client's interests are clear, a solicitor giving independent legal advice may be required to advise as to the practical consequences of the transaction or recommend that their client obtain independent financial advice.

120 It will be immediately apparent that Mr Panopoulos was not independent, in circumstances where he also acted for Mr Hanna. In any event, his advice

was inadequate. As I have stated above, the final Deed prepared by Mr Panopoulos did not conform to Mr Raoul's instructions. He was also aware at the time that he prepared the draft deed, as is apparent from the draft deed, that Mr Raoul may need capital should he be admitted to a nursing home in the future, but he did not include any such provision in the Deed that was entered into: see above at [17].

121 Mr Taouk, even if independent, confined his advice to whether Mr Raoul understood the contents of the Deed. However, as his Honour held, at [95], that was insufficient in circumstances where Mr Raoul was unable to properly protect his interests, even if the Deed reflected what he said he wanted. What he wanted and what was in his best interests were two different questions which needed to be independently assessed. As was the case in *Aboody v Ryan,* Mr Taouk was "*dealing with an old man who was giving away the capital in his home*". Mr Taouk ought to have advised Mr Raoul as to the practical implications of the arrangement, including the shortcomings of cl 6 of the Deed, as raised by Mr Raoul in his notice of contention, or recommended that he seek independent financial advice.

122 His Honour further observed, at [101], correctly in my view, that Mr Taouk's focus on giving effect to Mr Raoul's proposal to transfer the property in exchange for having the mortgage discharged:

> "... without exploring the availability of alternatives open to [Mr Raoul], operated to blind all participants in the process to [Mr Raoul's] want of capacity; his vulnerability to exploitation; and his need for financial, if not estate planning, advice generally."

123 Mr Hanna sought to resist this reasoning by reference to the opinion of Mr Bell: see above at [76]-[79], and complained that his Honour failed to have regard to it. That submission misunderstands both the reliance that was placed on Mr Bell's evidence at trial and his Honour's reasoning. Mr Bell's evidence related to the way Mr Raoul's pension would be treated under the arrangement contained in the Deed. At trial, Mr Hanna did not directly meet the argument that Mr Raoul should have received independent financial advice or that the advice he received was inadequate. Instead, he responded

by submitting that, even if the advice given by the solicitors was inadequate and they should have advised Mr Raoul to seek expert advice on the "*Centrelink issues*", then Mr Bell would have recommended the very arrangement that was put in place.

124 As his Honour observed, at [107]-[108], it was not necessary to make a determination about Mr Raoul's pension. This was because, whilst his Honour considered that any deficiency in the advice tendered to Mr Raoul may have been aggravated by a failure to consider any risks to his pension entitlements, the deficiencies were of a much broader character, including, as his Honour reiterated, at [113], the fact that he had been deprived of any access to capital in his declining years. In addition, adequate independent advice was likely to have apprised Mr Raoul of other options that might have been available to him. These included obtaining a reverse mortgage, or, as the primary judge suggested at [103], agreeing to leave the property to Mr Hanna in his will in consideration for Mr Hanna discharging the mortgage.

125 It follows, in my opinion, that appeal grounds 1(a)-(b) should be rejected.

126 It might be added that Mr Bell's advice was itself narrowly focussed on the possible impact of the arrangements on Mr Raoul's pension and so, of itself, that advice would not have been adequate to satisfy the content of the independent advice that was required. Accordingly, even if Mr Bell's evidence was accepted insofar as it goes, it is not an answer to Mr Raoul's claim that the Deed was unconscionable. For the reasons that I have given, I consider that no error has been demonstrated in his Honour's finding that the arrangement was unconscionable and, accordingly, that the Deed and the Transfer should be set aside.

Third issue on the appeal

Whether the Deed and the Transfer were "*unjust*" at law or within the meaning of the *Contracts Review Act*: appeal ground 2(a)

The legislation

127 The *Contracts Review Act*, s 7 provides for the grant of relief, including making an order that the contract is void in whole or in part where a court finds a contract or a provision thereof "*to have been unjust in the circumstances relating to the contract at the time it was made*". "*Unjust*" is defined in s 4(1) to include "*unconscionable, harsh or oppressive*" and "*injustice*" is to be construed in a corresponding manner.

