

**IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY**

I TE KŌTI MATUA O AOTEAROA TAURANGA MOANA ROHE

CIV-2017-470-114
[2019] NZHC 1226

IN THE ESTATE of Karin Margite Dodssuweit
BETWEEN CORNELIA and STEPHAN DODSSUWEIT Plaintiffs
AND NORMAN KEVIN OLIVIER First Defendant
BETTINA DODSSUWEIT Second Defendant
KM DOD TRUSTEES LIMIT Third Defendant

Hearing: 10 to 14 December 2018

Counsel: SP Bryers for plaintiffs
G Brittain QC for second defendant

Judgment: 31 May 2019

JUDGMENT OF FITZGERALD J

This judgment was delivered by me on 31 May 2019 at 2:30pm,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

31/5/19
Date.....

STEPHEN HEWLETT
Deputy Registrar
High Court of New Zealand

Solicitors: Holland Beckett, Tauranga (D Fraundorder)
Rejthar Stuart Law, Tauranga (P Stuart)
Priscilla Brown, Auckland

To: V Bruton QC, Auckland

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Introduction

[1] Karin Margite Dodssuweit (Mrs Dodssuweit) died of lung cancer on 2 June 2017, aged 70. Approximately two weeks before she died, she entered into various inter vivos transactions¹ and executed a new will. The overall effect of the gifting transactions and will was to benefit her daughter, the second defendant (Bettina), to a significantly greater extent than her two siblings.²

[2] Bettina's siblings, Stephan and Cornelia, are the first and second plaintiffs. They bring these proceedings challenging the gifting transactions and their mother's will. There are three primary causes of action: lack of testamentary capacity in relation to the will; invalidity of the gifting transactions due to lack of capacity; and an application to set aside the gifting transactions as unconscionable transactions.³ As was clear by the end of the hearing, however, the central issue for determination is whether Mrs Dodssuweit had capacity to enter into the gifting transactions and/or to make her last will.

[3] The issue of capacity arises not only because Mrs Dodssuweit entered into the gifting transactions and made her last will shortly before her death, but also because about a week prior to the transactions and will, she had been admitted to the Mental Health Unit at Tauranga Hospital on the basis there were reasonable grounds for believing she was mentally disordered.

[4] After spending 10 days at Tauranga Hospital, it was clear that Mrs Dodssuweit's primary need was appropriate palliative care. Upon funded palliative care being located and agreed, Mrs Dodssuweit was discharged into that care where she died a few weeks later.

¹ I will refer to these transactions as the "gifting transactions".

² To avoid confusion, and to reflect how they were referred to at the hearing, I will refer to the three siblings by their first names. I mean no disrespect in doing so.

³ There was a further cause of action in undue influence, but at the conclusion of the evidence, Mr Bryers, counsel for the plaintiffs, confirmed this was no longer pursued. The first and third defendants abide by the decision of the Court on the pleaded causes of action against them and were excused from attendance at the hearing.

[5] It is important to record at the outset that Mrs Dodssuweit undoubtedly had a very particular and unusual personality. She is variously described as being eccentric, dramatic, melodramatic, changeable, stubborn, direct and forthright, and as having obsessional traits (for example, in relation to cleanliness). Mrs Dodssuweit was also a firm believer in alternative medicine and homeopathy and as a result, strongly disliked hospitals and conventional medical treatment (which she refused in relation to her cancer). It is important these traits do not illegitimately influence the assessment of capacity.

[6] Before turning to the factual background to these proceedings, a preliminary point arises out of the pleadings.

[7] Mr Brittain QC, senior counsel for Bettina, noted in opening that Stephan and Cornelia strictly do not have standing to bring the application to set aside the gifting transactions, given standing to bring such a claim vests in Mrs Dodssuweit's personal representative (who is yet to be appointed).⁴ Nevertheless, Mr Brittain confirmed that Bettina consents to the Court determining the unconscionable transactions claim, given all relevant factual and documentary evidence is before the Court. Mr Brittain noted that if the claim is successful, and if necessary, an order could be made adding Mrs Dodssuweit's personal representative as a plaintiff once the Court has determined which will is proved. Mr Bryers, counsel for Stephan and Cornelia, took no issue with that approach, which I agree is a sensible and pragmatic way forward.

Factual background

Introduction

[8] A significant amount of (dense) oral and documentary evidence was adduced at the hearing. Much of it was not, however, directly relevant to the central issue of Mrs Dodssuweit's capacity. A lot of the evidence stems from the dysfunctional relationship between Stephan and Cornelia on the one hand, and Bettina on the other, and the difficult relationship each of them had at times with their mother.

⁴ This will turn on which of Mrs Dodssuweit's wills is granted probate.

[9] Broader family dynamics and interactions are, however, relevant to the issues I must determine, as they provide the context in which Mrs Dodssuweit's capacity is to be assessed. They also inform the rationality of the choices she made shortly before her death. Accordingly, while I have sought to confine the factual background section of this judgment to matters relevant to the issues to be determined, I have found it necessary to traverse the broader family dynamic and the events of March to the end of May 2017 in some detail.

[10] It is also appropriate to make some overall observations on the evidence.

[11] First, a considerable part of the documentary evidence comprises Mrs Dodssuweit's medical record, including that held by her General Practitioner (GP), that arising from her admission to Tauranga Hospital over the period 9 to 19 May 2017, and her subsequent admission to Acacia Park Rest Home for palliative care. Only two medical professionals involved with Mrs Dodssuweit's care at the time were called to give evidence. Nevertheless, all parties relied extensively on the medical records, including for the truth of their contents.

[12] There was ultimately no challenge to the admissibility of the medical records.⁵ I also readily accept that calling, for example, every nurse who attended on Mrs Dodssuweit during her stay at Tauranga Hospital would have greatly extended the hearing's duration. Moreover, no party suggested the underlying record was incorrect or unreliable. I record, however, that when assessing the weight to be given to individual items of evidence, I have taken into account that the authors of much of the medical records were not called to give evidence.

[13] Second, I have not found Stephan, Bettina and to a lesser extent, Cornelia's, evidence of significant assistance in determining the key issue in this case, namely Mrs Dodssuweit's capacity. This is not intended as a direct criticism of them. However, their evidence, in particular Stephan's, often focussed on details and disputes not relevant to the questions I must determine. All three, and again Stephan in particular, also had difficulty at times providing a direct or clear answer to questions put to them in cross-examination. I fully accept that the matters between them and

⁵ Some objections had been noted in the common bundle index but these were not pursued.

these proceedings are difficult and give rise to significant emotions, which no doubt contributed to these issues.

[14] Overall, I have found the most reliable and helpful evidence to be the contemporaneous documentary record and that of the independent medical professionals who gave evidence at the hearing. In relation to the former, there is fortunately a significant body of contemporaneous materials, comprising not only the copious medical notes, but also many text messages between the parties, photographs, and even audio recordings which have been transcribed.

[15] With those observations in mind, I turn now to the factual background.

Early period – to 2012

[16] Mrs Dodssuweit and her then husband Erhard emigrated from Germany to New Zealand in 1981/1982. They brought with them their four children Cornelia, Bettina, Patricia and Stephan.⁶ Cornelia described her mother as reasonably successful financially, having her own real estate agency in Germany. Once in New Zealand, she and her husband ran a business exporting kiwifruit vines to Germany, though retired a few years later.

[17] In 1984, Mrs Dodssuweit purchased the family home in Te Hono Street, Maungatapu, Tauranga (the Te Hono Property). It was registered in her name. At some point a second property was purchased in Queenstown, registered in her and her then husband's joint names.

[18] Not long after arriving in New Zealand, Cornelia went to live and work in Auckland where she continues to reside. Stephan lived at home for a time, then attended boarding school. He left New Zealand in 1992/1993 to pursue a career as a pilot. He currently resides in Poland. Bettina lived at home with her mother for most of the period 1984 to 2016, other than short times away, including flatting with Cornelia and Patricia in Auckland for two years over the period 1986 to 1988.

⁶ Erhard Dodssuweit was not, however, Cornelia or Bettina's biological father. Patricia died in 1996.

[19] Mrs Dodssuweit often dealt with “legal” matters in an informal way. For example, on 18 July 1993, she handwrote a document entitled “My Will”. In this document she:

- (a) cancelled her earlier wills;
- (b) divided her residue in three equal shares between her children;⁷
- (c) directed that her half of the Queenstown property was to go her husband;
- (d) provided that “only my shares of \$50,000 should be paid out to my son Stephan. He must use this money only towards his career”;
- (e) noted that “[the Te Hono Property] should be sold if all parties agree and go to equal shares towards Bettina, Cornelia, Stephan”;
- (f) gave a Mercedes 230 to Cornelia and a Mercedes 240 to Bettina (and if Cornelia was not living at the time of Mr Dodssuweit’s death, Bettina was to get both vehicles); and
- (g) expressly excluded Patricia from these arrangements (as she was to inherit property from her paternal grandmother).

[20] Even from this early time, therefore, Mrs Dodssuweit demonstrated an intention to benefit her children unequally, based on her view of their needs.

[21] Mrs Dodssuweit wrote another handwritten “will” on 5 September 1995. By that time, she and her husband had been living apart since July 1994. In this document, she:

- (a) stated “my wish is that my three children take my assets in three equal shares”;

⁷ Patricia was expressly excluded. See [19](g).

- (b) noted that her half-share in the Queenstown property should be paid out to her three children;
- (c) envisaged the properties would be sold, noting that the money from the houses “go to new property or section each on my children’s name only”;
- (d) directed that the “bank money” was to go to Stephan, with a small amount going to his career and the rest towards his section or property;
- (e) directed that jewellery was to be shared, though Stephan was to get her father’s watch and bluestone rings; and
- (f) again, expressly excluded Patricia.

[22] Mr and Mr Dodssuweit divorced on 6 May 1997. A few days later, Mrs Dodssuweit made a further handwritten “will” which broadly replicated that of 5 September 1995.

[23] In March 2004, Mrs Dodssuweit purchased a section in Welcome Bay, Tauranga. In a handwritten “note for myself” dated 30 April 2005, she stated the following:

I purchased the section on the 24th March 2004 for the purpose of building a new home for my daughter Bettina to live in. She has been living with me for a long period now. I feel she should live in her own environment now.

However now she has decided that she doesn’t want a home on a small section as she loves the countryside with more space. She would love to have instead some land and a small cottage, so she can keep her horses on the land and can attend to them more often.

[24] Mrs Dodssuweit concluded that if Bettina did not change her mind “I may as well sell it and look for something that she thinks will be more suitable for her and her horses”. There is no evidence of any similar arrangements being made to acquire property for Stephan or Cornelia. By that time, Cornelia had married (in 2002). Stephan had also married, though divorced in 2003.

[25] It appears that at least at some point in the intervening years, Mrs Dodssuweit had loaned Stephan money towards a deposit for his pilot training. On 4 February 2012, she emailed Stephan reminding him that he had promised to pay back \$7,000 but had not yet done so. She said the following:⁸

Just want to remind you on your promise to give me back the 4th and in the next month the 3 which gave to you for a deposit towards your last training.

It also was borrowed.

I don't mind that you are living well but you should keep promises you made to your sponsor other wise I loose my joy on everything

I don't want to become her fool.

It can not be that you buy an apartment when you still have debts to me that's what I am talking about. I will not support that as well that is already passed my limit of my benevolence.

You should break the habit to exploit me

I will buy the land for Tina. I will take out a credit for a small house and you can when your half allows it send your deposit to my account.

I will probably wait a long time for that and hardly live to see

[26] The only other point of relevance during this period is that Mrs Dodssuweit had an ongoing dispute with her neighbour (a painter) about him storing paint and other chemicals near to her house. She was concerned about the potential poisoning effect they could have. Photographs taken by Mrs Dodssuweit of the chemical and paint containers in her neighbour's backyard were produced in evidence.

2016 to end of March 2017

[27] In October 2016, Mrs Dodssuweit purchased a section in Waihi for Bettina to use (the Waihi Property).⁹ Bettina later borrowed a caravan, moved it onto the section and went to live there. Mrs Dodssuweit wanted to arrange and pay for a small cottage to be built on the property, and preliminary plans were prepared in early February 2017.

⁸ Typographical and grammatical errors are in the original.

⁹ The Welcome Bay property had been sold in the interim.

[28] By very early March 2017, however, Mrs Dodssuweit had become ill. She was having trouble breathing and was admitted briefly to Tauranga Hospital. This was very distressing for her, given her deep dislike of hospitals and conventional medicine. Sadly, she was diagnosed with terminal lung cancer. Without aggressive treatment, the diagnosis was of months rather than years to live. Mrs Dodssuweit refused chemotherapy or other conventional treatment.

[29] Stephan was then between jobs in Europe and his mother asked if he could come to New Zealand for a time to look after her. He agreed. He was due to arrive in late March 2017. Stephan said that, as he was between jobs, he was concerned about finances in coming to New Zealand, but his mother said she would look after his flights and expenses while in New Zealand.

[30] At this time, Bettina was evidently concerned at what she perceived to be Stephan's status as the "favourite", and feared he would come to New Zealand and somehow secure all his mother's assets. She expressed her concern to Cornelia. This resulted in Cornelia preparing a written document dated 1 March 2017 for Stephan to sign. It read:

I Stephan Dodssuweit, agree that in the event of my mother's death, anything that I should inherit from my mother's estate from her will, I will split equally with my sisters Cornelia Dodssuweit and Bettina Dodssuweit. That is, I will keep one-third, and Cornelia and Bettina will get one-third each of my share.

[31] The document was emailed by Cornelia to Stephan (under the subject heading "insurance") and Stephan signed it. There is no evidence Bettina was provided with a copy.