128 Section 9, which lists the matters to be considered by the court, provides, relevantly, as follows:

> "9 **Matters to be considered by Court**
>
> (1) In determining whether a contract or a provision of a contract is unjust in the circumstances relating to the contract at the time is was made, the Court shall have regard to the public interest and to all the circumstances of the case, including such consequences or results as those arising in the event of
>
> (a) compliance with any or all of the provisions of the contract, or
>
> (b) non-compliance with, or contravention of, any or all of the provisions of the contract
>
> ...
>
> (2) Without in any way affecting the generality of subsection (1), the matters to which the Court shall have regard shall, to the extent that they are relevant to the circumstances, include the following:
>
> (a) whether or not there was any material inequality in bargaining power between the parties to the contract,
>
> (b) whether or not prior to or at the time the contract was made its provisions were the subject of negotiation,
>
> (c) whether or not it was reasonably practicable for the party seeking relief under this Act to negotiate for the alteration of or to reject any of the provisions of the contract,
>
> (d) whether or not any provisions of the contract impose conditions which are unreasonably difficult to comply with or

not reasonably necessary for the protection of the legitimate interests of any party to the contract,

(e) whether or not:

(i) any party to the contract (other than a corporation) was not reasonably able to protect his or her interests, or

(ii) any person who represented any of the parties to the contract was not reasonably able to protect the interests of any party whom he or she represented,

because of his or her age or the state of his or her physical or mental capacity,

(f) the relative economic circumstances, educational background and literacy of:

(i) the parties to the contract (other than a corporation), and

(ii) any person who represented any of the parties to the contract,

...

(h) whether or not and when independent legal or other expert advice was obtained by the party seeking relief under this Act,

(i) the extent (if any) to which the provisions of the contract and their legal and practical effect were accurately explained by any person to the party seeking relief under this Act, and whether or not that party understood the provisions and their effect,

(j) whether any undue influence, unfair pressure or unfair tactics were exerted on or used against the party seeking relief under this Act:

(i) by any other party to the contract ...

...

(4) In determining whether a contract or a provision of a contract is unjust, the Court shall not have regard to any injustice arising from circumstances that were not reasonably foreseeable at the time the contract was made."

Primary judge's reasons

129 The primary judge noted, at [125], as a preliminary observation, that Mr Raoul's case could be accommodated by an application of equitable principles, without resort to the *Contracts Review Act*. However, for

completeness, his Honour considered the application of the Act, noting that, in substance, the relief available under the Act was the same as that available in equity.

130 His Honour held, at [128], that the Deed and the Transfer were attended by both procedural and substantive injustice, which:

> "... manifested in the improvident character of the business thereby transacted and the inadequacy, and haste, of the advice tendered to [Mr Raoul] in the transaction of it."

131 His Honour found, at [129], that, having regard to Mr Raoul's "*frailty of mind and body, his vulnerability to exploitation, and his suggestibility*", which his Honour reiterated constituted a "*special disability or disadvantage*", there was a "*marked inequality in bargaining power*" between Mr Raoul and Mr Hanna, having regard to Mr Raoul's special disability. His Honour also found that Mr Raoul was incapable of and did not engage in any form of negotiation, and thus the Deed and the Transfer were not the subject of negotiation in any real sense and that Mr Raoul did not receive legal or other advice that was truly independent of Mr Hanna and which brought home to him the improvident nature of the transaction.

132 Accordingly, the primary judge held that the Deed and the Transfer were "*unjust in the circumstances relating to the contract at the time it was made*", pursuant to s 7(1). His Honour paid particular attention to the need to take into account the public interest, pursuant to s 9(1), which, in his Honour's view, favoured a finding that the Deed and the Transfer were "*unjust*" contracts, jointly and severally.

Submissions

133 Mr Hanna submitted that the primary judge should have found that the Deed and the Transfer were not "*unjust*" because Mr Raoul had capacity to enter into the Deed and the Transfer, "*initiated the key terms himself*" and "*achieved exactly what he wanted*". Mr Hanna relied on the fact that, since 2006, Mr Raoul had consistently attempted to have the mortgage removed.

Mr Hanna also relied on Mr Bell's evidence to show that the Deed was "*the best option for him*", in circumstances where Mr Raoul wanted to have the mortgage removed but also remain in his home.