[32] Despite her diagnosis, Mrs Dodssuweit was keen to press on with the construction of the cottage for Bettina on the Waihi Property. On 4 March 2017, she emailed her builder stating:

Craig please note I have been in hospital and my future is not good. Thursday I have again hospital time lung tumour. Timing may be very short. Please do as we had

Dear Craig I will rely on your work, please don't let me down. I will need care in future and my time is very limited. I am sad but not fearful.

[33] A few days later, Mrs Dodssuweit emailed a contractor about the cottage at Waihi, again requesting the final foundation plans. She stated: “please understand my girl [a reference to Bettina] is homeless and I very unwell”.

[34] The Waipuna Hospice was then assisting with Mrs Dodssuweit’s in-home care. On 22 March 2017, a Hospice registered nurse wrote to Mrs Dodssuweit’s GP (Dr Barklie), recounting a home visit that day. The nurse recorded that she had found Mrs Dodssuweit “intense and highly emotional”, going on to note that:

I had a sense that she may normally be like this as I had phoned her several times and each time she was very stressed. I was wondering whether she had a history of mental health issues and if so whether you could share this information with us.

[35] The letter also recorded that Mrs Dodssuweit had said she found her admission to Tauranga Hospital in March 2017 very distressing.

[36] Stephan arrived in New Zealand on 24 March 2017. The first few weeks were relatively amicable and settled, and several photographs were produced in evidence showing Stephan and his mother enjoying lunches by the Tauranga Harbour and looking happy together.

[37] Stephan explained that not long after he arrived, his mother said she wanted to make a new will. She suggested they visit a lawyer at Harris Tate who had assisted her with an earlier property transaction. Stephan and Mrs Dodssuweit attended the offices of Harris Tate on 28 March 2017. It was an unscheduled visit. The lawyer Mrs Dodssuweit knew had retired so they saw a different lawyer. Instructions were taken and a draft will prepared (Harris Tate Will).¹⁰ Stephan accepted in cross-examination that at some time prior to visiting Harris Tate and at his mother’s request, he had promised that the Te Hono Property would not be sold, but its income would be used to look after the family, and that his mother had expressed her wish that Bettina was to be taken care of.

[38] The draft Harris Tate Will provided as follows:

¹⁰ No one from Harris Tate was called to give evidence. The will was never signed by Mrs Dodssuweit.

- (a) the directors of Harris Tate Ltd were to be appointed the executors and trustees of Mrs Dodssuweit's estate;
- (b) the Waihi Property was to be given to Bettina and Cornelia, and divided between them 55/45 per cent respectively;
- (c) Mrs Dodssuweit expressed her wish that Bettina may personally live in "the house" (presumably at Waihi once constructed) as long she wished, provided she paid rates and outgoings and kept it in good repair. If Bettina no longer wished to live in the house, Bettina and Cornelia could sell the house and divide the sales proceeds in accordance with their ownership proportions;
- (d) the Te Hono Property was to be given to Stephan;
- (e) a Mercedes ML500 was to go to Bettina, a Mercedes 230E to Stephan and certain jewellery to Stephan and Cornelia;
- (f) that Mrs Dodssuweit had not provided for her children equally, but had made provision for them based on their need and on the support they had given her over the years; and
- (g) apart from the specific gifts discussed above, the residue of her estate was to be divided equally between Bettina, Stephan and Cornelia.

[39] Mrs Dodssuweit was evidently not happy with the Harris Tate Will. Stephan stated that she did not like that lawyers had been appointed executors and trustees of her estate. The next day, she and Stephan went to see Mr Kevin Olivier at Tauranga Law. Mr Olivier gave evidence at the hearing. He explained that he had first met Mrs Dodssuweit in 2014 when acting for her on the sale of the Welcome Bay property, and then again on the purchase of the Waihi Property in 2016. He said that in the intervening period, Mrs Dodssuweit and his wife had struck up a friendship and kept in contact.

[40] Mr Olivier took instructions, prepared a new will and Mrs Dodssuweit signed it in the one visit. In this will (the 29 March Will):

- (a) Stephan was appointed trustee and executor of Mrs Dodssuweit's estate;
- (b) Bettina was given the right to reside at the Waihi Property until her death;
- (c) the Te Hono Property was given to Stephan, though Mrs Dodssuweit expressed her wish that:

...he will use the income or proceeds of the property to look after my daughter Bettina Dodssuweit who is a special needs person. I specifically request that Stephan Dodssuweit will in his will stipulate that the proceeds of [the Te Hono Property] will in the event of the death of Stephan Dodssuweit continue to be used for the benefit of my daughter Bettina Dodssuweit until her death.

- (d) articles of personal use, including motor cars, were to be divided equally between Bettina and Stephan;
- (e) the remainder of Mrs Dodssuweit's estate was to be held by her trustees on a trust to be known as the Karin Dodssuweit Family Trust for the benefit of Bettina; and
- (f) Mrs Dodssuweit stated that she left nothing to Cornelia "as she is independently wealthy and has no need of any money from me".

[41] During the hearing, the gifting of the Te Hono Property to Stephan, but with the proviso that the income or proceeds were to be used to look after Bettina, was referred to as the Te Hono Property "with strings". I will also refer to it this way in this judgment. Mr Olivier said he discussed with Mrs Dodssuweit whether the Te Hono Property ought to be put into a trust, but that Mrs Dodssuweit was very firm that she wanted Stephan to look after it for the benefit of Bettina.

[42] Stephan was present during the meeting with Mr Olivier and gave an account of it. He said there had been an argument during the meeting, and that Mr Olivier had banged the table angrily with his fist and shouted “nothing” for Cornelia. I find this highly unusual and ultimately not credible. It was not referred to in Stephan’s brief of evidence, nor was the point put to Mr Olivier in cross-examination in any event.

[43] Further, while Stephan said in cross-examination that a *few days later*, his mother told him that she felt she had been bullied into making the 29 March Will and she didn’t really like Mr Olivier or his firm, in his brief of evidence, Stephan said that it was in *early May 2017* his mother said she felt she had been bullied into making the will. Stephan also said in his brief of evidence that his mother was generally happy with the 29 March Will, though was disappointed Mr Olivier had put himself as trustee (which was of course incorrect, as Stephan was the named trustee).

Difficulties start to arise – April to early May 2017

[44] Over the course of April 2017, it became evident that Stephan was finding it increasingly difficult to care for his mother on a 24/7 basis. That is quite understandable, given Mrs Dodssuweit was suffering from terminal cancer, but declining conventional medicine to treat her symptoms and pain.¹¹ This, combined with her naturally histrionic personality, would no doubt have made it difficult for anyone caring for her on a day-to-day basis.

[45] Stephan also reported difficulties sleeping, as his mother was not sleeping overnight and often called out and waking him. On 11 April 2017, Stephan texted Dr Barklie stating that he needed time out from caring for his mother, describing her as insane and blaming her for Patricia’s death. There were also difficulties arising between Stephan and Bettina (who had never had a close relationship), with Bettina reporting to Cornelia on 12 April 2017 that Stephan had threatened to “smash her face in”. Stephan later apologised to Bettina for whatever the outburst had involved, noting he had had very little sleep over the intervening weeks. On 17 April 2017, Stephan again texted Dr Barklie, stating that he was at the end of his capabilities and on 20 April 2017, had a private appointment to talk about how he was coping at home.

¹¹ Mrs Dodssuweit was receiving vitamin C injections.

The position appears to have been exacerbated by the arrival in New Zealand on 22 April 2017 of Stephan's girlfriend, with whom Mrs Dodssuweit did not wish to "share" Stephan. Stephan stated that shortly after his girlfriend arrived, they went to live at a friend's apartment, though he still visited his mother regularly at her home.

[46] The difficulties arising between Stephan and Mrs Dodssuweit were also evident from her perspective. On 24 April 2017, she hand-wrote a document headed "To Whom it May Concern" and headed "My last wish". It recorded that Bettina "is entitled to inherit the investment and funds of my bank account and to use the Visa card held at the ANZ Bank in Tauranga for the purpose of building her house on the Waihi Property". That night, Mrs Dodssuweit also left a voicemail message for Mr and Mrs Olivier in the following terms:¹²

Hi Louise and Kevin. I just want to say I have made out a letter for Tina to have the money on my investment bank with the ANZ Bank and to have for a house to build to make sure [inaudible] totally make sure. Stephan is not really very good he's always going on a weekend to Auckland. I hope you haven't done anything wrong. I think it is better when Kevin would be taking care of whole of Te Hono Street.

[47] Mr Brittain says that this was the starting point of Mrs Dodssuweit having doubts as to whether Stephan was the right person to hold the Te Hono Property for the purpose of looking after Bettina. I consider that a fair characterisation.

[48] Matters appeared to get back on track (briefly), however, and on 28 April 2017, Stephan texted Dr Barklie stating that he had had a great day with Mrs Dodssuweit and that he had taken her to a new residential care home and she had agreed to try it for three nights per week. Stephan was planning his return to Poland at that time, stating to Dr Barklie that "when we leave she won't be left in a vacuum void and she can overcome her fears whilst we're still here".

[49] The following day, Mrs Dodssuweit wrote a handwritten "Lasting power of attorney" in favour of Stephan. She did not receive any legal input or advice. The document recorded that Mrs Dodssuweit "herewith give the above power of attorney" to Stephan and "all properties and financial dealings shall be transferred as with

¹² A transcript of the recording was produced in evidence.

immediate effect". The document also noted that Stephan "shall be the executor according to my will as it currently exist at the Tauranga Law Office ...". The document was signed by Mrs Dodssuweit and Stephan and witnessed by Stephan's girlfriend. The reference to the 29 March Will does not evidence any substantive concern on Mrs Dodssuweit's part about its contents.

[50] As noted earlier, Stephan said that in early May, his mother expressed concern that she had been bullied into making the 29 March Will. I have some doubt about that evidence, as the contemporaneous record to that point does not evidence any real concern on Mrs Dodssuweit's part as to the contents of the will. Nevertheless, on 1 May 2017, Stephan uplifted Mrs Dodssuweit's will from Tauranga Law.¹³ He and his mother then met with Graeme Elvin of the law firm Mackenzie Elvin. This was again a "walk in" appointment, and Mr Elvin had had no prior dealings with Mrs Dodssuweit or Stephan. Mr Elvin gave evidence at the hearing. I found him a credible and reliable witness.

[51] Mr Elvin said Mrs Dodssuweit stated she was not happy with the 29 March Will and wanted to change it, being very clear and direct in her views. He could not recall, however, any discussion about why she was unhappy with the will. He had found Mrs Dodssuweit eccentric and a little "unusual," and quite "clingy" to Stephan during the meeting. He noted that he gathered from speaking with both Stephan and his mother, there had been some form of argument between Mrs Dodssuweit and/or Stephan and Mr Olivier about the 29 March Will, but did not go into detail about that. Mr Elvin said that Mrs Dodssuweit expressed concern about Bettina and her ability to look after herself. Mr Elvin said that Mrs Dodssuweit was quite adamant that the Te Hono Property should go to Stephan, though accepted he did not expressly ask or discuss with her why she wanted to make the change from "strings" to "no strings". Mr Elvin also raised with Mrs Dodssuweit that it seemed unfair not to leave anything to Cornelia, and she agreed that it would be fair for Cornelia to receive some part of the estate in due course.

¹³ There was some dispute as to whether Mrs Dodssuweit was in the car outside at the time Stephan collected the will; Mr Olivier said he could see the car from his office and there was no-one else there, while Stephan said his mother was present. Nothing, however, turns on this difference.

[52] Mr Elvin noted several technical/drafting issues with the 29 March Will which needed “tidying up”, though they are not relevant for current purposes. Having taken Mrs Dodssuweit’s instructions, he then prepared a new will, as well as documents to form a trust to hold the Waihi Property. Mr Elvin confirmed that Stephan was present during his discussions with Mrs Dodssuweit, but she did not appear influenced or afraid of him.¹⁴ Mr Elvin said that at the time, he was “in no doubt” about Mrs Dodssuweit’s capacity and saw no need to have it independently assessed.

[53] Mrs Dodssuweit executed her new will on 2 May 2017 (the 2 May Will). It provided as follows:

- (a) Stephan was appointed executor and trustee;
- (b) the Te Hono Property was to be gifted to Stephan with “no strings”;
- (c) the Waihi Property was to be gifted to the Dodssuweit Family Trust, created by a trust deed of the same day. Stephan and Bettina were the trustees. The principal purpose of the trust was Bettina’s housing needs and the trustees were directed to give “primary consideration to the needs of Bettina Dodssuweit”. All three children were to be final beneficiaries;
- (d) the Mercedes vehicles were to be given to Stephan and Bettina as per the 29 March Will; and
- (e) any remaining chattels were to be shared between the three children equally.¹⁵

[54] The 2 May Will also stated that Mrs Dodssuweit had provided a disproportionate share to Stephan to reflect “the fact he has taken care of me”. It further recorded that:

¹⁴ Mr Brittain put to Stephan that he pressured his mother in to making the 2 May Will, which he denied.

¹⁵ There was no evidence of any chattels of particular value.

The provisions for my daughter Bettina is provided for within the terms of the Dodssuweit Family Trust because I have some concerns about her ability to properly look after herself.

[55] Cornelia was described as “independently wealthy and is not in need of the same level of support from me”.

[56] On the same day, Mrs Dodssuweit granted an enduring power of attorney (EPOA) to Stephan.

[57] The following day, 3 May 2017, Stephan took Mrs Dodssuweit to the Somerset Old Age Home in Katikati for respite care.¹⁶ It was intended she would be there for three nights. She was not happy there, however, and she discharged herself in the middle of the first night, contacting Bettina and asking her to come and collect her. In a text to Dr Barklie reporting on the self-discharge, Stephan referred to Bettina as the “weakest link” in the chain.