134 In response, Mr Raoul submitted that the primary judge correctly applied the factors relevant to determining whether a contract is "*unjust*", as listed in the *Contracts Review Act*, s 9(2), having regard to the following considerations:

(1) The inequality of bargaining power was "*palpable*": ss 9(2)(a) and 9(2)(f);

(2) There had been no negotiation of any of the terms. Mr Hanna did not even see to it that all of Mr Raoul's instructions were incorporated into the Deed: s 9(2)(b);

(3) As the primary judge found, Mr Raoul's special disability deprived the process by which agreement was reached, as well as the arrangement agreed upon, of any entitlement to be characterised as "*just*": s 9(2)(c);

(4) The Deed and the Transfer imposed conditions that were not reasonably necessary for the protection of the parties' legitimate interests: s 9(2)(d);

(5) Mr Raoul was not able to protect his interests because of his overwhelming and disabling fear and anxiety: s 9(2)(e);

(6) Truly independent legal advice was not obtained and the legal and practical effects of the Deed and the Transfer were not sufficiently explained to Mr Raoul, who should have been advised to seek independent financial advice, including in relation to his pension entitlements: s 9(2)(h); and

(7) Mr Hanna had used unfair tactics against Mr Raoul, by taking him to Mr Taouk for 'independent' advice, even though Mr Raoul had his own solicitors, that is, Konstan Lawyers: s 9(2)(j).

135 Accordingly, Mr Raoul submitted that there was no basis upon which Mr Hanna could allege that his Honour's finding was "*manifestly unreasonable*" or demonstrated *House v The King* error.

Consideration

136 As the primary judge indicated, it was not strictly necessary to deal with the claim under the *Contracts Review Act*, as this case could be accommodated by the application of equitable principles. I agree with this observation. For the same reasons that Mr Raoul established his entitlement to equitable relief, I consider that he established that the contract was "*unjust*", having regard to the circumstances relating to the contract at the time it was made.

137 There was a material inequality of bargaining power between Mr Hanna and Mr Raoul, given that Mr Hanna was a younger person who conducted his own business and Mr Raoul was about 70 years of age and, more fundamentally, was frail, and under personal and financial stress: ss 9(2)(a) and 9(2)(f). There was no relevant negotiation as to the terms of the Deed and the Transfer and it was not reasonably practicable for Mr Raoul to have done so: ss 9(2)(b) and 9(2)(c). The arrangement need not have been one which gave Mr Hanna the fee simple in the property (subject to a life interest): s 9(2)(d). Mr Raoul was unable to reasonably protect his interests because of his mental and physical infirmity: s 9(2)(e). The importance of the impact of these factors and the fact that the transfer to Mr Hanna of the remainder interest was of a significant undervalue is underscored by the absence of relevant independent advice: s 9(2)(h). There is a real question as to why Mr Hanna took Mr Raoul to Mr Taouk for 'independent' advice, rather than to Mr Raoul's solicitors, Konstan Lawyers. Even if this cannot be considered an exertion of "*unfair tactics*" on Mr Raoul: see s 9(2)(j), the factors to which I have referred are sufficient to demonstrate that the contract was "*unjust*".

138 It is not a sufficient answer to these factors that Mr Raoul "*achieved exactly what he wanted*" by the transaction. That very factor meant that Mr Raoul was blinkered as to what was in his best interests. In circumstances where

the transfer of the property was at a significant undervalue and Mr Raoul could not adequately protect his own interests, what was done by way of advice, which was essentially an explanation of the terms of the Deed, failed to ensure that his interests were appropriately protected.

139 Finally, it is appropriate to observe that Mr Hanna made no submissions directed to the public interest consideration in s 9. It is sufficient therefore to state that I consider that the primary judge was correct, at [130], to have had regard to the public interest in the terms that he did. In that regard, I would also refer to the observations of White J (as his Honour then was) in *Jones v Moss* [2007] NSWSC 969 at [93]. Insofar as his Honour's observations are relevant to this case, I consider that in circumstances where a party, who is mentally and physically frail, gives away their only asset at an undervalue, creating a potential risk to their pension entitlements, the public interest points to such a contract as being one that is unjust.

140 I would reject appeal ground 2(a).

Costs issues on the appeal

Whether the primary judge erred in not awarding costs in favour of Mr Hanna in relation to Mr Raoul's unsuccessful application for the reappointment of Mr Khalifeh and/or the appointment of Mr Raoul's tutor to manage Mr Raoul's affairs: appeal ground 6(a)

Primary judge's reasons

141 The primary judge rejected, at [170], Mr Hanna's contention that his costs liability should be reduced by reason of the fact that, until the penultimate day of the final hearing, Mr Raoul maintained a case that the power of attorney made in favour of Mr Khalifeh should be restored or, alternatively, that Mr Raoul's tutor be appointed as his financial manager. His Honour stated, at [171], that although, throughout the proceedings, "*there was an undercurrent of rivalry between Mr Khalifeh ... and* [*Mr Hanna*], *that rivalry did not change the essential character of the proceedings*", that being proceedings to set aside the Deed and the Transfer.

Submissions

142 Mr Hanna submitted that, in circumstances where Mr Raoul had been unsuccessful in his application for the reappointment of Mr Khalifeh as his attorney and/or the appointment of his tutor as his financial manager, a claim Mr Raoul had maintained until the penultimate day of the hearing and had abandoned only after the primary judge indicated his preference for the appointment of the NSW Trustee, Mr Hanna was prima facie entitled to costs in relation to that issue.

143 In response, Mr Raoul contended that the reappointment of Mr Khalifeh and/or the appointment of his tutor was not an issue for determination, and that the only issues that were "*fought to the finish*" were his capacity and whether the Deed and the Transfer were unconscionable or unjust.

Consideration

144 Mr Raoul's submissions on this must be accepted. Neither the reappointment of Mr Khalifeh nor the appointment of Mr Raoul's tutor was an issue in the proceedings, whether as pleaded or in relation to the relief sought. As the primary judge noted, to the extent that there was an issue, it was essentially of a personal nature.

Whether the primary judge erred in awarding costs against Mr Hanna on an indemnity basis after 11 April 2017: appeal ground 6(b)

Primary judge's reasons

145 The primary judge ordered, at [202], that Mr Hanna pay Mr Raoul's costs assessed on an ordinary basis up to and including 11 April 2017, the day before Mr Hanna rejected Mr Raoul's Calderbank offer of 7 April 2017, and on an indemnity basis thereafter.

146 His Honour selected 11 April 2017 on the basis that a date subsequent to 7 April 2017 was appropriate to accommodate the fact that Mr Hanna was entitled to a reasonable time to consider the offer and that, on 12 April 2017, Mr Hanna sent Mr Raoul a detailed rejection of the offer. In those

circumstances, his Honour held that four days was a reasonable time for Mr Hanna to have reflected on the offer.

147 His Honour rejected Mr Hanna's submission that it was not unreasonable for him to reject Mr Raoul's offer. Rather, his Honour found, at [165], that the offer was more favourable to Mr Hanna than what Mr Hanna ultimately achieved in the proceedings.

Submissions

148 Mr Hanna submitted that, irrespective of his response to the Calderbank offer, the offer was incapable of acceptance as it did not address all the matters in dispute between the parties. Mr Hanna submitted that, as at 7 April 2017, the reappointment of Mr Khalifeh and/or the appointment of Mr Raoul's tutor was a live issue, but one in respect of which the offer did not propose any resolution. Mr Hanna also submitted that no clarification on this issue was provided upon request. This, Mr Hanna submitted, was a "*significant deficiency*" with the offer and that, "[*p*]*ut simply,* [*he*] *was forced to defend these proceedings*". Accordingly, Mr Hanna submitted that the costs order:

> "... unreasonably punish[ed Mr Hanna] for pressing on with a case he felt he had no alternative on – other than to relinquish [Mr Raoul's] financial affairs to Mr Khalifeh."

149 In addition, Mr Hanna submitted that Mr Raoul bore the onus of establishing that his rejection of the offer was unreasonable, which, he contended, Mr Raoul failed to do.

150 Mr Raoul submitted that, in the proceedings below, Mr Hanna had not contended that the offer was incapable of acceptance. Mr Hanna conceded that this was so. Mr Raoul also submitted that Mr Hanna had not sought clarification regarding the reappointment of Mr Khalifeh and/or the appointment of Mr Raoul's tutor. Rather, contrary to Mr Hanna's contention that his letter of 12 April 2017 provided Mr Raoul with an opportunity to clarify the offer, Mr Raoul submitted that that letter "*vehement*[*ly*] *rejected*" the offer. Mr Raoul submitted that Mr Hanna's rejection of the offer:

> "... reflected the misconceptions in relation to the merits of the case under which [he] laboured throughout, a failure to properly consider the evidentiary issues, and a failure to make a realistic assessment of prospects."

151 Further, Mr Raoul submitted that having regard to the parties' correspondence regarding the Calderbank offer, Mr Hanna's contention that he believed the issue of the reappointment of Mr Khalifeh and/or the appointment of Mr Raoul's tutor was alive and prevented settlement was inconsistent with his references to the settlement of "*these proceedings*" and "*full and final settlement of this matter*".