[58] Over the ensuing days, Stephan also exchanged emails with a good friend of Mrs Dodssuweit’s in Germany who had agreed with Mrs Dodssuweit to come out to New Zealand to be with her. The friend was positive in her emails with Stephan about the visit and was emailing him about flights. She could not come until later in May however, given commitments in Germany.

Mrs Dodssuweit is admitted to Tauranga Hospital

[59] It is not in dispute that on Sunday 7 May 2017, Mrs Dodssuweit went for a drive in one of her vehicles to the estuary below her house. There was significant controversy at the hearing, however, as to what her intentions were in doing so. Stephan was adamant she told him the next morning that she had wanted to commit suicide, but the tides were too low (and that she would therefore try again the following evening when the tides were higher). The contemporaneous documents record Mrs Dodssuweit’s firm denial of this, however, and that she had driven her car to see if she could still drive, and wished to immerse her feet in the cold water, later discussing with medical staff her belief in a German “hot and cold therapy”.

¹⁶ Consistent with Stephan’s earlier text to Dr Barklie; see [48] above.

[60] Whether Mrs Dodssuweit was suicidal at that time is not directly relevant to the question of her capacity to enter into the gifting transactions or make her new will on 19 May 2017. But it does provide an important backdrop to her compulsory admission to Tauranga Hospital under the Mental Health (Compulsory Assessment and Treatment) Act 1992 (Act). In this context, Mr Brittain accepted that given Mrs Dodssuweit's compulsory admission and assessment, he could not rely on the presumption of capacity and thus the burden of proving at least testamentary capacity rests on Bettina.

[61] When Stephan arrived at Mrs Dodssuweit's home on the morning of 8 May 2017, he said he noticed that one of the cars had been driven overnight and his mother's wet shoes were beside it. He took a photograph of them at the time. In his evidence in chief, he said his mother told him at that point that she had driven to the water as she wanted to commit suicide and he was so concerned, he insisted she see a doctor and over the course of the morning, he managed to get her to agree to do so.

[62] There is a text from Stephan to Dr Barklie at some point that morning.¹⁷ The message said that his mother wanted "admittance" to the "Southern Cross Hospital" that day, that she refused to go the public emergency department in Tauranga and asked Dr Barklie to help. Stephan did not receive a response from Dr Barklie. Consistent with this text, however, the patient notes from The Doctors (Mrs Dodssuweit's GP clinic) record a phone call from Stephan that morning, stating that he thought his mother needed drainage of fluid from her lungs but she did not want to be admitted to hospital. The notes record that he would bring her into a walk-in clinic for urgent review. The notes make no reference to suicide. Stephan's brief of evidence makes no reference to his text or telephone call, or the need to drain fluid from Mrs Dodssuweit's lungs. Stephan also texted Bettina that morning stating that his mother had a doctor's appointment and that she had driven in the night, but made no mention of suicide.

[63] Stephan and his mother duly attended a "walk-in" clinic at The Doctors. He said he told the triage nurse that Mrs Dodssuweit had tried to commit suicide and that

¹⁷ The time stamps are not reliable, being in different time zones.

in the presence of the triage nurse, his mother admitted this. Again, however, the medical notes written by the nurse simply record that Mrs Dodssuweit was of increasing shortness of breath and “feels may have fluid on the lungs”. There is no mention of suicide.

[64] Stephan was also insistent when giving his evidence that he had a recording on his mobile telephone of a discussion between him and his mother while in the doctor’s waiting room, which made it clear his mother had wanted to drive to the water to commit suicide and was asking for his help in that regard. The parties agreed that the recording ought to be located, transcribed and admitted into evidence. Once that had occurred, the recording did not, clearly at least, say what Stephan said it did. It simply referenced Mrs Dodssuweit asking whether she was allowed to “jump in [the] water”,¹⁸ and Stephan saying that of course she could. This could also be consistent with Mrs Dodssuweit’s medical beliefs and in particular the “hot and cold” therapy.

[65] Certainly by the time Mrs Dodssuweit and his mother saw a doctor (Dr Hudson) at the clinic, the topic of suicide had come up, as the doctor’s notes record that Stephan was concerned his mother had attempted suicide the prior evening. Texts sent by Stephan to Dr Barklie some two hours after his first text also asked if his mother’s mental status could be assessed and referred to a suicide attempt. I nevertheless consider it unusual that if the primary (and indeed, based on Stephan’s brief of evidence, the only) reason Stephan took his mother to the doctors that morning was because of an attempted suicide, the notes of neither his initial telephone call nor the discussion with the triage nurse refer to suicide (particularly if, as Stephan said, his mother admitted that to the triage nurse).

[66] There was also an audio recording of at least part of the discussion between Dr Hudson and Stephan. It referenced the fact that Mrs Dodssuweit had discharged herself out of the residential care at Katikati on 2 May 2017, in which context Stephan stated the following:

I could have stopped her because I have power of attorney but whilst she is not declared mentally unfit she can revoke that power of attorney. Then you

¹⁸ The parties were not agreed on whether the word “the” should be included (Bettina’s position being it should not).

know who is going to get it, this friend of hers in Germany who has already done this twice to other people. In other words clean out the accounts, take the jewellery etc etc. I want to stop my mum from seeing her friend if mum lives that long. But I don't want to do it you understand why my case [noise] and she's called the Police around to her house because [noise] I can't.

[67] Dr Hudson replied: "I mean I don't think there is any sort of acute psychiatric illness we can manage here. I mean this is a personality that's been there for a while".

[68] Given the suggested suicide attempt, the mental health crisis team was called to the clinic to conduct an initial assessment of Mrs Dodssuweit. Claire McGowan-Blair, a registered mental health nurse, attended and she also gave evidence at the hearing.

[69] Ms McGowan-Blair said that Mrs Dodssuweit appeared surprised to be meeting with her, was in quite an emotional state, was hungry and just wanted to go home. She said this made her engagement with Mrs Dodssuweit difficult, and this was exacerbated by Stephan's presence, given that throughout the assessment, he made non-verbal gestures when he did not agree with his mother's answers to the questions put to her. Mrs Dodssuweit denied any suggestion of attempted suicide and reported the reason she had come to the doctors that morning was to get her lungs checked for fluid. In relation to the events the prior evening, Mrs Dodssuweit said he had just wanted to drive her car (to see if she still could) and dip her toes in the water. Ms McGowan-Blair's notes also record that Stephan said he felt his mother was making a clear plan to end her life, that he believed she knew the tidal waters and would return that night (i.e. overnight on 8 May) to try again, and so he did not feel safe to leave her at home.

[70] Ms McGowan-Blair had Mrs Dodssuweit carry out a Montreal Cognitive Assessment (MOCA), a question and answer type tool used as part of a cognition assessment. Mrs Dodssuweit scored fairly low, at 13 out of 30. In her evidence, however, Ms McGowan-Blair said that in hindsight, it was probably not the right time to carry out the test, given Mrs Dodssuweit's high emotional state and her lack of engagement, including her view that the various questions were stupid. She also considered it might have been more helpful for Mrs Dodssuweit to have carried out

the German version of the test. Ms McGowan-Blair accepted in cross-examination, however, that she did not communicate any concerns about the MOCA at the time.

[71] Ms McGowan-Blair concluded there was insufficient evidence to detain Mrs Dodssuweit under the Act. She said, however, that Stephan was insistent Mrs Dodssuweit was formally assessed and kept expressing his belief that his mother was intending to commit suicide. Given the distress Mrs Dodssuweit was exhibiting at that point, a decision was made not to carry out any further assessment at the clinic at that time, and arrangements were made for Ms McGowan-Blair and a doctor (Dr Lewis) to visit Mrs Dodssuweit at her home later that day.

[72] Mrs Dodssuweit was seen at her home that afternoon, initially with Stephan, and then in his absence by Dr Lewis. Dr Lewis's notes record the following:

Very difficult and muddled [history] as Karin and her son tended to bicker in German and were vague [gap]. I spoke alone with Karin who was adamant she needed no doctor and she had "all my marbles".

Reports avid user of homeopathy and went in the car to dip her feet in the cold water. "Hot and cold" therapy. She says this was therapy done in Germany and gave me the German name. She feels the whole thing was a misunderstanding.

...

Very difficult to assess the situation due to differing and changing story from son versus Karin. They have an unusual dynamic but he does not seem to be coping with her mood swings. No clear evidence of suicidality – Karin has explanations for events that are consistent with her long-standing health beliefs. No evidence long-standing depressive symptoms.

Karin does show some obsessional behaviours and this picture today and her MOCA would suggest this is more of a dementia picture than suicidal.

I think there is not enough evidence to say Karin needs detention under the MHA but I would like a consultant to see her tomorrow given how difficult it is to gauge her mental state.

I think she will be safe overnight "just wants to sleep" and it would be very distressing to bring her to hospital this evening.

[73] The doctor's notes also record Mrs Dodssuweit was surrounded by more than 50 homeopathic medicine bottles, and that Dr Lewis was asked to wear slippers when entering the house and asked to sit on a towel on the seat. The notes also reference "some paranoia about her neighbours poisoning her vegetables."

[74] That evening, and despite his earlier insistence that his mother had attempted or threatened to commit suicide and she would try again that night when the tides were high, Stephan returned to his friend's apartment. He said in cross-examination that he felt comfortable in doing so as his mother was by that stage calm.

[75] The following day, 9 May 2017, Dr Miller and Dr Evans attended Mrs Dodssuweit's home to carry out a further assessment. Neither were called to give evidence.

[76] Dr Miller's handwritten notes record Stephan recounted the difficulties over the prior weeks in caring for his mother, and said that she had tried to commit suicide and asked for his help in doing so. The notes record Mrs Dodssuweit's denial of this, and that she felt her "son is trying to make out she is mad to get her money". The report describes several dramatic outbursts by Mrs Dodssuweit, though after a time, she calmed down. The assessment recorded "70 year-old lady with long-standing personality issues".

[77] Dr Evans completed an application for assessment under s 8A of the Act. This was supported by a medical certificate signed by Dr Miller, which recorded:

[Recently] talking about ending her life and found with wet shoes and trousers after being in ocean at night.

Possible cognitive impairment past 2 weeks possibly due to low sodium which she will not have investigated and which may be impacting on cognition.

[78] Mrs Dodssuweit was therefore served with a notice to attend an assessment with Dr Andrew Wilkinson at the Mental Health Support for Older People (MHSOP) in-patient clinic at Tauranga Hospital later that afternoon. Unsurprisingly, she refused to attend. She was escorted to hospital by Police at 4 pm.

[79] Dr Wilkinson was not called to give evidence, though his notes and reports were included in the common bundle. Dr Wilkinson certified there were reasonable grounds for believing Mrs Dodssuweit was mentally disordered and it was desirable

that she be required to undergo further assessment and treatment.¹⁹ In his accompanying clinical report, Dr Wilkinson noted that Mrs Dodssuweit was refusing treatment for her cancer and that “she has become increasingly confused and has expressed suicidal ideation”. His report also noted that she was lacking energy, unable to care for herself and that she has talked of suicide. The form noted that Dr Wilkinson had consulted with Stephan who agrees with “MHA”. Dr Wilkinson issued a notice requiring Mrs Dodssuweit to undergo a five-day further period of assessment and in-patient treatment at Tauranga Hospital. The assessment and treatment was to be undertaken by a Dr Reidl (who did give evidence at the hearing).

[80] Mrs Dodssuweit’s compulsory admission to hospital on 9 May was clearly an extremely traumatic episode for her, given her deep and long-standing beliefs in alternative medical therapies and dislike of hospitals. Her admission notes record her as highly anxious and fixated on medical issues and family dynamics. The records state there was some confusion evident and she was melodramatic. Until she settled, family were asked not to visit.

[81] The medical notes over the ensuing days record Mrs Dodssuweit’s continued agitation (though with good responses to one-on-one reassurances), her strong desire to leave the hospital and anger and rumination over what she perceived to have been Stephan’s actions in having her admitted under the Act. The notes also record a consistent denial of suicidal ideation and no evidence of there being such ideation. Mrs Dodssuweit is regularly recorded as being oriented as to “TPP” (time, place, person).

[82] On 10 May 2017 (the day after her admission), Mrs Dodssuweit telephoned Mr Elvin’s offices. In the note of her call left with office staff, she is described as being very distressed, stating: “my son is a bad man. He sent me to the mental ward. He is a bad bad man. I need to redo my will urgently”. Mrs Dodssuweit therefore recalled the preparation of her earlier will, its contents and the solicitor who had prepared it for her, despite that in recent weeks, she had engaged with three different lawyers in relation to three different wills. I also accept Mr Brittain’s submission that

¹⁹ This is the standard form of wording on the certificate, rather than a tailored description of Mrs Dodssuweit’s condition at that time.

it was at this point Mrs Dodssuweit decided to change the terms of her will as they pertained to Stephan.

[83] Also on 10 May, Mrs Dodssuweit telephoned Bettina and asked her to visit her in hospital, which Bettina did. She asked Bettina to collect some items for her from the Te Hono Property. Bettina said that when she visited the property, she saw the gazebo in the garden had been damaged and alcohol bottles strewn around. When she returned to hospital that evening, she reported to her mother that Stephan had broken the gazebo.

[84] Stephan accepted that a couple of days after Mrs Dodssuweit's admission to hospital, a wooden gazebo at her property was partially destroyed. He said that he had begun working to repair the gazebo (at his mother's request), but a storm overnight had dismantled some of the pieces and strewn those he had already removed around the property. It was put to him in cross-examination that while under the influence of alcohol he had damaged the gazebo, which he strongly denied.

[85] I accept, however, that Stephan did damage the gazebo. There is a contemporaneous note dated 14 May 2017 in Mrs Dodssuweit's medical records in which the nurse recorded a discussion between Mrs Dodssuweit and Cornelia in which Mrs Dodssuweit said that Stephan had damaged the gazebo. Cornelia agreed it was Stephan but that he was drunk at the time.²⁰ There would have been no reason for Cornelia to agree it was Stephan if she did not believe it was him; and she and Stephan were clearly in regular contact at the time. When the extract of the medical notes was put to her, Cornelia denied saying anything to that effect. Despite the nurse who wrote the record not giving evidence, there is no plausible reason why her contemporaneous note would have recorded something which did not occur. I formed the view at the time Cornelia gave evidence that she was trying to protect Stephan by denying the validity of the note. I should stress that the fact Stephan damaged the gazebo no doubt reflected an extremely distressing and difficult time for him also.

²⁰ The notes record "Karin stated her house was wrecked by Stephan doors kicked in – gazebo over fence – [Cornelia] agreed it was Stephan and was drunk at the time".

[86] On 11 May 2017, the District Inspector was to see Mrs Dodssuweit for the purposes of the Act, but the clinical notes record that she was “too frail/confused to interview re MH Act”. However, at a family meeting held the next day (see [89] below), Dr Reidl, told the family that Mrs Dodssuweit had instead declined to speak to the Inspector.

[87] Also on 11 May, Mrs Dodssuweit telephoned Mrs Olivier arranging for Mr Olivier to visit her the following day to change her will. Clearly alive to the issue of capacity, Mr Olivier had Mrs Olivier contact Dr Barklie’s office to request confirmation of Mrs Dodssuweit’s capacity. Mrs Olivier was informed that as Mrs Dodssuweit was then in hospital under the Act, Dr Barklie’s office could not assist.

[88] A family group meeting was held at Tauranga Hospital on the morning of 12 May 2017 (a Friday). Stephan, Cornelia and Bettina attended. Cornelia recorded the discussion and her evidence accordingly contained a fulsome account of it.

[89] Dr Reidl explained that Mrs Dodssuweit was admitted under the Act for five days of assessment, but this would run out on Sunday, so it was necessary to decide how much further she should stay in the hospital. Cornelia recounted that Dr Reidl explained that the Act was quite frequently used to get people into hospital, but was not meant for long term intervention or treatment. She reported that Dr Reidl stated that he understood Mrs Dodssuweit had been eccentric over the course of her life and that she probably did not have any major mental disorders. She also said that Dr Reidl had observed that Mrs Dodssuweit had declined to speak to the District Inspector. Dr Reidl explained that Mrs Dodssuweit needed medical care and his recommendation was that she go into a private facility with hospital care, it not being appropriate that she continue to look after herself at home.

[90] The above is broadly consistent with Dr Reidl’s own evidence and his contemporaneous notes. In his evidence-in-chief, Dr Reidl stated that his assessment was that Mrs Dodssuweit was not suffering from any primary mental health condition, but was highly distressed as a result of her diagnosis with cancer, her involuntary admission to hospital, her belief in homeopathic medicine and her family dynamics.

He said he explained this to the family at the meeting. He confirmed there had been discussion about extending the Act's review process, and the need for a hospital care level placement for palliative care. He also noted the EPOA had not been activated at that point.

[91] Dr Reidl said that after the family group meeting, he saw Mrs Dodssuweit. In relation to her capacity, his notes record:

Re capacity – is agreeing to go into care. Cognition 13/30 MOCA is not consistent with her presentation which is cognitively much better – probably has capacity.

[92] Dr Reidl confirmed that his focus and expertise in relation to capacity assessment is in relation to capacity regarding personal care and welfare (to which his comments about Mrs Dodssuweit's capacity were therefore directed).

[93] The same day, Dr Reidl also completed several formal documents under the Act. This included a clinical report for the Director of Area Mental Health Services. In his report, Dr Reidl noted the following:

Mrs Dodssuweit has settled considerably, and she is deny [sic] any suicidal ideation or intent. She has adapted well to the ward and its routine, though she complains of the noise in her room.

...

She is now accepting that she will need to go into residential care.

However she continues to express persecutory ideation aimed at her son Stephan and his motives towards her and her money.

Stephan appears to be motivated by a genuine desire for his mother to go into care and does not seem to have any concerns about the financial cost of this.

...

Karin has repeatedly asked Stephan to help her die and has driven her car down to the waterfront and wandered out on to the estuary at low tide.

...

Karin continues to express persecutory ideation aimed at her son which does not superficially appear to be wholly based on reality.

Has expressed suicidal ideation and has requested assistance from her family.

...

It is very likely that the MHA assessment will be discontinued on Monday when EPOA is activated.

[94] In his clinical report, Dr Reidl checked the checkbox “yes” for manifestation of an abnormal state of mind. Dr Reidl accordingly also checked the checkbox “yes” for his opinion that Mrs Dodssuweit was mentally disordered.

[95] In relation to the comment that Mrs Dodssuweit’s ideation in relation to Stephan did not superficially appear to be wholly based on reality, Dr Reidl said it was not possible for him to determine whether her beliefs were valid or not. In relation to the s 12 Certificate (certifying that there were reasonable grounds for believing Mrs Dodssuweit was mentally disordered), Dr Reidl said it was “expedient” to continue Mrs Dodssuweit’s assessment under the Act until a reasonable discharge plan was agreed, including palliative care. Dr Reidl had also added a handwritten note to the s 12 Certificate stating “assessment truncated because of weekend”.

[96] Dr Reidl was questioned about his report and the s 12 Certificate, including by the Court. Dr Reidl confirmed that the main reason for extending the Act’s review process was to give him time to find suitable palliative care.

[97] I formed the clear view at the time of Dr Reidl’s evidence, which has not altered in my review of the documentary record and the notes of evidence, that on Friday 12 May 2017, the doctor found himself in an awkward position. He was of the view that Mrs Dodssuweit most likely had capacity in relation to personal care and welfare, but was also of the view that she clearly needed hospital grade palliative care. This was why he considered it “expedient” to continue her assessment under the Act, until a reasonable discharge plan could be agreed.

[98] I therefore do not consider the various certificates signed by Dr Reidl on 12 May 2017 to be evidence of Mrs Dodssuweit *not* having capacity. Rather, Dr Reidl quite understandably formed the view that it was appropriate for Mrs Dodssuweit to remain in hospital until appropriate palliative care could be secured.

[99] Mr Olivier attended on Mrs Dodssuweit later in the day on 12 May. Mrs Dodssuweit had earlier telephoned him stating that, in addition to changing her will, she also wanted to cancel Stephan's EPOA. Mr Olivier had prepared a letter revoking the EPOA which Mrs Dodssuweit signed during his visit. Mr Olivier arranged for Bettina to deliver copies of the letter to ANZ, Mackenzie Elvin, and for the attention of Stephan by delivery to the letterbox at the Te Hono Property. He explained that Friday afternoons are very busy in a small legal office (with property settlements) and Mrs Dodssuweit had suggested Bettina could assist.

[100] Mrs Dodssuweit telephoned Mr Olivier again later in the day, concerned that Mr Elvin had telephoned to confirm he would come to visit her (in response to the earlier message left by her with his office on 10 May). Mr Olivier's file note at the time reported Mrs Dodssuweit telling him that Mr Elvin was wanting to see her at the hospital "to sign legal docs", but that Mrs Dodssuweit did not want to do this. Mr Olivier told her to tell Mr Elvin his services were no longer needed.

[101] Mr Elvin attended on Mrs Dodssuweit at about 5pm on 12 May, but took no documents with him, as he was not clear on what her instructions would be. Mr Olivier said in an affidavit sworn earlier in these proceedings that Mrs Dodssuweit had told him that Mr Elvin attended on her and tried to make her sign some documents. In his earlier affidavit, Mr Olivier said those documents related to transferring her assets to the trust she had settled on 2 May 2017. Mr Olivier said in his evidence in the hearing, however, that that was incorrect, and he had simply assumed those were the documents Mrs Dodssuweit had been asked to sign.

[102] Mr Bryers places some emphasis on Mr Olivier's evidence that Mrs Dodssuweit had told him Mr Elvin asked her to sign some documents, as Mr Elvin's clear evidence, which I accept, was that he did not take any documents to the hospital with him. Mr Bryers says this demonstrates the extent of Mrs Dodssuweit's confusion at the time.

[103] I am not so persuaded. First, if Mrs Dodssuweit had thought Mr Elvin would come to the hospital with documents for her to sign, that would not itself have been wholly unreasonable, given she had left him a message saying she wanted to see him

to change her will. Further, I do not place significant weight on this aspect of Mr Olivier’s earlier affidavit or evidence. He was clearly mistaken when making his first affidavit as to the nature of the documents to be signed. I consider it also quite possible he was mistaken that Mrs Dodssuweit reported that Mr Elvin *had* come with documents for her to sign – there is, for example, no contemporaneous file note recording such a discussion, as with his other telephone calls with Mrs Dodssuweit at the time. There is also at least one other error in Mr Olivier’s affidavit of 29 March 2018, being a reference to he and his wife forcing open a cabinet at Mrs Dodssuweit’s home with a knife and discovering certain personal items belonging to Mrs Dodssuweit missing. He accepted in cross-examination, however, that this aspect of his affidavit was incorrect, given he had not been to the house other than to serve trespass notices (see [107] below).²¹ Mr Olivier, somewhat oddly, put the error in his affidavit down to “bad drafting”.²²

[104] Turning back to the factual chronology, the following day, 13 May 2017, Bettina attended the Te Hono Property to retrieve items her mother had asked her to bring to her. Both Stephan and Cornelia were present. Stephan objected to Bettina retrieving the items on the basis he held his mother’s EPOA. There was a verbal altercation between Stephan and Cornelia on the one hand and Bettina on the other, and a minor “scuffle” when it became apparent Bettina was recording events on a dictaphone in her handbag. When Bettina returned to her car, Stephan sought to retrieve the bag from the car to remove the dictaphone (Bettina said she was trying to hang onto her bag). Bettina telephoned her mother who told her to call the Police, which she did. The Police attended and oversaw Bettina retrieve some items from the house. They also viewed the letter revoking Stephan’s EPOA and confirmed that it looked to be valid. At least from this point, Stephan was aware his mother had sought to revoke his EPOA.

[105] I do not place any real weight on the details of the scuffle, what it precisely involved and who was to blame. Those matters are not directly relevant to the core issues. The event simply reflects the breakdown in the relationship between the three siblings.

²¹ Bettina gave evidence that it was in fact her who had opened the cabinet and found items missing.

²² The point was not pursued any further with Mr Olivier in cross-examination.

[106] The scuffle is, however, of some indirect relevance, in that Mr Bryers places reliance on the fact Bettina told her mother that Stephan had damaged the gazebo and of the altercation during her visit to the Te Hono Property.²³ He also links references in the medical records to Mrs Dodssuweit ruminating negatively over matters concerning Stephan to whether her views were based on reality or were delusional. Irrespective of whether the reports from Bettina to her mother were wholly correct (and as noted, I accept that Stephan *did* damage the gazebo), Bettina accepts she did report these matters to her mother. Accordingly, Mrs Dodssuweit's belief at the time in relation to the gazebo and the scuffle were not delusional, given she understood them to be factually true.

[107] Later on 13 May, Mrs Dodssuweit instructed Mr Olivier to prepare trespass notices trespassing Stephan, his girlfriend, Cornelia and her husband from the Te Hono Property. Mr Olivier did so, visited Mrs Dodssuweit at the hospital for her to sign the papers, and then he and his wife attended the Te Hono Property to serve the notices. Mr Olivier says he saw alcohol bottles strewn about the property and that he later reported that to Mrs Dodssuweit (see [109] below). Stephan and Cornelia denied this. Again, irrespective of whether there *were* alcohol bottles strewn about the property, Mrs Dodssuweit was told by Mr Olivier that there were. She had no reason to doubt what he was telling her. Like the gazebo and the scuffle therefore, the views she later expressed about Stephan's drinking at the Te Hono Property cannot be described as delusional.

[108] The clinical notes also record that on 13 May, Mrs Dodssuweit had reported to nurses that she would "allocate her own speaker for her health not her son". This indicates she was aware what the EPOA related to.

[109] That evening, Mr and Mrs Olivier visited Mrs Dodssuweit again in hospital. Mr Olivier confirmed the trespass notices had been served and that he had seen alcohol bottles strewn around the Te Hono Property.

²³ The submission, relevant to the unconscionable transaction claim, being that Bettina was trying to turn her mother against Stephan.

[110] The discussion then turned to Mrs Dodssuweit's wishes. Mr Olivier recounts Mrs Dodssuweit saying she was "finished" with Stephan and Cornelia and wished to appoint Mrs Olivier as her EPOA and to change her will to ensure Bettina was well cared for. Mr Olivier said Mrs Dodssuweit said she had lost trust in Stephan, given her view he had caused her admission to hospital. Mr Olivier said Mrs Dodssuweit stated that she wanted to transfer the Waihi Property to Bettina and protect the Te Hono Property for Bettina by placing it in a trust. He said Mrs Dodssuweit already had these concepts in mind and he said they could be discussed further later.

[111] Clinical notes from 14 May 2017 record Mrs Dodssuweit recounting that her lawyers had removed Stephan and Cornelia from her home, stating that "now Bettina can live there until her home is built [on the Waihi Property]". The notes record that Mrs Dodssuweit acknowledged paying for the Waihi cottage, and that she was "orientated – knew of financial details, amounts, date, time, month, year, celebrations, Mother's Day, recall most events since admission".

[112] On Monday 15 May 2017, Mr Olivier took steps to prepare the documents now challenged in these proceedings. He also telephoned Dr Reidl to seek his opinion on Mrs Dodssuweit's capacity.

[113] Dr Reidl had no independent memory of his telephone call with Mr Olivier, but did take notes at the time. His notes record that it had been a "complicated weekend", during which Mrs Dodssuweit had revoked Stephan's EPOA and issued the trespass notices. His notes go on to record: "spoke to Kevin Olivier. Felt that Karin had capacity to do so at that time – (copy on file)."

[114] While accepting he did not carry out a formal capacity assessment, Dr Reidl said that if he had felt Mrs Dodssuweit was lacking capacity in relation to at least personal care and welfare, his action would have been to activate the EPOA and he had not done so. He said:

[M]y assessment was based on the fact that she seemed to have a good understanding of her condition, medical condition and that she was beginning to accept treatment, she was aware that she was dying, she had some planning about what she needed to do, so from that point of view I felt she had capacity to make decisions about the personal care and welfare.

[115] Mr Olivier appears to have taken his discussion with Dr Reidl to be that Mrs Dodssuweit had capacity generally, including testamentary capacity and capacity to enter into gifting transactions. In his evidence at the hearing, however, Dr Reidl made it clear that his expertise extends only to assessing capacity in relation to personal care and welfare and that was all he would have intended to convey to Mr Olivier.

[116] Dr Reidl's notes of his engagement with Mrs Dodssuweit on 15 May go on to state:

Accusing Stephan of drunkenness and damaging her home while drunk also of assaulting sister Bettina. Karin remains fixated and adamant on this.

...

Histrionic affect often tearful. Speech free and generally goal directed. Content as above. There is no indication that these ideas are delusional.

Mood euthymic.

Cognition good. STM remembers my name and given a good account of admission. Cognition likely much better than MOCA 13/30 indicates.

Denies suicidal idea or intent. Wants to go to Acacia in Omokoroa.

No obvious Axis I disorder by [sic] shows histrionic traits.

Karin has declined permission to speak to Stephan/Connie.

[117] At Mrs Dodssuweit's request, Mr Olivier went back to meet with her at the hospital on Tuesday morning, 16 May 2017. Mrs Olivier was with him. He said that Mrs Dodssuweit had already decided that she wanted all her assets to benefit Bettina, rather than Stephan and Cornelia. The one exception was that she wanted \$100,000 to be available to Stephan for repaying his student debt. Mr Olivier said he advised Mrs Dodssuweit that she should consider making some gift to Cornelia, but she did not want to as she had "married well". Mr Olivier said he was "absolutely certain" Mrs Dodssuweit understood the extent of her estate, the need to consider Stephan and Cornelia and the effect of the transactions on her family; Mrs Dodssuweit said she expected Stephan and Cornelia to "fight".

[118] While Mrs Olivier stayed with Mrs Dodssuweit at the hospital for the balance of the day, Mr Olivier returned to the office to prepare the first batch of documents

comprising the transactions now in issue. He returned to the hospital and took Mrs Dodssuweit through the documents. He said he had no doubts about Mrs Dodssuweit's capacity. Mrs Dodssuweit executed an agreement for sale and purchase transferring the Waihi Property to Bettina for \$280,000, and contemporaneously signed a deed forgiving the debt of \$280,000 from Bettina to her. She also executed a EPOA appointing Mrs Olivier as her attorney.

[119] Mr Olivier continued to discuss the concept of a trust with Mrs Dodssuweit, and said she was clear she did not want Bettina to have control of the Te Hono Property, which was her main asset and debt free. It was agreed the property would be put in a trust for the primary benefit of Bettina. Mrs Dodssuweit asked Mrs Olivier to take up the role of trustee.

[120] Bettina was not present during these discussions, though did attend the hospital later that day to sign the sale and purchase agreement and associated documents.

[121] The clinical notes for that evening report Mrs Dodssuweit was "pleased that I have sorted out the children and my house I can die now".

[122] On 17 May 2017, Stephan returned to Poland.

[123] On 18 May 2017, Mr and Mrs Olivier visited Mrs Dodssuweit and discussed further with her instructions concerning a new will and putting the Te Hono Property into a trust. Mr Olivier said that he advised Mrs Dodssuweit that there was a danger that if she excluded Stephan and Cornelia they might contest her will and challenge the gifts. When cross-examined, Mr Olivier said he had explained to Mrs Dodssuweit the effect of the transactions on the family as a whole including the litigation risk, the potential costs of litigation, and whether there were viable alternatives to what she was proposing.²⁴ Mrs Dodssuweit nodded her head in understanding and confirmed her instructions that she wanted the Te Hono Property in a trust for Bettina's benefit, and the \$100,000 made available to Stephan to repay his student loan.

²⁴ Mr Bryers noted that this level of detail had not been included in Mr Olivier's brief of evidence.

[124] The same day, and on Mrs Dodssuweit's instructions, Mr Olivier lodged a complaint with Tauranga Police in relation to withdrawals Stephan had made from Mrs Dodssuweit's bank account over the preceding few days totalling \$6,000. Stephan did not deny making the withdrawals (some of which occurred after he had notice of the revocation of his EPOA). He said most of the money was needed to cover his first month's living expenses when back in Poland (given he was between jobs), and that he considered it consistent with his mother's earlier agreement that she would look after his expenses when he came to New Zealand.

[125] The clinical notes for 19 May 2017 written by a registered nurse (in anticipation of Mrs Dodssuweit's discharge) state the following:

Karin appeared warm and friendly in affect and agreed to talk to me without any problems.

...

Karin reports that she has found solutions to all her problems and worries by going to the care facility and states that doctors have given her the OK to go when she is ready. Reassured Karin that discharge planning is in process and she would have to wait for doctors and team to finalize her discharge, Karin accepted this. When Karin was asked to tell about her plans and if she has any worries, Karin stated that she had her children's [sic] being very greedy towards her and her money but now she has one daughter who is very kind to her and finding her a facility to live in. Karin stated that she does not want to talk or worry about what happened in the past. Karin also stated that what her son and daughter (one in AKL) do, she is not bothered about it. She states that she is very positive about her life at present as she got things sorted (did not mention what?) and that she is going to the Rest home.

Asked Karen about her expectations from the Rest home staff, Karin stated that she will get help when she needed, she can do walks as she loves walking, Karin also stated that she hates the heat in her room (here in the ward) and believes that this heat is breaking her body down....Denies any suicidal or self-harm ideation and laughed off by saying that this is crazy, why would I kill myself for no reason?? Appeared to have some insight about her physical health being deteriorating but she did not mention about lung cancer.

[Mental State Examination]

Client appeared bright and friendly in affect, slightly melodramatic at times. Speech normal, good eye contacts were made by Karin. Appeared oriented to TPP although did not ask client formally about date today. Mood appeared euthymic, on two occasions appeared tearful when talked about her son and daughter trying to exploit her financially. Karin was able to recall that she had visitors this morning and she has been talking to her daughter over the phone about her discharge. Appeared slightly delusional about her fixed thoughts – re health deteriorating being in the hot room and being in the hospital.

Appeared to have some insight about her physical health deteriorating and she became [short of breath] on exertion. Karin denies having any suicidal ideations at present and looking forward to getting discharged to the Rest home.

[126] As the above notes record, Mr and Mrs Olivier had visited Mrs Dodssuweit earlier that day, during which she signed the documents establishing the trust for the Te Hono Property and her 19 May Will. Mr Olivier said that Mrs Dodssuweit was very clear in her wishes and he was very sure she understood what she was doing, including the moral claims upon her estate. Bettina was not present and he said he did not discuss the transactions or the will with her at the time.

[127] The same day, Dr Wilkinson completed a s 14 Certificate under the Act (as to a final assessment and clinical report). The certificate stated that Mrs Dodssuweit was fit to be released from “compulsory status”. The clinical report recorded that Mrs Dodssuweit’s mental condition had improved and that she was to be placed in palliative care in hospital at Acacia Park, Omokoroa. The report certified that she did not manifest an abnormal state of mind, and in the box headed “describe to justify opinion regarding abnormal state of mind”, Dr Wilkinson recorded “she was depressed with suicidal ideation, but her mood has improved”. The report also goes on to note “she has improved in mood and is no longer suicidal. She may deteriorate mentally if symptoms of her terminal lung cancer are poorly controlled, but she will have [follow up] by [Mental Health for Older Persons] plus Palliative Care team”.

[128] Mrs Dodssuweit was accordingly discharged from hospital to the Acacia Park rest home. The in-patient nursing unit discharge letter recorded that:

Since admission denies suicidal thoughts and ideations and none have been verbalised to staff. Karin states her son ‘made it up to get her out of the house’. There have been ongoing family dynamics regarding the home.

[129] On 25 May 2017, Ms McGowan-Blair met with Mrs Dodssuweit at Acacia Park by way of a seven-day review following her discharge from Tauranga Hospital. Her report noted the following:

On conversation with Karin, she reported she was in no pain or discomfort and that she was getting on well with the staff generally, apart from one staff member who she did not care for. Karin reported no problems with her mood

and nil thoughts of harm to self or others. Karin did not want to discuss this further nor be reminded of the past nor her recent admission to hospital.

On interview today Karin presented as a 70 year old lady looking slightly older than her stated years. She was welcoming and happy to speak to me and did not recall me from our initial meeting some weeks ago. Karin was able to keep good eye contact and speech was normal in rate rhythm and flow, if a little quiet in volume. There was no evidence of any psychomotor agitation today. Affect was reactive and mood subjectively described as okay; objectively she did not convey any symptoms of depression to me other than of reduced appetite, but this she put down to the type of food being served. Sleep remains poor. Thought content was logical, sequential and normal in flow and form. Thought content was focused on her comforts and comfort needs. There was nil expressed suicidality or thoughts of harm to self. Nil perceptual disturbance or delusional content. Cognition not formerly tested today. Karin has insight is aware she is in a residential facility and has ongoing care needs and is accepting help for care.

- [130] On 1 June 2017, Dr Reidl signed a formal letter concerning Mrs Dodssuweit's capacity to make decisions on her health and personal care. He stated:

Mrs Dodssuweit was a patient admitted under my care at Tauranga Hospital from the 9th to the 19th May this year. During the course of the admission we did not question Mrs Doddesuweit's [sic] capacity to make decisions in regard to her health and personal cares. Therefore, I have no concerns about her capacity to donate a new Power of Attorney for (the) her property. Karin Margite Dodssuweit is on palliative care as she is terminally ill.

- [131] Mrs Dodssuweit passed away at Acacia Park Rest Home on 2 June 2017.

- [132] As appears to have been Mrs Dodssuweit's wish, Bettina did not inform Stephan or Cornelia of their mother's discharge from hospital, her whereabouts from that time or that she had died on 2 June. Cornelia finally learned on 9 June 2017, through others, that her mother had passed away and relayed the news to Stephan.

- [133] For completeness, I note that a good friend of Mrs Dodssuweit, Marita Erben, also gave evidence as to Mrs Dodssuweit's personality, her wishes and what she had said in the period leading up to her death. While Mr Brittain did not place significant weight on Mrs Erben's subjective views, Mrs Erben said:

- (a) Mrs Dodssuweit was a very tough character, brutally honest and determined;
- (b) Mrs Dodssuweit was very fearful of hospitals;

- (c) that Mrs Dodssuweit told her she did not have much of a relationship with Cornelia who had married someone Mrs Dodssuweit considered to be a wealthy man in Auckland;
- (d) that Mrs Dodssuweit felt Stephan only contacted her when he needed money, and this was a regular source of pain for her;
- (e) she (i.e. Mrs Erben) had visited the Te Hono Property once during the period in question and found beer bottles thrown all over the garden;
- (f) Mrs Dodssuweit had regular contact with Bettina and was worried she was unable to look after herself;
- (g) Mrs Dodssuweit was extremely clean and tidy and insisted visitors take off their shoes when entering her house;
- (h) Mrs Dodssuweit had issues with next door neighbours who would sometimes work outside with spray paint;
- (i) the first time she visited Mrs Dodssuweit in hospital, she was very upset with Stephan and Cornelia, who she blamed for her compulsory admission;
- (j) that Mrs Dodssuweit had told her Stephan forced her to rewrite her previous will, and that she needed to change it as it did not reflect her wishes for Bettina;²⁵ and
- (k) during her daily visits to Acacia Park, she never had cause to think that Mrs Dodssuweit's mind was slipping.

²⁵ As noted at fn 14 above, Stephan denied the proposition put to him that he had pressured his mother to make the 2 May Will.

The expert evidence

[134] Each side also called a psychiatrist specialising in old age psychiatry to provide an opinion on Mrs Dodssuweit's capacity. There was no challenge to either expert's qualifications or expertise, which is fully accepted by the Court.

The plaintiffs' expert evidence

[135] The plaintiffs called Dr Gary Cheung. In completing his assessment, Dr Cheung reviewed the underlying medical records, as well as some affidavit and pleadings materials in this case.

[136] Dr Cheung explained that from a medical perspective:

- (a) Capacity is decision and time-specific, namely a person's capacity should be assessed in relation to a particular task or decision. This is because a person's capacity can fluctuate.
- (b) An informal opinion as to capacity, even by a trained specialist, is not as reliable as an objective test for capacity.
- (c) A person lacks capacity if they are unable to:
 - (i) understand the nature, purpose and significance of a particular decision; or
 - (ii) retain relevant, essential information for the time required to make the decision; or
 - (iii) use or weigh the relevant information as part of the reasoning process of making the decision, and to consider the consequences of the possible options (including the option of not making the decision); or
 - (iv) communicate their decision, either verbally in writing or by some other means.

[137] Dr Cheung said that in relation to the gifting transactions, he proceeded on the basis the law requires that the transferor must understand the general nature, as opposed to the details, of the transaction when it is explained to him or her, and that the degree of capacity required will depend on the nature of the transaction.

[138] Dr Cheung also noted that delirium is particularly common in advanced-stage cancer, in which prevalence rates of almost 90 per cent have been reported in the last hours, days and weeks of the illness.

[139] Dr Cheung referred to Mrs Dodssuweit's score of 13/30 on the MOCA. He said this is suggestive of moderate impairment to cognition. He noted, however, that English was not Mrs Dodssuweit's first language, and that she may have performed better if the German version of the MOCA had been used via an interpreter.

[140] With that reservation in mind, Dr Cheung said that in his opinion, the MOCA score shows on the balance of probabilities that Mrs Dodssuweit had cognitive impairment of at least mild severity when she was admitted to Tauranga Hospital on 9 May 2017. He acknowledges that during the hospital admission, Dr Reidl and others thought Mrs Dodssuweit's cognition was likely to be better than suggested by the MOCA, but those comments were not based on any objective cognitive testing.

[141] Dr Cheung said that the time for assessing Mrs Dodssuweit's capacity is significant in this case, because he was of the opinion there is evidence of a fluctuating mental state during the time of her admission. This was based on, inter alia, the report that Mrs Dodssuweit was too frail or confused to be interviewed by the District Inspector;²⁶ that on 12 May, Dr Reidl thought her ideation about her son did not superficially appear to be wholly based on reality; that on the same day, Dr Reidl thought she probably had capacity; that on 15 May, Dr Reidl thought her cognition was better than the MOCA indicated; and that on 18 May, the clinical notes (referred to at [125] above) recorded that Mrs Dodssuweit appeared "slightly delusional". Dr Cheung stated that these matters suggest that Mrs Dodssuweit may have had

²⁶ Dr Cheung stated that the comment was "quite significant".

capacity at some times but not at others, which he says would be typical of a person at an advanced stage of cancer suffering from delirium.²⁷

[142] Dr Cheung did not place significant weight on Dr Wilkinson's clinical report dated 19 May 2017 in which he said Mrs Dodssuweit did not manifest an abnormal state of mind and was not mentally disordered. He noted those address the formal statutory definition of mental disorder and not cognition or capacity.

[143] Dr Cheung's overall conclusion was that he was not able to reach any conclusion based on the available evidence as to whether Mrs Dodssuweit had capacity between 16 and 19 May 2017.

[144] Dr Cheung accepted in cross-examination, however, that Dr Reidl was the medical practitioner best placed to assess Mrs Dodssuweit's mental health during that period. He also accepted that according to the medical records, and given Mrs Dodssuweit's personality traits, it was possible she was simply upset with the drama that was occurring within her family, but remained oriented to time, person and place, and remained goal directed.

[145] Finally, other than the registered nurse's observation on 18 May 2017 that Mrs Dodssuweit appeared slightly delusional, Dr Cheung accepted that the balance of the clinical notes was generally positive. Ultimately, Dr Cheung reiterated that because of the absence of good quality medical evidence in the notes, he personally could not reach a conclusion on capacity.

Second defendant's expert evidence

[146] The second defendant called Dr Jane Casey.

[147] Dr Casey also reviewed the clinical records, a USB of audio recordings of medical consultations and the primary briefs of evidence.

²⁷ Dr Cheung noted that although none of the medical records record any suggestion of delirium in Mrs Dodssuweit's case, there is still a possibility of that diagnosis because it under-diagnosed and under-reported. He accepted, however, that he was not in a position to make that diagnosis.

[148] Dr Casey agreed with Dr Cheung that the four key parameters to assessing capacity from a medical perspective are those set out at [136](c) above. She also agreed that capacity is “domain specific, task specific, situation specific and time specific”.

[149] Dr Casey noted that from her review of the medical records, and given Mrs Dodssuweit’s personality style and expressed wishes pertaining to her health, it was challenging for both general practice and palliative care to provide her with optimal care and treatment.

[150] Based on her review of the medical notes over the period 16 to 19 May 2017, Dr Casey concluded there was no evidence of impairment in Mrs Dodssuweit’s levels of alertness, attention, orientation and memory. She noted Dr Reidl’s opinion that on 15 May 2017, Mrs Dodssuweit had capacity over the preceding weekend to revoke the EPOA and make decisions about her ongoing health and care needs.

[151] Dr Casey said the evidence was consistent with Mrs Dodssuweit having a probable personality disorder. She stated the disorder would be of a “Cluster B” type, characterised by dramatic, overly emotional or unpredictable behaviours. Dr Casey explained that the sub-type of a histrionic personality style is someone who tends to seek attention, be excessively emotional or dramatic, speak dramatically with strong opinions and have shallow or rapidly changing emotions. She also described the personality disorder sub-type of “borderline personality structure,” being a person who can be unstable and have intense relationships, variable moods, frequent intense displays of anger and suicidal behaviour or threats. Dr Casey said that in her opinion, Mrs Dodssuweit had features of both histrionic and borderline personality traits of a Cluster B personality disorder. She noted that depressive symptoms are frequently associated with certain personality disorders, but there was no evidence in Mrs Dodssuweit’s medical records of a major depressive disorder.

[152] Dr Casey did not disagree with Dr Cheung’s evidence as to rates of delirium in advanced stage cancer, including in the last hours, days and weeks of the illness. Nevertheless, while Mrs Dodssuweit had a terminal condition, Dr Casey said she could discern no evidence in the medical or nursing notes that could indicate delirium. While

Mrs Dodssuweit was clearly having trouble sleeping (which can suggest delirium as a possibility), the difficulties sleeping could also have been a result of depression, agitation or anxiety given her circumstances, which Dr Casey described as being higher up “on [her] differential” than the possibility of delirium.

[153] On the MOCA score of 13/30, Dr Casey noted the clinical impression at the time was that Mrs Dodssuweit was likely to have scored better than this if it had been repeated. She agreed that confounding factors were that the test was performed at a time of intense emotional distress; Mrs Dodssuweit was not examined alone or in ideal conditions; the records indicate she was not focussed on or fully engaged in the process; and not performing the assessment in her native German tongue may have been sub-optimal. Dr Casey agreed that the MOCA sub-scores were consistent with evidence of mild executive deficits, which may relate to a potential diminution in capacity to decide. Counter-balanced to this, however, Dr Casey observed that during Mrs Dodssuweit’s hospital admission, there were repeated entries in the medical notes that her orientation, attention and memory were normal.

[154] Dr Casey agreed with Dr Cheung that the capacity assessments conducted during the in-patient admission were not exemplary, as exemplified by the absence of a comprehensive cognitive assessment. She noted, however, that the treating team were able to arrive at general impressions and had formed the view that she had the requisite capacity on 15 May 2017 in relation to the EPOA. Dr Casey observed that during the period 16 to 19 May 2017, Mrs Dodssuweit was observed to be more stable in her mental state.

[155] Dr Casey noted there is no suggestion Mrs Dodssuweit did not have capacity on 2 May 2017. She said that there was no evidence from a medical perspective to suggest there would have been any significant or sustained changes in cognition from 2 May to 16/19 May 2017.

[156] Dr Casey stated that it was “therefore likely that [Mrs Dodssuweit] knew she was revising a will, had a knowledge of the nature and extent of her estate and knew who her natural beneficiaries were; and a knowledge of the people who may have reasonable claim to her estate”. Dr Casey accordingly concluded that in her expert

opinion, on the grounds of probability, Mrs Dodssuweit would have retained testamentary capacity at and around the signing of the 19 May Will. Dr Casey did not purport to give an opinion on capacity to enter into the gifting transactions.

[157] I turn now to the legal principles and the parties' submissions.

Legal principles - capacity

Testamentary capacity

[158] The principles governing testamentary capacity are well settled.

[159] A preliminary question is the onus of proof in testamentary capacity disputes. The leading decision is that of the Court of Appeal in *Bishop v O'Dea*.²⁸ The Court noted that where lack of capacity is raised on the evidence as a tenable issue, the burden of proving capacity (on the balance of probabilities) lies on that party seeking probate of the will.²⁹ Whether the onus has been discharged will depend, amongst other things, upon the strength of the evidence suggesting lack of capacity.³⁰ In the absence of evidence raising capacity as a tenable issue, however, the maker of a will, apparently rational on its face, will be presumed to have testamentary capacity.³¹

[160] As noted, Mr Brittain does not dispute that testamentary capacity has been raised as a tenable issue. The burden of proving testamentary capacity therefore rests on Bettina.

[161] The Court of Appeal in *Woodward v Smith* confirmed the longstanding approach to the assessment of testamentary capacity, adopting the following propositions from the leading authority of *Banks v Goodfellow*:³²

(1) Because it involves moral responsibility, the possession of the intellectual and moral faculties common to our nature is essential to the validity of a will.

(2) It is essential to the exercise of such a power that a testator:

²⁸ *Bishop v O'Dea* (1999) 18 FRNZ 492.

²⁹ At [3].

³⁰ At [5].

³¹ At [3].

³² *Woodward v Smith* [2009] NZCA 215, referring to *Banks v Goodfellow* (1870) LR 5 QB 549.

- [i] understands the nature of the act and its effects; and also the extent of the property of which he is disposing;
- [ii] is able to comprehend and appreciate the claims to which he ought to give effect;
- [iii] be free of any disorder of the mind which would poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties; that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

(3) Unsoundness of mind arising from want of intelligence caused by defective organization, or by supervening physical infirmity or the decay of advancing age, as distinguished from mental derangement is equally cause of incapacity. But

- [i] though the mental power may be reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains.
- [ii] It is enough if the mental faculties retain sufficient strength fully to comprehend the testamentary act about to be done.

(4) It is not necessary that the testator should view his will with the eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed, and the disposition of his property in its simple forms.

(5) In deciding upon the capacity of the testator to make his will, it is the soundness of the mind, and not the particular state of the bodily health, that is to be attended to. The latter may be in a state of extreme weakness, feebleness or debility and yet he may have enough understanding to direct how his property shall be disposed of; his capacity may be perfect to dispose of his property by will, and yet very inadequate to the management of other business, as, for instance, to make contracts for the purchase or sale of property.

(6) A testator who has reflected over the years on how his property should be disposed of by will is likely to find it less difficult to express his testamentary intentions than to understand some new business.

(7) Testamentary capacity does not require a sound and disposing mind and memory in the highest degree; otherwise, very few could make testaments at all.

(8) Nor must the testator possess such capacity to the same extent as previously. His mind may have been in some degree weakened, his memory may have become in some degree enfeebled; and yet there may be enough left clearly to understand and make a sound assessment of all those things, and all those circumstances, which enter into the nature of a rational, fair, and just testament.

(9) But if that standard is not met, he will lack capacity.

Capacity to enter inter vivos transactions

[162] There is relatively little New Zealand authority on the test for capacity to enter into inter vivos transactions. The leading judgment is the Court of Appeal's 1986 decision in *Scott v Wise*.³³

[163] That case concerned the capacity of an elderly man (Mr Scott) in May 1978 when he established a trust in favour of his three legitimate daughters and their families, the sale of his farm property to the trustees at the then government valuation in return for a mortgage of the same amount (repayable free of interest on his demand), with the farm being leased back to Mr Scott. In September 1978, Mr Scott was admitted to Lake Alice Hospital, and it was not in dispute that at that time, he was suffering from senile dementia.

[164] The High Court concluded that the transactions were so important that Mr Scott was required to bring to them the same degree of understanding as he would need for making a will. The High Court found that at the time of the transactions in May 1978, Mr Scott lacked testamentary capacity. As the Court considered the transactions to be fair, however, it declined to set them aside. Mr Scott (by his guardian) appealed.

[165] The Court of Appeal dismissed the appeal. It stated:³⁴

We are of the opinion that in putting the test of capacity at the level apposite for the making of a will the Judge put it too high. He was led to this view in part by what he rightly saw as some lack of commercial realism in the terms of sale, in part by the benefits Mr Cyril Wise might receive, and in part by the very significance of the transactions. The case however was not one in which Mr Scott was completely denuding himself of his property. He would be left with the sale price of the land, his plant (or its proceeds) and (if the option was exercised) the standard value of his livestock. He lost the prospect of increase in value of the land and he might lose the difference between the standard and market value of his livestock less the income tax which would be payable on its realisation at market value. But he was still well able thereafter, if of sound mind, to benefit, either inter vivos or by will, those to whom he had moral obligations.

³³ *Scott v Wise* [1986] 2 NZLR 484.

³⁴ At 491.

The law requires in a case such as this that a person entering into it is able to understand the nature of the transaction when it is explained to him. It follows that the capacity required is related to the transaction. See *Gibbons v Wright* (1954) 91 CLR 423,425. **It was not necessary that Mr Scott should have understood the whole detail as worked out by the lawyers and accountants. But it was necessary that he understood its general nature,** that is to say, that he was selling his farm in exchange for a mortgage over it the amount of which he might demand at any time, that the buyers were trustees who would hold the property and the income for the daughters of his marriage and their children and that in 22 years' time what was left would be divided between his three daughters and their children; that in the meantime he would lease back the farm; that Cyril would manage it; and that within another five years when he was aged 75 Cyril could buy the farm at its then government valuation, his plant at valuation and his stock at standard values, that is to say at a fraction of their market value.

[Emphasis added]

[166] The Court did not directly address the burden of proof in a case of capacity to enter into inter vivos transactions, and whether there can be a “shifting” burden as in the case of testamentary capacity. The Court did observe, however, that “upon a bare reading of the evidence it would not be difficult to conclude that the plaintiff had not made out the case for want of capacity”.³⁵ This would tend to suggest that in the case of inter vivos transactions, the plaintiff bears the onus in the ordinary way.

[167] The Court also observed that the test of incapacity in the case of gifts (and conveyances) is the same as that for contracts.³⁶

[168] The above approach was adopted by the High Court five years later (in relation to gifting transactions) in *Dark v Boock*, in which Heron J stated:³⁷

The view that I take of her capacity, in the absence of an independent assessment made at the time, is that she lacked the capacity to properly understand the document and the transaction which it contained. The test in simple terms is, does the person understand the nature of the transaction when it is explained to them? Nature means general purport, not the exact detail.

[169] Counsel did not refer me to any more recent authorities which directly consider this issue and suggest different approaches, and further research has not disclosed any. I accordingly proceed on the basis of the principles set out in *Scott v Wise*.

³⁵ At 491.

³⁶ At 492.

³⁷ *Dark v Boock* [1991] 1 NZLR 496 at 500.

The parties' submissions

The plaintiffs' submissions

[170] Mr Bryers notes that no formal assessment of Mrs Dodssuweit's capacity was carried out in the period 16 to 19 May 2017, and that when considered as a whole, the evidence gives rise to considerable doubts as to her capacity. Mr Bryers submits that, in this case at least, there ought not to be any material difference in outcome even if the capacity tests are not entirely the same given:

- (a) first, Mrs Dodssuweit *clearly* lacked testamentary capacity and capacity to enter the gifting transactions; and
- (b) second, there is no obvious or logical reason why the outcome should be any different, given the gifting transactions and the will were all part and parcel of an overriding estate plan and happened in close proximity to each other.

[171] Mr Bryers rejects any suggestion that Stephan "made up" that Mrs Dodssuweit had told him she wanted to commit suicide and/or manipulated the medical professionals into getting his mother admitted to hospital. Rather, he says the evidence paints a picture of a son becoming increasingly stressed and finding it more and more difficult to cope with the task he had undertaken in trying to look after his mother, and desperately seeking professional assistance. He says the process by which Mrs Dodssuweit was admitted to hospital was very thorough and no doubt can be cast on the conclusion reached by the medical professionals at the time, namely there were reasonable grounds for believing Mrs Dodssuweit was mentally disordered.

[172] Mr Bryers points to Mr Olivier's evidence, and submits he was clearly alive to the issue of Mrs Dodssuweit's capacity, but mistakenly undertook from his discussion with Dr Reidl on 15 May that the doctor's opinion extended to Mrs Dodssuweit's capacity generally. Mr Bryers further submits that Mr Olivier was unreasonably involved in the transactions and had lost his sense of objectivity, and therefore little weight ought to be given to his own assessment of Mrs Dodssuweit's capacity at the time.

[173] Mr Bryers accepts that Ms McGowan-Blair, with hindsight, thought the MOCA test might have been conducted at the wrong time, but points to the fact she had no reservations about its validity at the time it was conducted. Mr Bryers emphasises that that test, being the *only* objective test conducted, showed moderate cognitive impairment, and there was nothing in the medical record following which indicated the position had materially improved. He also urged me to place limited, if any, weight on Mrs Erben's evidence, being the subjective views of a close friend, who is obviously not qualified to make any comment on Mrs Dodssuweit's capacity to enter the challenged transactions.

[174] Turning to the expert evidence, Mr Bryers submits that Dr Cheung's views reflect a sensible and careful assessment of the medical record from which conclusions about capacity cannot safely be drawn. On that basis, Mr Bryers says it is very difficult for the Court to conclude, even on the balance of probabilities, that Mrs Dodssuweit did have the requisite capacity. Mr Bryers further says that Dr Casey's evidence contains an illegitimate element of "forward-looking" from Mrs Dodssuweit having capacity on 2 May to retaining that capacity on 19 May 2017. He also notes that Dr Casey accepted in cross-examination that delirium can be common in the advanced stages of cancer, which further emphasises that a cautious approach ought to be taken. Mr Bryers notes that Dr Casey's opinion was limited to testamentary capacity in any event, which he says is important because the gifting transactions were much more complex than the will itself.

[175] Mr Bryers also submits that in order to enter into these transactions with valid capacity, Mrs Dodssuweit needed to have understood their effect, their effect on the family as a whole including the litigation risk, the costs of litigation and whether there were viable alternatives to what she was proposing. He urges me to be sceptical about Mr Olivier's evidence that all these matters were discussed with Mrs Dodssuweit, given that level of detail did not form part of his brief of evidence.

[176] Finally, Mr Bryers says that when all the evidence is considered, the 19 May Will is the anomaly. While he accepts Mrs Dodssuweit had always been clear she wanted to see Bettina cared for, that was never at the total exclusion of her other two children. In terms of the rationality of the decision-making, he submits there is no

good reason for excluding Cornelia entirely from the estate, when she was not involved in Mrs Dodssuweit's admission to the hospital, *even if* that were to explain her sudden change in thought vis-à-vis Stephan. Mr Bryers accordingly submits the exclusion of Cornelia altogether evidences irrational decision-making, further undermining the case for capacity.

Bettina's submissions

[177] Mr Brittain emphasises the undisputed evidence of Mrs Dodssuweit's difficult and histrionic personality, and her strong belief in alternative medicine and dislike of hospitals. He submits these long-term characteristics cannot themselves demonstrate a lack of capacity. He further submits that the gifting transactions and 19 May Will were entirely consistent with Mrs Dodssuweit's long-held wish to ensure Bettina was taken care of. Mr Brittain says the 2 May Will is therefore the true anomaly, in that it gave the Te Hono Property to Stephan with "no strings", contrary to the informal promise which Stephan admits he made to his mother and which had been reflected in the 29 March Will.

[178] Mr Brittain says that rather than being an anomaly giving rise to capacity concerns, the gifting transactions and 19 May Will were a rational and quite understandable response to the circumstances as Mrs Dodssuweit perceived them to be at the time. This included her not unreasonable view that Stephan had fabricated her attempt to commit suicide, or at the very least, that his actions had led to her admission to Tauranga Hospital against her will. Mr Brittain says that in these circumstances, Mrs Dodssuweit's primary motivation was not to disinherit Stephan as such, but to remove him from a position of trust when she no longer trusted him. Mr Brittain says this was not irrational, but was well founded. In terms of Cornelia's position, Mr Brittain submits it was also not irrational or surprising for Cornelia to be excluded, given Mrs Dodssuweit's distant relationship with her, the fact Cornelia had not benefited to any significant extent under earlier wills (given what Mrs Dodssuweit perceived to be Cornelia's financial security), and that Mrs Dodssuweit not unreasonably saw Cornelia as "siding" with Stephan in mid-to-late May 2017.

[179] Mr Brittain says that when viewed overall, the medical record of Mrs Dodssuweit's time in hospital presents a positive and improving picture, and various reported mood swings are appropriately attributable to her eccentric and somewhat unusual personality. Mr Brittain says it is therefore inappropriate to "cherry pick" the occasional histrionic outburst over the period from 9 May to 19 May 2017 and point to that as evidence of incapacity.

[180] Mr Brittain accepts that at no time was best practice followed in terms of an assessment of Mrs Dodssuweit's capacity. Nevertheless, he says that when considering the tests for capacity derived from the leading authorities, there is no doubt Mrs Dodssuweit had the requisite capacity. The MOCA was unreliable, while the clinical notes from 10 to 19 May 2017 show a consistent pattern of good orientation as to time, person and place, as well as Mrs Dodssuweit's ability to recall and understand her assets and detailed financial matters. And while accepting that Dr Reidl did not purport to carry out an assessment of capacity to enter into the gifting transactions or make the 19 May Will, Mr Brittain emphasises Dr Reidl was nevertheless the doctor with direct oversight of Mrs Dodssuweit over an extended period. Mr Brittain also urges the Court not to place undue weight on the certificate signed by Dr Reidl on 12 May 2017, given Dr Reidl all but accepted he was in an awkward position at that time, and was quite understandably using the Act's process to keep Mrs Dodssuweit in hospital until much needed palliative care could be arranged.

[181] Mr Brittain also points to the discharge letter on 19 May 2017, the Acacia Park assessment of the same day and Ms McGowan-Blair's visit to Mrs Dodssuweit on 25 May 2017, all of which reflect a stable position, consistent with Mrs Dodssuweit having the requisite degree of capacity over the period 16 to 19 May 2017.

[182] Ultimately, Mr Brittain says that if Mrs Dodssuweit's property decisions had been made in the community rather than while at the Mental Health Unit at Tauranga Hospital, they simply would not have been questioned.

Discussion - capacity

[183] Having carefully considered the evidence and counsels' helpful submissions, I am satisfied on the balance of probabilities that Mrs Dodssuweit had the requisite capacity to enter into the gifting transactions and to make her 19 May Will. That is irrespective of which party carries the burden of proof in relation to the gifting transactions. I have reached this conclusion for four key reasons.

[184] First, other than Mrs Dodssuweit's admission to hospital under the Act on 9 May 2017, there is no evidence she had any mental health issues which might have adversely impacted her capacity. I consider her admission was a direct result of, first, Stephan's insistence that she had attempted to commit suicide on the evening of 7 May 2017 (which was then frequently reported in the medical records as fact), and second, the manifestation of Mrs Dodssuweit's underlying personality traits and beliefs at a time of extreme stress for her.

[185] While it is not strictly necessary to decide whether Mrs Dodssuweit *did* tell Stephan that she had tried to commit suicide, I have considerable doubt that she did. I say this because:

- (a) The contemporaneous record of Stephan's initial telephone call to The Doctors' medical practice and meeting with the triage nurse are inconsistent with the reason for the visit being Stephan's concern at suicide. Rather, they are consistent with the visit being prompted by a concern of fluid on Mrs Dodssuweit's lungs which needed draining.
- (b) Stephan was quite understandably anxious for his mother to be admitted to hospital care, given her weakening physical condition but continued refusal to voluntarily admit herself to hospital. Elevating his concerns to also include her mental health would have increased the prospects of such admission.
- (c) Stephan was also clearly concerned that unless Mrs Dodssuweit was declared mentally unfit, she could revoke the EPOA which had been

granted to him. This was reflected in his discussion with Dr Hudson on 8 May 2017.

- (d) Stephan was also insistent on 8 May 2017 that his mother intended to return to the estuary below her house that evening to attempt suicide when the tides were right. Yet on the basis she was “calm” later that day, he was content to leave her on her own that evening. This strikes me as unusual if she had indeed told Stephan she had tried to commit suicide the prior evening, and had regularly expressed a desire to do so.
- (e) Dr Millar’s assessment on 9 May 2017 relied heavily on an acceptance that Mrs Dodssuweit had recently spoken of wanting to end her life, and had been found with wet trousers and shoes from “being in the ocean”. As other medical professionals accepted from later interactions with Mrs Dodssuweit however, there were plausible reasons for that other than attempted suicide, namely her belief in “hot and cold” therapy.
- (f) Stephan also said in evidence that he had an audio recording of Mrs Dodssuweit telling him of her suicide attempt and asking him to help her try again and take her to the water again that evening. As noted, however, the audio ultimately did not disclose anything to that degree of clarity, or indicating suicide.
- (g) Finally, Mrs Dodssuweit immediately rejected the suggestion of suicide and was adamant it was a misunderstanding. There is no record of her ever acknowledging she had tried or wanted to commit suicide, or had repeatedly asked family members to assist her in doing so. Again, it strikes me as unlikely that if a patient was indeed so intent on committing suicide, there is no mention of such a sentiment in detailed medical records over a 10-day period, and indeed the records state quite the opposite.

[186] In addition, many of the other factors relied on for Mrs Dodssuweit's compulsory admission reflected her underlying personality and medical beliefs, for example:

- (a) in the context of the MOCA results, Mrs Dodssuweit's dismissiveness of the assessment process, coupled with her emotional state at the time;
- (b) the difficulties evident between Mrs Dodssuweit and Stephan during the assessment which hindered a clear picture being ascertained; and
- (c) what was described as "paranoia" in relation to her view that her neighbours were poisoning her vegetables.

[187] Similarly, the medical records of Mrs Dodssuweit's stay at Tauranga Hospital generally paint a positive picture of her mental state. Those aspects of the notes which suggest delusion again reflect her personality type, or her own understanding of the factual circumstances which I do not consider to be unreasonable or irrational:

- (a) that she was not fit to be interviewed by the District Inspector (when it was also reported she declined to speak with him);
- (b) her reported "ruminating" on persecutory ideation aimed at Stephan;
- (c) the repeated references (as fact) to having attempted suicide and having had suicidal ideation, when for the reasons set out above, I am not persuaded that is correct;
- (d) having a "histrionic" affect; and
- (e) appearing "delusional" about her physical health being negatively impacted by the hot room and being in hospital.

[188] In this context, I note William Young J's observations for the Court of Appeal in *Van der Kaap v Wilson*, to the effect that the will maker's attitude in that case to surgery and blood transfusions, and a denial of the fact he was dying, could not be

described as “delusional” and thus give rise to evidence of incapacity.³⁸ In my view, care must be taken that a will-maker’s underlying personality traits and medical beliefs, which may appear to many to be odd and ill-founded, are not illegitimately considered “delusional” and thus taken to be evidence of incapacity.

[189] As noted at [97] above, I also formed the clear view that Dr Reidl’s decision on 12 May 2017 to continue Mrs Dodssuweit’s assessment under the Act was largely driven by his concern that she needed residential palliative care and ought not to be discharged into her own or family care.

[190] I therefore do not consider Mrs Dodssuweit’s compulsory admission to Tauranga Hospital and the record of her 10-day stay is evidence of incapacity. If anything, the medical records tend to point the other way. They suggest Mrs Dodssuweit was lucid, oriented and alert. Her memory was intact, and she had good recall of events since her admission, her family dynamics, her assets and her financial dealings in relation to the construction of the house on the Waihi Property.

[191] I also place some, albeit limited, weight on Mr Olivier’s and Mrs Erben’s views as to Mrs Dodssuweit’s capacity.

[192] While I do not doubt Mr Olivier’s evidence as to his discussions with Mrs Dodssuweit in relation to the gifting transactions and 19 May Will, I accept Mr Bryers’ submission that, likely through Mrs Dodssuweit’s friendship with Mrs Olivier, Mr Olivier was more personally involved than one might have expected when implementing Mrs Dodssuweit’s instructions. I accept this might, subconsciously at least, have influenced his views on her capacity. I do, however, accept Mr Olivier’s evidence that he explained to Mrs Dodssuweit the nature and effect of the gifting transactions and the 19 May Will, and that he discussed with her, and Mrs Dodssuweit was alive to and understood, the moral claims on her estate. Mr Olivier was also clearly alive to the need to consider capacity, and to meet with Mrs Dodssuweit and explain the transactions to her in Bettina’s absence.

³⁸ *Van der Kaap v Wilson* CA97/04, 14 June 2005 at [49].

[193] Mrs Erben is obviously not medically qualified to offer an opinion on Mrs Dodssuweit's capacity, but did visit her daily at Acacia Park from 19 May 2017 until her death. She said that "right up until the end", she saw no evidence of a decline in her friend's mental health. In *Van der Kaap v Wilson*, the views of a close friend of the deceased were taken into account by the Court in its overall assessment of capacity.³⁹

[194] Mr Olivier and Mrs Erben's views, while subjective and in no way determinative, are nevertheless consistent with the overall picture painted by the medical records, as well as Dr Reidl and Ms McGowan-Blair's views.

[195] Second, having carefully considered Dr Cheung's evidence, I do not consider it alters the above conclusion. Dr Cheung did not feel able to reach a medical conclusion on capacity, in the absence of good quality (objective) medical evidence other than the MOCA. I do not, however, place significant weight on the MOCA test results, given the circumstances in which the test was carried out. In addition, most if not all the matters relied on by Dr Cheung to suggest Mrs Dodssuweit's mental state fluctuated during the period of her admission (see [141] above) are attributable to her underlying personality traits and her medical beliefs.

[196] Third, the content of the 19 May Will is, in my view, an understandable (and not irrational) response to what Mrs Dodssuweit understood to be the situation at the time vis-à-vis her three children. She was extremely upset and angry at Stephan's actions, which she saw as leading to her being admitted to hospital against her will. I do not consider her views in this regard to have been irrational. She also saw Cornelia as aligned with Stephan at this time, which was correct, and had a long-held view that Cornelia was independently wealthy. While Cornelia might not agree with that, there is nothing to suggest Mrs Dodssuweit's views in this regard were delusional.

[197] Further, Mrs Dodssuweit had expressed her desire over an extended period to assist Bettina to a significantly greater extent than Stephan and/or Cornelia, though given her concern at Bettina being able to look after herself, was not comfortable for the Te Hono Property to be in her name. This was reflected in the 29 March Will. And

³⁹ At [48].

even when the property was gifted to Stephan under the 2 May Will “without strings”, that was in the context of Stephan’s earlier promise to use the property for the benefit of either the broader family or Bettina. This was in turn reflected in Mrs Dodssuweit’s telephone message to Mrs Olivier on 24 April 2017 that it would be better for Mr Olivier (i.e. rather than Stephan) to “be taking care” of the Te Hono Property. I do not consider it was ever Mrs Dodssuweit’s intention that Stephan receive the Te Hono Property for his sole benefit.

[198] As the relationship between Stephan and his mother unravelled in late April 2017, she began to doubt whether he was the right person to be placed in a position of trust in relation to the Te Hono Property. What she later considered to have been his actions in having her admitted under the Act no doubt galvanised those views. The reported incidents regarding the gazebo, drinking at the property and the scuffle with Bettina would only have reinforced the position.

[199] Finally, capacity is transaction specific. When Mrs Dodssuweit entered into the gifting transactions and made her 19 May Will, it was in the context of having recently entered into similar transactions on three prior occasions (the draft Harris Tate Will, and the 29 March and 2 May transactions and wills). The concept of a trust had been discussed by Mr Olivier with Mrs Dodssuweit on 29 March 2017, and on 2 May 2017, a trust was established in conjunction with the 2 May Will. The broad concepts and structures would have therefore been familiar to her. Nor do I consider the ultimate nature and effect of them to be particularly complex in any event. I also place some, albeit not significant, weight on the fact Mrs Dodssuweit had a background in real estate (albeit overseas), and had been involved in the sale and/or purchase of at least four properties in New Zealand (Te Hono, Queenstown, Welcome Bay and Waihi). I do not consider Mrs Dodssuweit would have struggled to understand the general nature and effect of the gifting transactions and the 19 May Will.

[200] For the above reasons, I am satisfied on the balance of probabilities that Mrs Dodssuweit had testamentary capacity in relation to the 19 May Will and capacity to enter into the gifting transactions. The first, third and fourth causes of action therefore fail.

[201] I turn now to the remaining cause of action, namely whether the gifting transactions ought to be set aside as unconscionable transactions.

Unconscionable transactions

Unconscionable transactions – legal principles

[202] The legal principles concerning unconscionable transactions were comprehensively summarised by the Court of Appeal in *Gustav & Co Ltd v MacField Ltd*.⁴⁰

- (a) Equity will intervene to relieve a party from the rigours of the common law in respect of an unconscionable bargain.
- (b) The equitable jurisdiction is not intended to relieve parties from “hard” bargains or to save the foolish from their foolishness. Rather, and relevantly in this case, the jurisdiction operates to protect those who enter into bargains when they are under a significant disability or disadvantage from exploitation.
- (c) A qualifying disability or disadvantage does not arise simply from an inequality of bargaining power. Rather, it is a condition or characteristic which significantly diminishes a party’s ability to assess his or her best interests. It is an open-ended concept. Characteristics that are likely to constitute a qualifying disability or disadvantage are ignorance, lack of education, illness, age, mental or physical infirmity, stress or anxiety, but other characteristics may also qualify depending upon the circumstances of the case.
- (d) If one party is under a qualifying disability or disadvantage (the weaker party), the focus shifts to the conduct of the other party (the stronger party). The essential question is whether in the particular circumstances, it is unconscionable to permit the stronger party to take the benefit of the bargain.

⁴⁰ *Gustav & Co Ltd v MacField Ltd* [2007] NZCA 205 at [30].

- (e) Before a finding of unconscionability will be made, the stronger party must know of the weaker party's disability or disadvantage and must "take advantage of" that disability or disadvantage.
- (f) The requisite knowledge may be that of the principal or an agent, and may be actual or constructive. Factors associated with the substance of a transaction (for example, a marked imbalance in consideration) or the way in which a transaction was concluded (for example, the failure of one party to receive independent advice in relation to a significant transaction) may lead to a finding that the stronger party had constructive knowledge. So, in the particular circumstances the stronger party may be put on enquiry, and in the absence of such enquiry, may be treated as if he or she knew of the disability or disadvantage.
- (g) "Taking advantage of" (or victimisation) in this context encompasses both the active extraction and the passive acceptance of a benefit. Accordingly, as Tipping J said in *Bowkett* at 457, an unconscionable victimisation will occur where there are:

... circumstances which are either known or which ought to be known to the stronger party in which he has an obligation in equity to say to the weaker party: no, I cannot in all good conscience accept the benefit of this transaction in these circumstances either at all or unless you have full independent advice.
- (h) If these conditions are met, the burden falls on the stronger party to show that the transaction was a fair and reasonable one and should therefore be upheld.

[203] The Supreme Court in *Gustav & Co Ltd v MacField Ltd* endorsed the Court of Appeal's discussion of the authorities and summarised the position as follows:⁴¹

Equity will intervene when one party in entering into a transaction, unconsciously takes advantage of the other. That will be so when the stronger party knows or ought to be aware, that the weaker party is unable

⁴¹ *Gustav & Co Ltd v MacField Ltd* [2008] NZSC 47; [2008] 2 NZLR 735 at [6].

adequately to look after his own interests and is acting to his detriment. Equity will not allow the stronger party to procure or accept a transaction in these circumstances. The remedy is conscience-based and, in qualifying cases, the Court intervenes and says that the stronger party may not take advantage of the rights acquired under the transaction because it would be contrary to good conscience to do so. The conscience of the stronger party must be so affected that equity will restrain that party from exercising its rights at law. All necessary consequential orders may be made in aid of the primary remedy.

[204] Although there has been some doubt as to whether the unconscionability principles apply to gifts, the High Court has recently accepted that they do and for present purposes, I proceed on that basis.⁴²

The plaintiffs' submissions

[205] Mr Bryers submits that based on the same evidence relating to Mrs Dodssuweit's lack of capacity, she laboured under a significant disability or disadvantage at the time her two properties were gifted to Bettina and the Dodssuweit Trust. He says the recipients of the gifts were well aware of Mrs Dodssuweit's disability and disadvantage. He notes there was no evidence the value of the assets being gifted had been ascertained before the gifts were made. In those circumstances, Mr Bryers submits the recipients could not in good conscience have accepted the benefit of the gifting transactions because:

- (a) they involved the majority of Mrs Dodssuweit's estate;
- (b) the purpose of the transactions was to favour Bettina's interests in the assets to the detriment of Stephan and Cornelia;
- (c) the transactions took advantage of Mrs Dodssuweit's disability which had caused her to irrationally reject Stephan and Cornelia;
- (d) Bettina had actively encouraged Mrs Dodssuweit's rejection of her siblings;

⁴² *Willis v Thompson* [2017] NZHC 1645, [2017] NZAR 1448 at [56] and [58].

- (e) Mrs Dodssuweit was well-known to have changeable moods and changeable relationships with her children, and it is unconscionable for Bettina to have taken advantage of a sudden and irrational change of attitude towards Stephan in particular; and
- (f) Tauranga Law was acting for all parties to the gifts and Mrs Dodssuweit did not therefore have fully independent legal advice. In addition, both KM Dod Trustee Ltd and Tauranga Law stood to profit from the transactions through fees to be charged.

Bettina's submissions

[206] Mr Brittain submits that Mrs Dodssuweit did not suffer from a qualifying disability or disadvantage, on the same basis as his submission that she had capacity. He further submits there is no qualifying unconscionable conduct in any event, given Mrs Dodssuweit's decision to change her 2 May Will was made on 9 May 2017, before any contact with Bettina (or Mr and Mrs Olivier) about Stephan and Cornelia's behaviour. This was evidenced by, for example, her call on 10 May 2017 to Mr Elvin's office stating that she urgently needed to change her will because of Stephan's actions.

[207] Mr Brittain says that any later discussions with Bettina simply galvanised what Mrs Dodssuweit had already decided. He further says it cannot be unconscionable for Bettina to report to her mother events that were happening at the Te Hono Property. Mr Brittain finally notes Mrs Dodssuweit also received independent legal advice from Mr Olivier which is almost always fatal to an unconscionable bargain claim.

Discussion

[208] Given my factual findings on the capacity causes of action, I am clear in my view that the unconscionable transaction claim must also fail. My reasoning largely follows that in relation to Mrs Dodssuweit's capacity.

[209] Primarily, I do not accept Mrs Dodssuweit was under a qualifying disability or disadvantage at the time she entered into the gifting transactions. Rather, the gifting transactions reflected her strong but not unreasonable or irrational views at the time,

when she had capacity. For the same reason, I do not consider there to be any element of either Bettina or KM Dod Trustees unconscionably taking advantage of the rights acquired by them under the transactions.

[210] Nor do I consider the fact the properties were not valued at the time alters the outcome. Mrs Dodssuweit's position for some time had been that she wished to benefit Bettina to a greater extent than her other children. That would have been the case irrespective of the value of her properties, which one can expect she had a reasonable idea about in any event, given her profession as a real estate agent and obvious interest in property. Further, my assessment of Bettina was that she was not the influencer of Mrs Dodssuweit, and in all likelihood, the position was the reverse. Bettina was described in the evidence as "softer" than Mrs Dodssuweit, being the "weakest link" and generally a follower of her mother's instructions. She also had health issues herself, including depression and anxiety. She is not naturally characterised in my view as "a stronger party" taking advantage of or seeking to exploit a weaker party.

[211] Accordingly, while I fully accept that Stephan and Cornelia see the outcome of the gifting transactions as unfair, they were not unconscionable in the legal sense.

[212] This cause of action also fails.

Result

[213] The plaintiffs' claims are dismissed.

[214] It may be that additional orders are required as a result of this judgment, for example in relation to probate of the 19 May Will,⁴³ or any extant interlocutory applications. If any party considers further timetabling or substantive orders are required, it may file a memorandum within **15 working days** of this judgment setting out the proposed orders.

⁴³ Though as far as the Court is aware, no defendant had formally sought any such relief.

Costs

[215] There appears to be no reason why costs should not follow the event in the ordinary way. Subject to hearing from the parties (if agreement cannot be reached), scale costs on a 2B basis would seem appropriate. At least on the information presently available to the Court, I see no basis for increased or indemnity costs.

[216] I encourage the parties to agree costs. If they cannot, each of the defendants may file a costs memorandum within **15 working days** of the date of this judgment, with Stephan and Cornelia's memorandum in response following within a further **five working days**. I will thereafter determine costs on the papers. No memorandum is to exceed **five pages** in length.

Fitzgerald J