152 Finally, Mr Raoul submitted that Mr Hanna's rejection of the offer was unreasonable and revealed Mr Hanna's failure to give due consideration to the issues in the case. Mr Raoul submitted that his offer was a genuine offer that, had Mr Hanna taken into account the relevant issues, would have found acceptance.

Consideration

153 In my opinion, no error has been disclosed in the primary judge's discretionary determination of costs. In particular, Mr Hanna's reliance on the issue of Mr Khalifeh's reappointment and/or the appointment of Mr Raoul's tutor is misconceived. No relief was sought in the proceedings in respect of this issue. At most, as the primary judge observed, at [171], set out above at [141], despite the "*undercurrent of rivalry*", the nature of the proceedings was an application to set aside the Deed, together with consequential relief in respect of the Transfer.

154 The principles as to when indemnity costs will be ordered following the rejection of a Calderbank offer were summarised by this Court (Beazley P, Gleeson JA and Emmett AJA) in *Treloar Constructions Pty Ltd v McMillan (No 2)* [2017] NSWCA 146. The Court stated, at [9], that the rejection of an offer may cause the court to make an order for indemnity costs if satisfied that the offer was a "*genuine offer of compromise*" and that the rejection of the offer was unreasonable. See also *Miwa Pty Ltd v Siantan Properties Pte Ltd (No 2)* [2011] NSWCA 344, which was most recently cited with approval by this

Court in *Benson v Rational Entertainment Enterprises Ltd (No 2)* [2018] NSWCA 148.

155 In this case, the offer was more advantageous than the result that Mr Hanna achieved. That the offer did not address the question of the reappointment of Mr Khalifeh and/or the appointment of Mr Raoul's tutor did not mean that the offer was not genuine. Nor did it render it not unreasonable for Mr Hanna to have rejected it.

Whether the primary judge failed to take into account the unjust enrichment to Mr Raoul consequent upon the costs order: appeal ground 5

Submissions

156 Mr Hanna submitted that the costs order made by the primary judge did not put the parties back in the position they would have been in prior to entering into the Deed and the Transfer. Rather, Mr Raoul had been "*unjustly enriched to a very significant degree*" in circumstances where, had Mr Hanna not discharged the mortgage, Mr Raoul's property would have been sold and for less than half of its current value. The agreed value of the property as at the date on which the parties entered into the Deed and the Transfer was $675,000, while its agreed value as at November 2016 was $1.25 million. Accordingly, Mr Hanna submitted, Mr Raoul had been unjustly enriched by his success in the proceedings in the amount of at least $575,000.

157 Mr Raoul did not address this issue in either his written or oral submissions.

Consideration

158 In my opinion, this ground of appeal can be disposed of briefly. Whilst an order for costs is discretionary, I do not accept that it is relevant to the determination of costs that, because of the effluxion of time, a party has received the benefit of an increase in the value of property the subject of the dispute.

Orders

159 For the above reasons, I propose that the appeal be dismissed with costs.

160 **MACFARLAN JA**: I agree with the orders proposed by Beazley P and with her Honour's reasons for judgment. I add the following observations.

161 The test for determining whether a party to an *inter vivos* transaction had the capacity to enter into it was authoritatively stated in *Gibbons v Wright* (1954) 91 CLR 423 at 438; [1954] HCA 17. In that case the High Court noted that the question of capacity was to be determined by reference to the particular transaction in question in the proceedings and by asking whether the person concerned had "the capacity to understand the nature of that transaction *when it is explained*" (emphasis added). The Court applied that approach to the case before it by asking whether the two persons alleged to have lacked capacity had been capable of understanding at least the "general purport" of the relevant instrument "*if the matter had been explained to them*" (emphasis added; see also *Guthrie v Spence* (2009) 78 NSWLR 225; [2009] NSWCA 369 at [174]-[175]).

162 In the present case, the primary judge concluded his discussion of the issue of capacity by stating that "[a]bsent a necessary, careful explanation of the business to be transacted on 16 September 2014, [Mr Raoul] lacked the mental capacity to transact it" (at [116]). His Honour thus did not find that Mr Raoul would not have been able to understand the general purport of the Deed and the Transfer if a proper explanation of them had been given to him. Applying *Gibbons v Wright*, a finding that Mr Raoul lacked relevant capacity was therefore not warranted, for this reason as well as those given by Beazley P.

163 **WHITE JA**: I have had the advantage of reading in draft the reasons for judgment of the President. I agree with her Honour's reasons and the orders she proposes.

****

I certify that the preceding 163 paragraphs are a true copy of the reasons for judgment herein of the Court.

Date: 13.9.13

Associate: